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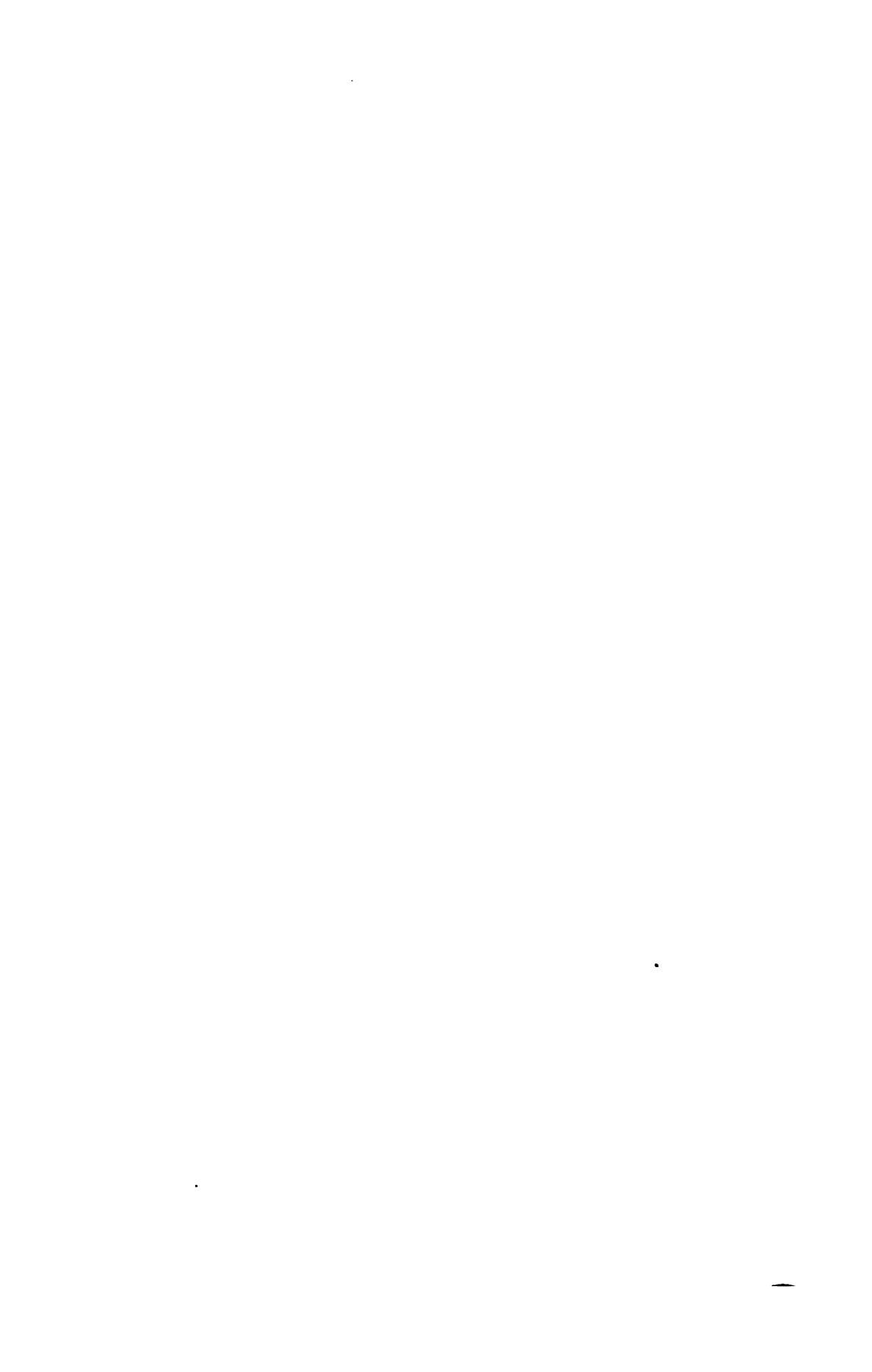


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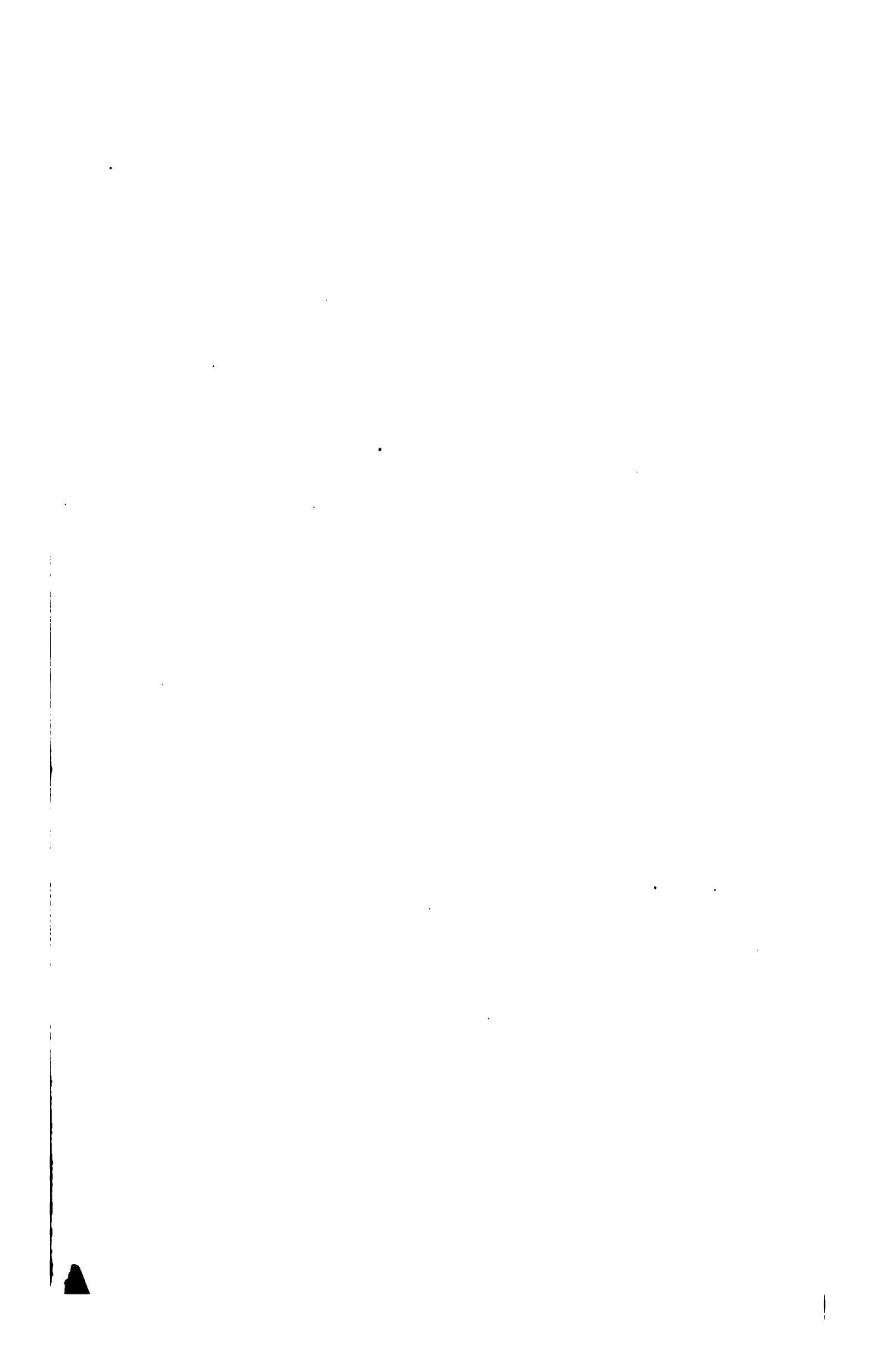




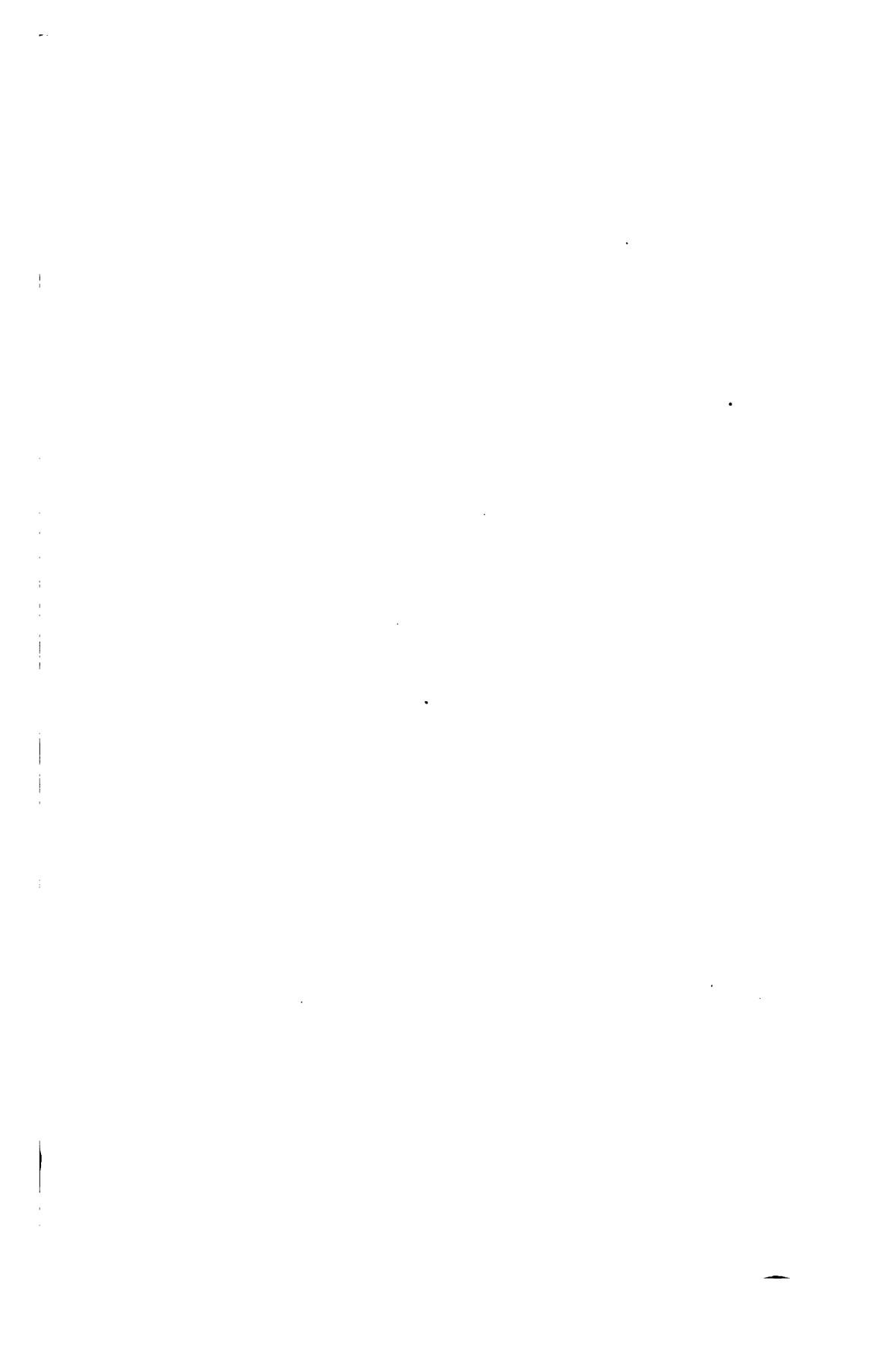
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NOTES  
ON THE  
**CALIFORNIA REPORTS**

SHOWING THE PRESENT VALUE AS AUTHORITY  
OF THE DECISIONS OF THE

**SUPREME COURT OF CALIFORNIA**

AS DETERMINED THROUGH THE

**CITATIONS**

IN SUBSEQUENT DECISIONS OF THIS COURT, THE COURTS OF  
LAST RESORT OF SISTER STATES, AND OF  
THE FEDERAL COURTS.

BY

CHARLES T. BOONE, WILLIAM FOSTER,  
JOS. A. JOYCE and ALBERT RAYMOND.

REVISED TO INCLUDE CITATIONS TO VOLUME 147 INCLUSIVE.

BY

CHARLES L. THOMPSON.

**BOOK III.**

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## **VOLUME XL.**

**By S. W. CHARLES.**

**Revised to include citations to volume 147, by CHARLES L. THOMPSON.**

### **40 Cal. 3-13. STEELE v. BRANCH.**

**Contract.**—The general rule of equity is that time is not of the essence of the contract, unless it clearly appears from its terms, in the light of all the circumstances, that such was the intention of the parties, p. 11.

Referred to in *Alexander v. Jackson*, 92 Cal. 526, in dissenting opinion of Paterson, J. The intent to make time the essence of contract must be clearly, unequivocally, and unmistakably shown by an express declaration; *Miller v. Cox*, 96 Cal. 344. Party in default, where time is the essence of contract, can take no advantage of his own wrong: *Beverly v. Blackwood*, 102 Cal. 91. Cited, also, in extended note to 50 Am. Dec. 598; 68 Am. Dec. 87, note; 70 Am. Dec. 740, note; and 27 Am. St. Rep. 166, note, giving in part dissenting opinion of Paterson, J., in 92 Cal. 526.

### **40 Cal. 14-19; 6 Am. Rep. 595. FLYNN v. SAN FRANCISCO & SAN JOSE RAILROAD.**

**Contributory Negligence.**—The rule releasing the defendant from liability on account of the contributory negligence of the plaintiff is limited to cases where the act or omission of the plaintiff was the proximate cause of the injury. It is not contributory negligence in a legal sense for a farmer to leave the stubble standing on his grain field, adjoining a railroad, p. 19.

If an owner places cotton in a hazardous position near a railroad, where it is destroyed by fire, he does not thereby lose his remedy for damage caused by the negligence of the company: *Railway Co. v. Fire Association*, 55 Ark. 178. A plaintiff is not guilty of contributory negligence, when by a small expense, he could have stopped the break in defendant's ditch, caused by the negligence of said defendant: *McCarty v. Boise City Canal Co.*, 2 Idaho, 228. The question of negligence is for the jury: *L. N. A. & C. R. Co. v. Krinning*, 87 Ind. 354. Referred to in *C. B. U. P. R. R. Co. v. Hotham*, 22 Kan. 52. It was not contributory negligence for plaintiff to allow combustible material to accumulate

Notes Cal. Rep.—127.

around his mill, in near proximity to a railroad track: *Kendrick v. Towle*, 60 Mich. 370; 1 Am. St. Rep. 531. Rule followed in a similar case: *Patton v. St. L. & S. F. Ry. Co.*, 87 Mo. 126; 56 Am. Rep. 449. Rule affirmed in *Longabaugh v. Virginia City & T. R. R. Co.*, 9 Nev. 298. Owner of land contiguous to a railroad track is not bound to keep his land free from leaves or other combustible material, to avoid danger from fire: *D. L. & W. R. Co. v. Salmon*, 39 N. J. L. 312; 23 Am. Rep. 225. "A plaintiff is not responsible for the mere condition of his premises lying along a railroad, but, in order to be held for contributory negligence, must have done some act, or omitted some duty, which is the proximate cause of the injury: *Philadelphia & Reading R. Co. v. Hendrickson*, 80 Pa. 190; 21 Am. Rep. 99. Persons may recover for the negligence of the railroad company, although they have not plowed up the stubble to guard against fire: *H. & T. C. R. R. Co. v. McDonough*, 1 Tex. Civ. App. 359. Cited, also, in 38 Am. Dec. 75, note; 99 Am. Dec. 289, note; 6 Am. Rep. 649, note; 7 Am. Rep. 80, referring to the note following the leading case in 6 Am. Rep. 595; 20 Am. Rep. 362, note; 32 Am. Rep. 98, note; and 20 Am. St. Rep. 852, note.

**Negligence.**—The leaving of dry grass and weeds along a railroad track, where it is liable to be set on fire by locomotives, is such negligence as will render the railroad company liable for consequent damages, p. 19.

Referred to in *Henry v. S. P. R. R. Co.*, 50 Cal. 181. To allow dry weeds and grass to remain on the right of way is not, however, negligence per se: *White v. Missouri Pac. Ry. Co.*, 31 Kan. 282. The negligent failure to remove or destroy dangerous combustible material on a railroad is always a question for the jury: *Jones v. Michigan Central R. R. Co.*, 59 Mich. 440. Approved in *Diamond v. Northern Pac. R. Co.*, 6 Mont. 589. "Every defendant shall be held liable for all those consequences which might have been foreseen and expected as the result of his conduct, but not for those which he could not have foreseen, and was, therefore, under no moral obligation to take into his consideration: *Stark v. Lancaster*, 57 N. H. 91. Whether regard be had to the statute or to the common law, a duty rests upon a railroad company to care for the condition of its track: *Delaware Lack. & West. R. R. Co. v. Salmon*, 39 N. J. L. 305; 23 Am. Rep. 219. Rule said to be supported by the great weight of authority in *Railway Company v. Hogsett*, 67 Tex. 688. See, also, 95 Am. Dec. 509, note; 6 Am. Rep. 685, note; 1 Am. St. Rep. 532, note; 28 Am. St. Rep. 315; and 35 Am. St. Rep. 237, note.

**Unavoidable Accident.**—A railroad company is not liable for damages occasioned by unavoidable or inevitable accident, p. 19.

Railroad company is not liable for damages caused by fire if it provides the best approved spark arresters and has taken reasonable precautions with their track to prevent injury: *Toledo etc. R. W. Co. v. Wand*, 48 Ind. 479. Mere fact of a company emitting sparks from its

engines is not negligence, unless it is proved that the sparks were negligently emitted: *H. & T. C. R. R. Co. v. McDonough*, 1 Tex. Civ. App. 354.

**40 Cal. 20-29. WRIGHT v. OROVILLE GOLD, SILVER AND COPPER MINING COMPANY.**

**Equitable Control of Corporations.**—Equity, at the instance of a shareholder, will restrain a corporation and its officers from doing acts even within the scope of corporate authority, if such acts, when done, would amount to a breach of the trust upon which the authority itself has been conferred, p. 27.

Cited in *Winchester v. Howard*, 136 Cal. 446, noted under *Neall v. Hill*, 16 Cal. 152; *Schnitger v. Old Home etc. Co.*, 144 Cal. 608, on point that stockholders may redeem on foreclosure sale of corporate property; *Tuscaloosa Manufacturing Co. v. Cox*, 68 Ala. 79, where it was said that, to invoke the restraining power of a court of equity, it must be a very strong case, showing that an appeal to the directors would be of no avail and delay extremely perilous. An association to promote the cause of temperance, and not for pecuniary profit, cannot devide any part of the corporate property or funds among its members, and an action may be maintained at the instance of a member to set aside such a misappropriation of the corporate funds: *Ashton v. Dashaway Association*, 84 Cal. 67. If the directors have permitted an illegal use of corporate funds, an action may be maintained, without first making a demand upon the directors: *Rogers v. Lafayette Agricultural Works*, 52 Ind. 306. A stockholder may bring suit when the corporation refuses, said corporation being in the hands of its enemies: *Carter v. Ford Plate Glass Co.*, 85 Ind. 182. An allegation, showing in substance that the business of a corporation is not prosperous, is not sufficient ground for equitable interference: *Gorman v. Guardian Savings Bank*, 4 Mo. App. 183. Rule applied where one corporation obtained control of the majority of shares of another: *Farmers' L. & T. Co. v. N. Y. & N. R. Co.*, 150 N. Y. 428; 55 Am. St. Rep. 694.

**Idem.**—A stockholder may interpose and redeem corporate property, sold under execution, and by so doing is subrogated to all the rights of the purchaser at the sheriff's sale, pp. 28, 29.

Referred to in *Lloyd v. Hoo Sue*, 5 Saw. 79, where it was held that an assignee in bankruptcy may redeem property of bankrupt, without discharging claim of judgment creditor who purchased at the sale, for the unsatisfied balance of his judgment.

**Corporation.**—Legal title to corporate property is vested in the corporation and not in the stockholders, p. 26.

Followed in *Kohl v. Lilienthal*, 81 Cal. 385.

**General Citations.**—Cited to the point that "an action for an in-

junction is an exception to the rule that action to protect corporate property must be in the corporate name" in *Doud v. W. P. & S. R. Co.*, 65 Wis. 117.

#### 40 Cal. 29-33. PEOPLE v. HENDERSON.

**Measurement of Distance on Navigable Stream.**—Where a certain distance is called for, from a given point on a navigable stream to another point on the stream, measurement must be made by its meanders and not in the straight line, p. 32.

Approved and followed in the concurring opinion of Lord, C. J., in *Rayburn v. Winant*, 16 Oreg. 324.

#### 40 Cal. 33-58. FARISH v. COON.

**Adverse Possession.**—“The very essence of an adverse possession is, that the holder thereof claims the right to his possession, not under, but in opposition to, the title to which his possession is alleged to be adverse,” p. 57.

But such possession does not lose its character as adverse because it is in subordination to the title of the paramount proprietor, unless the alleged adverse holder deraigns his claim from such paramount holder: *McManus v. O'Sullivan*, 48 Cal. 16. Parties holding land under a state patent do not hold adversely to the state: *People v. Center*, 66 Cal. 565. Cited, also, in 94 Am. Dec. 742, note.

**EstoppeL**.—Where school land warrants are located on lands of the state, not subject to location, the state is not estopped from asserting title by the fact that the purchase money had been paid, and has never been refunded or offered to be refunded, p. 50.

An auditor's deed given to land sold for taxes cannot estop the state from asserting its claim to the title of said land by escheat: *Reid v. State*, 74 Ind. 262. “An apparent exception to the doctrine that the state cannot be bound by estoppel arises in those cases in which the act sought to be made binding was done in her sovereign capacity by legislative enactment or resolution”: *Saunders v. Hart*, 57 Tex. 10. Cited in 16 Am. Dec. 754, note, in which it is said that there is a conflict in the decisions of the different states as to the doctrine of estoppel, as applied to the state.

#### 40 Cal. 58-63. ESPINOSA v. GREGORY.

Debt secured by mortgage is presumed due immediately or on demand when nothing appears to contrary, p. 62.

Cited in *Newhall v. Sherman*, 124 Cal. 511, noted under *Holmes v. West*, 17 Cal. 623.

**Mortgage.**—Where an absolute conveyance is given as security, the

**mortgagor retains the right of redemption only, the legal title being in the mortgagee, and the rights of mortgagor and mortgagee are so far mutual that when the debt is barred, the right to redeem is also barred,** pp. 62, 63.

Referred to in *Henderson v. Grammar*, 66 Cal. 336, in concurring opinion of McKee, J., where he held that if the causes of action upon the notes and mortgage were barred and the mortgage lien extinguished, then the right to foreclose and the right to redeem were also barred. Followed in *Harrington v. Miller*, 4 Wash. 812.

**Rule Changed by Code.**—Rule of the leading case undoubtedly the law before the code. If a mortgagor be in possession, the action to redeem may be brought at any time, provided there shall not have been an adverse possession of five years: *Raynor v. Drew*, 72 Cal. 311. Furthermore, absolute deed, intended as a mortgage does not convey legal title: *Raynor v. Drew*, *supra*, affirmed in *Hall v. Arnott*, 80 Cal. 355. But the adoption of the code did not affect the rights of mortgagees acquired previously; the rights of grantor of land by deed intended only as security, to redeem, and the time within which redemption might be made were fixed by the laws of the state, in force at the time of the execution of the deed: *Allen v. Allen*, 95 Cal. 197. The court also held "that a deed absolute in form, intended as a mortgage, did convey the legal title," at the time the leading case was decided, p. 199. Cited in the dissenting opinion of Beatty, C. J., in the same case, 95 Cal. 203, 204, 206, in which the chief justice distinguishes the leading case. Referred to in *Allen v. Allen*, 106 Cal. 138, where the principles laid down in *Allen v. Allen*, *supra*, were affirmed. See, also, 35 Am. Dec. 128, note.

**Pleadinga.—An answer which commences by stating that the "defendant, for answer, says he denies, etc.,"** is sufficient, and the court will not call in question the fact of denial, p. 62.

A similar answer held sufficient, but not commendable, in *Moen v. Eldred*, 22 Minn. 539. "It is a good denial": *Jones v. Ludlum*, 74 N. Y. 62.

#### 40 Cal. 63-69. HALL v. CENTER.

**Specific Performance of Contract.**—Equity will decree specific performance of a covenant in a lease, which provides that the lessee shall have the privilege of purchasing the premises for a fixed sum of money, even though there is a want of mutuality, pp. 67, 68.

Cited in *Perry v. Paschal*, 103 Ga. 138, decreeing specific performance of agreement originally unilateral, under facts stated; *Moore v. Tuohy*, 142 Cal. 348, holding action for specific performance not maintainable under facts stated. A writing by which a party agrees that if his lessee shall pay a stated annual rent for ten years, he will execute to him a good and sufficient deed to said land, as a free gift, without compensa-

tion, will be specifically enforced; *Davis v. Robert*, 89 Ala. 405, 18 Am. St. Rep. 129. Cited in *Ballard v. Carr*, 48 Cal. 80, where the court held that a contract between an attorney and client, by which the client agrees to convey land to the attorney, will be specifically enforced; and *Morrill v. Everson*, 77 Cal. 115. "A contract for the sale of real estate at the option of the vendee only, upon election and notice, may not only be specifically enforced, but the refusal of the vendor to accept the purchase money will not destroy the mutuality": *Calanchini v. Branstetter*, 84 Cal. 254. An optional contract upon sufficient consideration is binding: *La Rue v. Goezinger*, 84 Cal. 289; 18 Am. St. Rep. 185. But a vendor of land and buildings, under an executory contract of sale, cannot recover the purchase price from the vendee, where valuable buildings have been destroyed by fire before the day fixed for payment and conveyance, unless the vendee has taken possession under the contract as distinguished from possession under a lease: *Smith v. Phoenix Insurance Co.*, 91 Cal. 330; 25 Am. St. Rep. 194. Rule of leading case adopted in *Hayes v. O'Brien*, 149 Ill. 411; and *Bacon v. Kentucky Central R. Co.*, 95 Ky. 380. Contract wanting mutuality will be enforced, providing it was made upon a sufficient consideration: *Schroeder v. Gemeinder*, 10 Nev. 365. Rule affirmed in *Waters v. Bew*, 52 N. J. Eq. 791, where it was held, that if a contract to convey is part of an agreement to lease the premises for a term of years, specific performance will not be refused on the ground that the contract is unilateral. An agreement by a vendor, upon a sufficient consideration, to repurchase land if the vendee shall so desire, is not void for want of mutuality and may be specifically enforced: *Johnston v. Wadsworth*, 24 Oreg. 501. Cited in *Menger v. Ward*, 87 Tex. 626, to the point that assignment of a lease conveys to and invests in the assignee, the assignor's option to purchase. Doctrine approved in *Williams v. Graves*, 7 Tex. Civ. App. 366. Referred to in dissenting opinion of Snyder, J., in *Weaver v. Burr*, 31 W. Va. 775. Also referred to in 5 Am. St. Rep. 113, note. Cited in *Clarno v. Grayson*, 30 Oreg. 120; and in *Thurber v. Meves*, 119 Cal. 37.

Same.—Option may be specifically enforced although interest is remote in time, and remedy is not limited to lifetime of parties, p. 67.

Cited in *Blakeman v. Miller*, 136 Cal. 142, 143, enforcing contract in suit by heirs.

#### 40 Cal. 69-74. HODAPP v. SHARP.

**State Lands, Action to Recover Possession of.**—The act of Congress of July 23, 1866, had the effect to legalize the possession of locators upon unsurveyed public lands, and to enable them to maintain ejectment and other actions in respect to their possession, during the interval which elapsed prior to the time when they were afforded an opportunity to present their claims for adjudication by the proper officers, pp. 71, 72, 73.

Approved in *Fiscalina v. Doyle*, 47 Cal. 440.

**Idem.**—Title does not pass to the state until the land is certified over to the state by the commissioner of the general land office, p. 73.

Followed in *Buhne v. Chism*, 48 Cal. 472; and *Chant v. Reynolds*, 49 Cal. 217, 218. Cited in *Murphy v. Summer*, 74 Cal. 319, to the point that no presumption arises from the fact of the issuance of the certificate of purchase by the state that the lands were actually listed to the state.

**Judgment Affirmed in Part.**—In an action for the restitution of two separate tracts of land, where the judgment of the court below was for plaintiff for both tracts and for damages, and the order of this court affirms the judgment as to one and reverses it as to the other, if the record furnishes no data for the apportionment of damages, the entire judgment will be reversed unless all damages be remitted, pp. 73, 74.

Cited in *Lake v. Bender*, 18 Nev. 378.

#### 40 Cal. 74-77. **BUTLER v. VASSAULT.**

**New Trial.**—To entitle one to relief on the ground of newly discovered evidence, a general averment of diligence is not sufficient, but it should be stated particularly what acts were performed, in order that the court may decide whether proper diligence was used, p. 76.

New trial refused where no reason was shown why such evidence could not have been produced at the trial: *Ross v. Sedgwick*, 69 Cal. 251. New evidence must be described very distinctly and specifically: *Whitney v. Kelley*, 94 Cal. 154, 28 Am. St. Rep. 111, concurring opinion of Harrison, J.

#### 40 Cal. 77-83. **HARDING v. VANDEWATER.**

**Corporation.**—In the absence of a different provision in the charter or by-laws of a corporation formed under the general laws of this state, a special meeting of the trustees must be called by giving personal notice to each member of the board, p. 83.

The rule of the leading case is in accord with the weight of authority: *Bank of Little Rock v. McCarthy*, 55 Ark. 480, 482. In the absence of proof to the contrary, notice to directors of a meeting will be presumed, though not recited in the record. Cited in *Curtin v. Salmon R. etc. Co.*, 130 Cal. 348, holding void a mortgage authorized at such meeting when no notice was given to absent directors; *London etc. Co. v. City*, 103 Tenn. 322, applying rule to meeting of city council improperly convened; *Singer v. Salt Lake etc. Co.*, 17 Utah, 184, 70 Am. St. Rep. 781, also discussing exceptions to rule arising from emergency or other necessity. The leading case distinguished on the ground that there it appeared affirmatively that two trustees were not notified; *Granger v. O. E. M. & M. Co.*, 59 Cal. 682. Distinguished in Stockton

C. H. & A. Works v. Houser, 109 Cal. 11, where it was held that if a written notice of a special meeting was sent to each director, the presumption is that all the notices sent were received. Referred to in dissenting opinion of Knowlton, J., in Russell v. Wellington, 157 Mass. 106. An action had at a special meeting without notice to all the directors is void: Doernbecher v. C. C. L. Co., 21 Oreg. 578, 579; 28 Am. St. Rep. 769. The rule of the leading case is applicable alike to public and private corporations: Pike County v. Rowland, 94 Pa. 247. See, also, 18 Am. Dec. 102, note; and 3 Am. St. Rep. 70, note.

**Idem.**—The board of trustees of a corporation must be "duly assembled" to transact corporate business, and the decision of a majority of the "board duly assembled" shall be valid, p. 83.

Cited in Alta Silver Co. v. Mining Co., 78 Cal. 632; Salfeld v. Sutter Co. I. I. & R. Co., 94 Cal. 549; and Barrett v. Dolan, 71 Iowa, 96.

**40 Cal. 83-92. VANDALL v. SOUTH SAN FRANCISCO DOCK COMPANY.**

**Corporations.**—A given act is within the power of a corporation, first, if it falls within the powers expressly enumerated in the certificate, or, second, if it is necessary to the exercise of one of the enumerated powers, pp. 88, 89.

Street railway company has power to execute a note to the manager of a baseball field in consideration that he discontinue his former place of business and establish new baseball grounds near the company's line: Temple St. Cable Ry. v. Hellman, 103 Cal. 640. Referred to in San Diego v. Pacific Beach Co., 112 Cal. 58; and in Northern R. R. v. Concord R. R., 50 N. H. 194; Central etc. Co. v. Columbus etc. Co., 87 Fed. 825, sustaining mortgage by one corporation to guarantee bonds of another, under facts stated. Contracts for the compromise of suits and for noncompetition are within the exercise of powers incident to corporate management and business; Ellerman v. Chicago Junction R. etc. Co., 49 N. J. Eq. 251. Land company has power to acquire stock of a railway company, and guarantee its bonds and dividends on its preferred stock if conducive to the success of the land company: Marbury v. Kentucky Union Land Co., 62 Fed. Rep. 348.

**Idem.**—A corporation formed for the purpose of improving real estate and speculating therein, may do any act, the direct and proximate tendency of which is to benefit the property or enhance its value, p. 90.

Donation of land to a university by a land company is valid: Whetstone v. Ottawa University, 13 Kan. 340. Land company may guarantee bonus of a railway company in order to complete the railroad, and secure a market for the products of the land company: Tod v. Kentucky Union Land Co., 57 Fed. Rep. 61.

**40 Cal. 93-97. SHARTZER v. LOVE.**

**Appeal.**—Where it appears by affidavit that one of several respondents died before notice of appeal was filed, a motion to dismiss the appeal as to him must be granted, p. 96.

Said to be the correct rule in Moyle v. Landers, 78 Cal. 100, 106, 12 Am. St. Rep. 23, 28, but the leading case was distinguished and the rule held inapplicable where by the concealment of fact of the death of one of the respondents, an attorney fraudulently prevented appellant from making a valid appeal. Death of a party to an action terminates the authority of his attorney and no notice of appeal can be served on him: Pedlar v. Stroud, 116 Cal. 462. If appeal by the adverse party was desired, the proper course was to make the heirs at law parties to the action and serve notice on them: Wood v. Watson, 107 N. C. 55.

**40 Cal. 101. FULTON v. COX.**

**Dismissal of Appeal** from judgment does not bar appeal from subsequent new trial order, p. 105.

Cited in Knowles v. Thompson, 133 Cal. 247, but denying right to appeal from judgment after order granting new trial.

**40 Cal. 106-111. DOYLE v. FRANKLIN. S. C. 48 Cal. 537.**

**Ejectment.**—Where the issue in ejectment is whether plaintiff or defendant has the better title, a judgment therein is conclusive upon the question of title as between the parties, p. 110.

Rule applied in Every v. Superior Court, 57 Cal. 249. In an action of ejectment, a cross-complaint to quiet the title of the defendants is unnecessary: Mills v. Fletcher, 100 Cal. 149. Cited, also, in Reay v. Butler, 69 Cal. 584.

**Idem.**—A bill to quiet title filed by a defendant in an action of ejectment, is not an equitable defense, p. 110.

An averment by an intervener that plaintiff's claim is invalid, and a cloud upon his title, and that plaintiff intends to prosecute another clandestine and fraudulent suit of ejectment against intervener's servant in charge of the land, without his knowledge, and with a view to trick him out of the possession, is not sufficient to invoke the aid of a court of equity: Reay v. Butler, 69 Cal. 584.

**Pleadings.**—Where proper matters of defense are pleaded as such, they should be regarded only as matters of defense, notwithstanding a prayer for affirmative relief at the conclusion of the answer, pp. 110, 111.

Rule applied in Brannan v. Paty, 58 Cal. 331. Matters proper as a defense will not be turned into a cross-complaint merely by a prayer

for affirmative relief: *Shain v. Belvin*, 79 Cal. 263. Principal case followed in *Montana Co. v. Clark*, 42 Fed. Rep. 627.

**Idem.**—Cross-complaint must contain all the facts necessary to constitute a cause of action in favor of defendant and against the plaintiff, p. 111.

Cited in *Harrison v. McCormick*, 69 Cal. 618.

**Idem.**—A plaintiff need not reply to any affirmative matter set up in defense or by way of avoidance or counterclaim, p. 111.

Cited in *Cohn v. Kelly*, 132 Cal. 469, applying rule in action to quiet title to answer alleging plaintiff's acquirement of title by fraud; *Babcock v. Maxwell*, 21 Mont. 515, holding answer in replevin to state a defense merely and not a counterclaim: *Maudlin v. Ball*, 5 Mont. 100, as a general reference.

#### 40 Cal. 111-116. **HIMMELMANN v. HOTALING.** 6 Am. Rep. 600.

**Checks.**—Where the drawer and drawee of a bank check reside in the same city or town, a demand made during the business hours of the day succeeding that on which payment might have been first legally demanded, has uniformly been considered within a reasonable time, p. 115.

Affirmed in *Simpson v. Pacific M. L. Ins. Co.*, 44 Cal. 142. Rule cited in *Griffin v. Kemp*, 46 Ind. 176. The fact that a bank draft was still outstanding four months was sufficient to justify the trial court in holding that a subsequent assignee took it as overdue and dishonored paper: *La Due v. First National Bank*, 31 Minn. 39, referring to the leading case. Cited, also, in 27 Am. Dec. 196, note.

**Idem.**—What is the reasonable time for the presentation of a bank check, is a question of law for the court, p. 114.

Rule followed in *Durnell v. Sowden*, 5 Utah, 222. Cited, also, in 17 Am. St. Rep. 808, note.

**Idem.**—A person who, for a valuable consideration, receives negotiable paper before overdue or before the same is presumptively dishonored, is a bona fide holder, and is unaffected by the equities between the previous parties, p. 114.

Referred to in extended note to 9 Am. Dec. 273.

**General Citation.**—*Farmers' Nat. Bank v. Dreyfus*, 82 Mo. App. 402.

#### 40 Cal. 117-121. **HUGHES v. DAVIS.**

**Deed as Mortgage.**—An absolute deed, although shown by parol evidence to have been intended as a mortgage, conveys the legal title, p. 120.

Rule followed in *Espinosa v. Gregory*, 40 Cal. 63. Cited in *Byrne v. Hudson*, 127 Cal. 256, but held abrogated by sections 2924, 2925, Civil

Code; and see to same effect, *Snyder v. Parker*, 19 Wash. 278, 67 Am. St. Rep. 727; under the plea of the general issue in ejectment, a deed absolute in form cannot be attacked on the ground that it was in fact intended to be a mortgage: *Davenport v. Turpin*, 43 Cal. 604. The rule of the leading case was followed in *McNamara v. Culver*, 22 Kan. 669; *Gallagher v. Giddings*, 33 Neb. 227; *Harrington v. Birdsall*, 38 Neb. 185; *First Nat. Bank v. Tighe*, 49 Neb. 302; *Brophy M. Co. v. B. & D. M. Co.*, 15 Nev. 107; *Kemper v. Campbell*, 44 Ohio St. 214; and *Harrington v. Miller*, 4 Wash. 812. Cited, also, in 35 Am. Dec. 128, note.

**Rule Abrogated by the Code.**—To this effect see the cases of *Hyde v. Mangan*, 88 Cal. 325; and *Brandt v. Thompson*, 91 Cal. 461. But the change in the code did not affect right acquired prior to its adoption: *Allen v. Allen*, 95 Cal. 197, 199. Leading case distinguished in *Allen v. Allen, supra*, by *Beatty, J.*, in his dissenting opinion, 95 Cal. 303, 206. Referred to in *Allen v. Allen*, 106 Cal. 138, where *Allen v. Allen, supra*, was affirmed.

**Consideration.—Agreement to extend time for payment of money is void for payment of money void without consideration**, p. 120.

Cited in *Peachy v. Witter*, 131 Cal. 318, as to extension of maturity of note and mortgage.

**Idem.**—If a defendant asks the court to declare an absolute deed to be a mortgage in equity, he should first do equity by offering to redeem, p. 121.

Approved in *Mack v. Hill*, 28 Mont. 103, following rule. An executor cannot invoke the power of a court of equity to compel the creditor to surrender his security, or to enjoin the creditor from selling the land under a power contained in a deed of trust, if the debt for which such security was given be in fact subsisting and unpaid: *Whitmore v. S. F. Savings Union*, 50 Cal. 150. If plaintiff in ejectment claims under a conveyance absolute in form, but intended as a mortgage, he is entitled to recover, unless defendant in his answer, sets up his equities, with an offer to pay the amount of the mortgage lien, and prays that conveyance be decreed a mortgage: *Pico v. Gallardo*, 52 Cal. 208. Cited, also, in *Montgomery v. Spect*, 55 Cal. 358.

**40 Cal. 121-125. MAUMUS v. CHAMPION.**

**Contributory Negligence.**—If the negligence of the plaintiff has contributed proximately to the injury complained of, the defendant cannot be held liable, unless the injury is the result of a wanton or willful act on his part, p. 125.

Rule followed in *Tennenbrock v. S. P. C. R. R. Co.*, 59 Cal. 271.

**40 Cal. 125-126. HIMMELMANN v. SULLIVAN.**

**Practice—Stipulations.**—A party who has procured a judgment to

be entered in his favor by means of one part of a verbal stipulation, cannot repudiate the other part, p. 126.

If a party, by one part of a stipulation, obtains a transfer of the cause to another department of the court, he should not be allowed to avoid the accompanying burden of a trial without a jury, which he had waived in open court: *Hawes v. Clark*, 84 Cal. 275. The parties to an action cannot be relieved from an obligation created by stipulation, by the mere fact that another attorney is substituted in place of the former attorney who created the obligation; *Smith v. Whittier*, 95 Cal. 288. Executory stipulation, when denied, cannot be proved otherwise than by an agreement in writing filed with the clerk, or by agreement entered upon the minutes of the court; *Hearne v. De Young*, 111 Cal. 377. But if, under the terms of a verbal stipulation, one party has received the advantage for which he entered into it, or the other party has given up some right or lost some advantage, he will not be permitted to repudiate the obligation, because not entered in the minutes of the court; *Reclamation District v. Hamilton*, 112 Cal. 610.

#### 40 Cal. 127-128. PEOPLE v. KOHL.

**Double Taxation.**—The owner of land who has paid the taxes thereon, and who during the same year had sold the land and taken a note and mortgage, payable at a future day, for the purchase price, is not liable to reassessment with the amount of such mortgage for the same fiscal year, p. 128.

Leading case said not to be in point, in *Lick v. Austin*, 43 Cal. 596, where it was held that if mortgaged land be taxed, and the debt secured by the mortgage be also taxed, and the tax on the debt is paid by the mortgagee, then the mortgagor cannot complain of double taxation. If a debt for money lent, which is secured by mortgage, is taxed, and the mortgaged property is also taxed, it is a double taxation, and a violation of the constitution: Opinion of Crockett, J., concurred in by Niles, J., in *Sav. & Loan Society v. Austin*, 46 Cal. 485. Referred to in *County Commissioners v. Wilson*, 15 Colo. 95.

#### 40 Cal. 129-142. PEOPLE v. CAMPBELL.

**Verdict of Jury in Murder.**—In a trial for murder if the jury find the defendant guilty, they must expressly designate the degree of murder in their verdict, p. 138.

The rule of the leading case is well established by the following authorities, wherein the leading case is cited: *Levison v. State*, 54 Ala. 524. But the rule has no application to robbery, because that crime is not divided into "degrees"; *People v. Gilbert*, 60 Cal. 110. A verdict of conviction of burglary must state the degree of the crime of which defendant is found guilty: *People v. Travers*, 73 Cal. 582; *People v. O'Neil*, 78 Cal. 389. Whenever a crime is distinguished into degrees,

the **jury** must designate the degree: *People v. Lee Yune Chong*, 94 Cal. 386; *Hall v. State*, 31 Fla. 186. Leading case distinguished in *People v. O'Callaghan*, 2 Idaho, 147; *State v. Jackson*, 99 Mo. 67; *Territory v. Stears*, 2 Mont. 330; *State v. Rover*, 10 Nev. 392; 21 Am. Rep. 748; and *Wooldridge v. State*, 13 Tex. Crim. App. 460; 44 Am. Rep. 714.

**Accessory Before the Fact.**—An accessory must be indicted, tried, and punished as a principal, but the particular acts which show him to be an accessory must be stated in the indictment, p. 142.

One who advises or encourages the commission of a felony, but is not actually or constructively present when it is committed, cannot be convicted under an indictment charging him as principal: *Smith v. State*, 37 Ark. 275. Under an indictment charging a defendant as principal, he cannot be found guilty, if the evidence shows him to have been an accessory before the fact: *People v. McGungill*, 41 Cal. 431. Rule followed in *People v. Valencia*, 43 Cal. 555.

**Principal Case Overruled.**—The principal case practically overruled in *People v. Outeveras*, 48 Cal. 25, and following cases. It is sufficient to charge the accessory directly with having committed the act, and the acts constituting him an accessory may be proved under such charge: *People v. Rozelle*, 78 Cal. 87, 88. An accessory can only be indicted and punished as principal: *Fixmer v. People*, 153 Ill. 128. In an indictment against an accessory before the fact, it is only necessary to state the ultimate act itself, the same as in the case of a principal: *State v. Chapman*, 6 Nev. 331. An indictment which charged the defendant with the crime of abortion was sufficient, although the proof showed he was absent at the time the crime was committed, but that he counseled, induced and procured its commission: *People v. Bliven*, 112 N. Y. 88, 90; 8 Am. St. Rep. 708, 709. Cited, also, in *State v. Steeves*, 29 Oreg. 90.

#### 40 Cal. 142-148. PEOPLE v. BARTLETT.

**Appeal—Practice.**—It is not permissible practice in a statement on appeal to insert therein a “skeleton statement on motion for a new trial” and ask for a reversal of the lower court solely on the ground that the motion of a new trial was heard on such skeleton statement without considering the exhibits referred to, p. 147.

A certificate of the judge that “the foregoing statement on motion for a new trial has been settled and allowed by me” includes and authenticates such exhibits as form a part of such statement, although the certificate is attached to the body of the statement and precedes the exhibits: *Sharon v. Sharon*, 79 Cal. 640, where the leading case is distinguished. Referred to in *Reclamation District v. Hamilton*, 112 Cal. 607. If exhibits are referred to definitely and intelligibly, it is not necessary to incorporate them haec verba: *Moore v. Taylor*, 1 Idaho, 584.

**40 Cal. 154-159. DAMBELL v. BOARD OF SUPERVISORS OF SAN JOAQUIN COUNTY.**

**Establishment of Public Road.**—A board of supervisors, in laying out a public road, exercises judicial functions, p. 158.

The doctrine of the leading case is well established in the cases cited: Humboldt Co. v. Dinsmore, 75 Cal. 607. Its judgments are final and cannot be attacked, collaterally, but may be reviewed by certiorari where the jurisdiction of the board has been exceeded: Levee District No. 9 v. Farmer, 101 Cal. 181, report of reviewers cannot be collaterally attacked on the ground that it was made upon insufficient evidence: Siskiyou County v. Gamlisch, 110 Cal. 98.

**Idem.**—A person whose lands are directly affected by a proceeding to lay out a country road is a proper party to contest the legality of the proceedings for the establishment of the road, 158.

Approved in Gaines & Stringer v. Linn County, 21 Oreg. 434. When the proceeding is to redress a private wrong, the party beneficially interested should be named as plaintiff: Smith v. Lawrence, 2 S. Dak. 193.

**Idem.**—The viewers of a road must view and mark out the line of the road as proposed in the application, p. 155.

Under a petition asking for the improvement of an existing highway, a new way cannot be laid out: Lowe v. Brannan, 105 Ind. 249.

Cited in Gascho v. Sohl, 155 Ind. 420, quoting Lowe v. Brannan, 105 Ind. 249.

**Idem.**—Certiorari will lie to review the action of the board of supervisors if they exceed their authority, pp. 158, 159.

Distinguished in Los Angeles v. Water Co., 96 Cal. 95, where it was said the leading case was not authority in a proceeding under the statute.

**40 Cal. 159-164. MOSS v. WILSON.**

**Contract.**—An agreement by a number of persons, which states that the undersigned will pay the sum annexed to their names, in order to create an aggregate sum to be paid to another party, creates a several and not a joint obligation, p. 163.

Applied in a declaration of trust: Ward v. Waterman, 85 Cal. 500. Where sureties to the bond of an official had limited their obligation to specified sums, which sums were set opposite their respective signatures, the sureties are bound severally and not jointly: Butte v. Cohen, 9 Mont. 442.

**40 Cal. 165-166. FROST v. HARFORD.**

**Pleadings.**—An answer which sets up as a defense that the plaintiff

is not the legal holder and owner of a note, which on its face is payable to plaintiff is frivolous and should be stricken out, p. 166.

**Affirmed** in Felch v. Beaudry, 40 Cal. 444. It is unnecessary, in an action to foreclose a mortgage, where the note appears to have been made to plaintiff and not assigned to him, to allege that plaintiff is the owner of the note: Bank of Shasta v. Boyd, 99 Cal. 606. See, also, extended note to 72 Am. Dec. 523.

**40 Cal. 166-170. DAMBELL v. MEYER.**

**Pre-emption Act—Void Agreement.**—An agreement between two persons, that if either shall succeed in establishing a pre-emption claim to a tract of land, he shall divide the land with the other, is in contravention of the pre-emption act and cannot be enforced, p. 170.

Court of equity will not enforce an agreement to obtain the title to land by pre-emption and then convey the same to plaintiff: Hudson v. Johnson, 45 Cal. 25. An executory contract, made by a pre-emptioneer before proof and payment, to convey the land after he receives a patent, is null and void: Huston v. Walker, 47 Cal. 485. Such an agreement cannot be enforced at law or in equity: Thompson v. Doaksum, 68 Cal. 598. An agreement between pre-emptioneers that after they had obtained patents to their respective lands, each would convey to the other such land embraced in the patent to him as was in possession of the other at the time of the agreement is void, unless the parties are settlers and have their improvements upon the same legal subdivision: Turner v. Donnelly, 70 Cal. 604. But improvements erected upon public lands, by one in the mere possession thereof, may be sold, and constitute a good consideration for the promise of the buyer to pay the agreed price; O'Hanlon v. Denver, 81 Cal. 63, 15 Am. St. Rep. 21, in which case the rule of the leading case held inapplicable. Equity will not enforce a contract to share the results of fraud; Mitchell v. Cline, 84 Cal. 415, where the rule was applied to mining claims fraudulently located. Applied to a fraudulent agreement to secure large tracts of land from the state: Kreamer v. Earl, 91 Cal. 117.

**Idem.**—A person who has neither filed his declaratory statement, nor been prevented from so doing by the fraud of another, cannot avail himself of the benefits of an entry made by such other person and a patent issued in pursuance thereof, p. 170.

Cited in Burling v. Thompkins, 77 Cal. 261; and in Dreyfus v. Badger, 108 Cal. 63, to the point that a person seeking to have the patentee of land declared his trustee, in the absence of contract, must connect himself with the paramount source of title, and show that he prosecuted his claim with diligence.

**40 Cal. 183-185. BATES v. GAGE.**

**Stipulation.**—Parties by their stipulation cannot confer jurisdiction.

upon a court on the day when, by operation of law, the court is adjourned in that county and its term commenced in another, p. 184.

This was the rule prior to the adoption of the present constitution; upon its adoption all terms of court were abolished and by its provisions the superior courts are always open: *Von Schmidt v. Widber*, 99 Cal. 514; *Oakland v. Hart*, 129 Cal. 102. Rule only applicable where there is a statute fixing the times when a term of court should end: *Carland v. Commissioners*, 5 Mont. 590. Principal rule not followed in Nebraska: *Tippy v. State*, 35 Neb. 370; nor in Oregon: *Roy v. Horsley*, 6 Oreg. 387; 25 Am. Rep. 539; nor in Wyoming: *Stirling v. Wagner*, 4 Wyo. 26.

**40 Cal. 185-188. McCORMICK v. LOS ANGELES WATER COMPANY.**

**Mechanic's Lien.**—A person is not entitled to a lien for the value of his services rendered in cooking for men employed in the construction of a reservoir, pp. 187, 188.

Cited in *French v. Powell*, 135 Cal. 643, 644, but held inapplicable in action on bond under statutes of 1897, page 201; *Perrault v. Shaw*, 69 N. H. 181, 76 Am. St. Rep. 161, as to person furnishing board to workmen, and to same effect see *United States v. Kimpland*, 93 Fed. 405, holding such services not the supply of labor or materials. Services of a bookkeeper are not work and labor within the meaning of the mechanic's lien statute: *R. A. G. & S. M. Co. v. Bouscher*, 9 Colo. 388. Overseer of miners, who, in the performance of his duties, does some manual labor is entitled to the benefit of the mechanic's lien statute: *Mining Co. v. Cullins*, 104 U. S. 178.

**40 Cal. 188-194. KARR v. PARKS.**

**Imputable Negligence.**—It is not negligence, as a matter of law, on the part of parents, to permit a child five years of age to walk in the street in the daytime within sixty feet of her father's house, p. 193.

The rule of principal case falls as an exception under the general doctrine imputing to a child of tender years the negligence of its parent, or guardian; it is generally referred to in *Air-Line Railway Co. v. Gravitt*, 93 Ga. 374, 44 Am. St. Rep. 149, where it was held that if a child was injured through the gross negligence of its parents they could not recover. Cited in *Battishill v. Humphreys*, 64 Mich. 504, in which the doctrine of imputable negligence is thoroughly discussed. Cited, also, in 57 Am. Rep. 475, extended note; and 49 Am. St. Rep. 407, note.

**Negligence.**—A person in time of imminent danger is not negligent because he does not take every precaution that a careful calculation afterward will show he might have taken, p. 193.

"When one is placed by the negligence of another in a situation of peril, his attempt to escape danger, even by doing an act which is also dangerous, and from which injury results, is not contributory

negligence such as will prevent him from recovering from an injury": Lincoln Rapid Transit Co. v. Nichols, 37 Neb. 337. Cited in Edgerton v. O'Neill, 4 Kan. App. 84, holding contributory negligence not established under facts stated. If the circumstances appear to threaten his life, or serious bodily injury, and the party acts prudently or imprudently, this in no way excuses the negligence of the railroad: L & G. N. Ry. Co. v. Neff, 87 Tex. 309. Cited, also, in 55 Am. Dec. 675, note.

40 Cal. 194-198. **GREER v. BLANCHARD.**

**Conveyance.**—The word "purchase" includes every mode of acquiring an estate except by inheritance, p. 197.

A resolution authorizing a president of a corporation to deed and convey land to "purchasers," is sufficient to authorize the president on behalf of the corporation to execute a deed and donate land to a county: State v. Glenn, 18 Nev. 47.

**Trusts.**—Beneficiary has the equitable estate in the trust property, p. 197.

Cited in concurring opinion in Estate of Fair, 132 Cal. 536, 84 Am. St. Rep. 82, comparing English construction of statute of uses.

40 Cal. 198-221; 6 Am. Rep. 604. **PEOPLE v. BRADY.**

**Constitutional Law—Witnesses.**—The state legislature has the power to declare who shall be competent to testify, and therefore may exclude Chinamen from this right; this power in no manner conflicts with the fourteenth amendment to the constitution of the United States, p. 212.

The court refused to overrule the leading case in People v. McGuire, 45 Cal. 57. Chinese witness competent when the codes took effect January, 1873; People v. McGuire, 45 Cal. 57. The leading case falls among those cases involving a discussion of the effect of the fourteenth amendment on the "powers" of the state. The classification of school children on the basis of race or color and their education in separate schools is within the power of the state legislature; Cory v. Carter, 48 Ind. 345, 17 Am. Rep. 749. A statute making it a felony for a white person to marry a negro, or a person of mixed blood, is not in conflict with the federal constitution. Frasher v. State, 3 Tex. Crim. Rep. 263; 30 Am. Rep. 138. Referred to in State v. Strauder, 11 W. Va. 809; 27 Am. Rep. 614; and in concurring opinion of Williams, J., in Bowlin v. Commonwealth, 2 Bush, 5, 92 Am. Dec. 475. Cited, also, in 3 Am. St. Rep. 123, note.

40 Cal. 221-240. **CARPENTIER v. BRENNHAM.** S. C. 50 Cal. 551.

**Mortgage.**—Equity will keep the legal title and the mortgagee's interest separate, although both are held by the mortgagee, whenever

Notes Cal. Rep.—128.

necessary for the full protection of such person's rights. As against a junior mortgagee not a party to the foreclosure suit, the prior mortgagee who has purchased at the foreclosure sale holds the legal title subject to both mortgages, although still retaining his rights as first mortgagee, pp. 235, 236.

Cited in *Anglo-Californian Bank v. Field*, 146 Cal. 654, when assignee of plaintiff's mortgage took it from plaintiff pending suit with guaranty of priority, and subsequently acquired fee from mortgagor, under deed reciting that it was taken subject to both mortgages, prior mortgage not merged in fee as subsequent mortgage; *Rumpp v. Gerkens*, 59 Cal. 502, where it was held that the question whether a merger takes place is one of intention, actual or presumed, of the person in whom the interests are united; *Henderson v. Grammar*, 66 Cal. 335; and *Wilson v. White*, 84 Cal. 243, holding that a purchaser at a foreclosure sale is, in equity, the assignee of the mortgage foreclosed. If there is an intervening mortgage, attachment, or other lien, the acquirement of title by a prior mortgagee will not operate as a merger: *Scrivener v. Dietz*, 84 Cal. 299. Where one mortgage is substituted for another, equity will keep the first alive when the interests of justice require it: *Tolman v. Smith*, 85 Cal. 289. Cited in *Chasser v. McCloskey*, 101 Cal. 580, and *Davis v. Randall*, 117 Cal. 16, where it was held that merger will not be implied where there is an intervening claim.

**Foreclosure of a first mortgage in which junior mortgagee was not made a party does not affect rights of latter, p. 234.**

Cited in *Goad v. Hart*, 128 Cal. 201, holding a person not a necessary party when holding rights superior to all the litigants; *Frates v. Sears*, 144 Cal. 250, but sustaining right of second mortgagee to plead statute of limitations under the circumstances; *American etc. Co. v. Atlantic etc. Co.*, 99 Fed. 318, affirming right of junior mortgagee to redeem from foreclosure sale in suit under senior mortgage, when not made a party.

**Mortgage.—A mortgage is a mere security, and under it no estate in the land passes to the mortgagee, p. 234,**

Followed in *McGurren v. Garrity*, 68 Cal. 568.

**Junior Mortgagee.—The foreclosure of a first mortgage, to which the junior mortgagee was not made a party, does not affect the rights of the latter, p. 234,**

Cited in 70 Am. Dec. 754, note.

#### 40 Cal. 240-245; 6 Am. Rep. 617. **DUFFY v. HOBSON.**

**Agency.—A verbal authority to an agent to sell real estate is not sufficient to authorize the agent to execute a contract of sale in the name of the latter to such a contract, p. 244.**

This principle appears well founded and is supported in the following,

the leading case: *Armstrong v. Lowe*, 76 Cal. 617; *Delano v. Halsey*, 98 Cal. 279; 31 Am. St. Rep. 205; *Malone v. McCulloch*, 15 Colo. 466; *Everman v. Herndon*, 71 Miss. 829; *H. & T. C. R. R. Co. v. McNeely*, 55 Tex. 186, holding that agent of railroad company under a general power to procure a right of way, cannot make an agreement, binding the railroad company, to locate a depot at a particular place in consideration of a deed of a right of way to a company; *Halsey v. Monterio*, 92 Va. 584; and *Carstens v. McReavy*, 1 Wash. 364. Cited in *McCullough v. Hitchcock*, 71 Conn. 404, applying the rule to letter requesting agent to find a purchaser; *Holmes v. Redhead*, 104 Iowa, 403, holding agent not authorized to contract for exchange under facts stated; and cf. *Ballou v. Bergvendsen*, 9 N. Dak. 289, ruling similarly as to broker's contract of sale; *Brandrup v. Britten*, 11 N. Dak. 379, 380, discussed also in 17 Am. Dec. 59, extended note; 93 Am. Dec. 172, extended note; and 18 Am. St. Rep. 828, note.

**Exception.—Verbal Power to Execute Sufficient** if the words used for that purpose are so distinct and clear in their meaning as to manifest with uncertainty the intention of the principal, p. 245.

Principal case approved as to this exception to the general rule in *Ruttenberg v. Main*, 47 Cal. 219; and in *Malone v. McCullough*, 15 Colo. 466. Contrary rule has been upheld in Missouri, holding that the power to sell includes the power to do whatever is necessary to make the contract of sale valid and binding: *Stewart v. Wood*, 63 Mo. 256, incorrectly citing leading case; and *Glass v. Rowe*, 103 Mo. 536.

**Broker's Contract to Sell** is merely that the broker should find a purchaser willing to buy upon certain terms, p. 244.

It follows from this principal that if the broker produces a purchaser willing to buy upon such terms, he is entitled to his commission. The leading case is cited in support of this principle in the following cases: *Phelps v. Prusch*, 83 Cal. 628; *Grant v. Ede*, 85 Cal. 421; 20 Am. St. Rep. 238; *Smith v. Schiele*, 93 Cal. 149; *Gunn v. Bank of Cal.*, 99 Cal. 352; *Oullahan v. Baldwin*, 100 Cal. 660, in dissenting opinion of Harrison, J.; *Martin v. Ede*, 103 Cal. 160; and *McFarland v. Lillard*, 2 Ind. App. 163; 50 Am. St. Rep. 236.

**Internal Revenue Stamps.**—The omission of a United States revenue stamp cannot, under any circumstances, be set up as a defense in a state court, in an action upon a contract, p. 243.

Followed in *Thomasson v. Wood*, 42 Cal. 417. Cited in *Small v. Slocumb*, 112 Ga. 285, 81 Am. St. Rep. 550, holding rule excluding un-stamped documents from evidence applicable to federal courts only. The provisions of the United States Revenue Act, prohibiting the recording of unstamped instruments, and declaring their record to be void, applies only to instruments required to be recorded by federal legislation, and to officers under federal control: *Stewart v. Hopkins*, 30

Ohio St. 525. Referred to in 59 Am. Dec. 558, 559, note; 6 Am. Rep. 688, note; 7 Am. Rep. 51, note; 7 Am. Rep. 468, note; and 13 Am. Rep. 681, note.

**40 Cal. 246-250. MASON v. WOLFF.**

**Unlawful Detainer.**—Title is not in issue in the statutory action of unlawful detainer, p. 250.

Evidence of title in the defendant is not admissible for any purpose in unlawful detainer: *Felton v. Millard*, 81 Cal. 542.

**Idem.**—The rule that in an action of ejectment where defendant did not enter into possession under the lease, but was in possession at the time of the lease, he was not estopped from disputing the title of the landlord, is not applicable in action of unlawful detainer, p. 250.

In an action of unlawful detainer the lessee cannot avoid the obligation assumed by the reason of the lease, by showing that the lessors did not have the title to the premises demised to them: *Knowles v. Murphy*, 107 Cal. 114. Referred to in *Parrott v. Hungelburger*, 9 Mont. 534.

**Unlawful Detainer.**—Judgment may include rent due at time of trial, p. 250.

Cited in *Keyes v. Moy*, 136 Cal. 130, sustaining similar judgments, and *Nolan v. Hentig*, 138 Cal. 283, to same effect.

**Evidence.**—The judgment and findings in a former action are inadmissible in evidence in a second action, unless accompanied by the judgment-roll, p. 249.

The jurisdiction of a foreign court must be shown: *Wickersham v. Johnston*, 104 Cal. 415, 43 Am. St. Rep. 123. Cited, also, in 14 Am. Dec. 187, note. Rule not applicable in a case where it appears that the facts, showing that the court had jurisdiction, are recited in the judgment itself: *Simmons v. Threshour*, 118 Cal. 101.

**General Citations.**—Cited in *Rogers v. Borchard*, 82 Cal. 350, to the point that if evidence is inadmissible, it is none the less so because tried by the court without a jury, p. 249.

**40 Cal. 251-255. MORE v. BONNETT. 6 Am. Rep. 621.**

**Contract in Restraint of Trade.**—A contract by which one of the parties binds himself not to engage in a particular business in the city of San Francisco, or the state of California, is in restraint of trade, and void, p. 254.

The rule that a contract in total restraint of trade within a state is void as against public policy is fully supported by the cases following: *Prost v. More*, 40 Cal. 348. A contract that a person shall not engage in any branch of the yeast powder business is void: *Callahan v.*

**Donnelly**, 45 Cal. 153; 13 Am. Rep. 173. Applied in a contract not to sell oil in **the whole state**: *Consumers' Oil Co. v. Nunnemaker*, 142 Ind. 565, 51 Am. St. Rep. 197. Cited, also, in 7 Am. Dec. 744, note; 95 Am. Dec. 193, note; 4 Am. St. Rep. 343, note; 32 Am. St. Rep. 301, note; 33 Am. St. Rep. 855, note.

**Contract is Severable** when price is apportioned either expressly or impliedly, p. 254.

Cited in *Herzog v. Purdy*, 119 Cal. 101; note to *Huyett etc. Co. v. Chicago etc. Co.*, 59 Am. St. Rep. 278, 279, holding contract of sale severable **when** price was expressly apportioned; *Carmack v. Drum*, 27 Wash. 386, in action of unlawful detainer tenant cannot set up defense that he had **contract** whereby latter, in case of his dispossession, should reimburse **tenant** for furniture, fixtures and improvements, before he should be compelled to vacate.

A **contract** not to engage in a particular business in a certain city, or in the state, is an entire contract and is not severable so as to enforce that portion relating to the city, p. 254.

A **contract** tending to stifle competition and create monopolies is void and is not severable: *Mill & Lumber Co. v. Hayes*, 76 Cal. 393; 9 Am. St. Rep. 215. An agreement not to build a sidetrack at a certain town held void and not severable: *Pueblo etc. R. R. Co. v. Taylor*, 6 Colo. 16. Cited in *State v. Jones*, 21 Nev. 514, to the point that whether a contract is entire or separable, depends upon the intention of the parties, to be ascertained from the language employed, and the subject matter of the contract. Cited, also, in 92 Am. Dec. 765, extended note.

Cited in *Reagan v. Bank*, 157 Ind. 658, holding mortgage void in toto as against creditors and not severable.

**Rule Doubted.**—The leading case was distinguished in *City Carpet etc. Works v. Jones*, 102 Cal. 513, and the court also held that if it was not distinguishable, it was decided before the adoption of the Civil Code, and therefore inapplicable. It was there decided that a covenant in restraint of trade is divisible as regards space.

#### 40 Cal. 255-264. HEWES v. REIS.

**Street Assessment.**—When the statute requires a series of acts to be performed before the owners of property are chargeable with the tax, such acts are conditions precedent to the exercise of the power to levy the tax and the requirements of the statute must be strictly complied with, or the tax cannot be collected, p. 262.

Referred to in *Chambers v. Satterlee*, 40 Cal. 526. Cited in *Chase v. City Treasurer*, 122 Cal. 546, as to publication of notice of intention in paper designated by city council; *Ives v. City*, 51 Neb. 140, applying rule to proceedings to compel construction of sidewalks; *Sweigle v. Gates*, 9 N. Dak. 545, noted under *Smith v. Davis*, 30 Cal. 537; *Bank v.*

Portland, 41 Or. 5, holding resolution "that notice be given that common council of city of Portland propose to improve" certain streets, followed by specification of how work must be done, complies with Portland charter of 1898, sections 127, 128. Followed in *Hixon v. Brodie*, 45 Cal. 277. Street superintendent has no power to enter into contract for street improvement, until after the expiration of the five days from the first publication of the award: *Burke v. Turney*, 54 Cal. 487. Property owners does not waive his right to object to the want of jurisdiction by the fact that he appeared before the city council and filed objections and afterward protested against the report of the commissioners: *Dehail v. Morford*, 95 Cal. 480. In proceedings where property of a citizen is to be taken, every requirement of the statute must be complied with: *Shipman v. Forbes*, 97 Cal. 574. "Such statutes are in derogation of the common law, and must be construed strictly": *McLauren v. Grand Forks*, 6 Dak. Ter. 401. Principle approved in *Doster v. Sterling*, 33 Kan. 386; *Mason v. City of Sioux Falls*, 2 S. Dak. 647; 39 Am. St. Rep. 807; and *Dallas v. Ellison*, 10 Tex. Civ. App. 433.

**Idem.**—The word "unknown," written in the assessment opposite the number of the lot, is sufficient to show that the name of the owner was unknown to the superintendent of streets, and is an exact compliance with the statute, p. 261.

When the superintendent of street has written the word "unknown" opposite the number of the lot, it is conclusive of the fact so certified and cannot be collaterally attacked: *Chambers v. Satterlee*, 40 Cal. 518.

**Idem.**—An assessment sufficiently describes the property to be assessed which gives the numbers of the lots as shown upon the diagram attached to the assessment, the frontage of each lot, and refers to the diagram for further description, p. 261.

Cited in *Ede v. Knight*, 93 Cal. 163.

**Street Work.**—Appeal to board does not lie as to defects in notice or publication, p. 263.

Cited in *De Haven v. Berendes*, 135 Cal. 182, holding assessment void for want of jurisdiction, not cured by failure to appeal.

**Street Improvements.**—If errors, not amounting to a failure of jurisdiction, have been committed by the superintendent of streets, ample remedy is afforded by appeal to the board of supervisors, p. 264.

Referred to in *Blair v. Luning*, 76 Cal. 136. One who has failed to appeal to the supervisors cannot complain later of matters from which he could have obtained relief by applying at the proper time: *McVerry v. Boyd*, 89 Cal. 310.

**General Citations.**—Cited in *Adams v. Fisher*, 63 Tex. 658, to the point that it was competent for the legislature to have authorized the board to make the contract without publishing notice of intention and without inviting bids, p. 263.

**40 Cal. 264-267. HARTSON v. HARDIN.**

Where Evidence Tending to Establish value of plaintiff's services was admitted as competent after objection, finding that there was no proof of value of services was surprised, p. 267.

Approved in Porter v. Printing Co., 26 Mont. 182, where court found certain counterclaims well pleaded and plaintiff defaulted thereto, and court adopted findings of referee, but declared part only of counter-claims well pleaded, new trial granted defendant for surprise.

Pleadings.—A plea which does not aver that the cause of action accrued more than two years before the commencement of the action, but only that services rendered by plaintiff were rendered more than two years before action brought, is insufficient as a plea of the statute of limitations, p. 267.

In pleading the statute of limitations, the facts showing that the limitation has run must be stated: Paine v. Comstock, 57 Wis. 164.

**40 Cal. 268-271. PEOPLE v. WEIL.**

Juror.—If, on the examination of a juror in a criminal case, he states he has formed a fixed, decided opinion in regard to the guilt or innocence of the defendant, he should be rejected, notwithstanding on cross-examination he said he could render a verdict according to the evidence, p. 271.

Rule of the leading case applied in Sylvester v. State, 45 Ark. 170. Cited in Quill v. S. P. Co., 140 Cal. 271, holding challenge improperly overruled.

Idem.—When the practical result of an erroneous disallowance of defendant's challenge for cause was to so contract the number of peremptory challenges to which he was entitled, as to deprive him of the right of peremptory challenge before the jury was complete, the error may have been seriously prejudicial to the defendant, p. 271.

But if the peremptory challenges of defendant are not exhausted before the jury is complete, no injury could have resulted to the defendant, and the error of the court below will not be reviewed upon appeal: People v. Durrant, 116 Cal. 196. An injury could only arise in case the challenging party was compelled to exhaust all his peremptory challenges, and afterward have an objectionable juror placed on the panel for want of another challenge: State v. Raymond, 11 Nev. 108. An error similar to that of the leading case was considered material in Hartnett v. State, 42 Ohio St. 578. "The general rule seems to be that if the trial court erroneously refuses to allow a challenge, the error of the court is waived if a jury is obtained before the party against whom the error is committed has exhausted his peremptory challenges; otherwise the error is material": Ford v. Umatilla County, 15 Oreg. 324.

**40 Cal. 272-275. LARGAN v. CENTRAL RAILROAD COMPANY.**

**Negligence—Evidence.**—In an action for damages for the alleged negligence of a railroad company, it is wholly immaterial whether it was the usual practice of the defendant's cars to run along without a driver, inasmuch as it appears that when the injury occurred the car was running with a driver, p. 274.

Principal case held not in point in Craven v. Central Pacific R. R. Co., 72 Cal. 350, where it was decided, in an action for damages for injuries caused by alighting from a train of cars, the evidence that plaintiff had, within a year previous to the accident, frequently jumped off the cars while in motion is admissible.

**40 Cal. 275-278. PEOPLE v. COX.**

**Embezzlement.**—An indictment for embezzlement should state the description of the property embezzled, with the same particularity as is required in an indictment for larceny, p. 277.

Indirectly referred to in People v. Strassman, 112 Cal. 689. The omission to describe the property with sufficient particularity is a fatal objection at any stage of the case: Grant v. State, 35 Fla. 584, 585; 48 Am. St. Rep. 265. Cited in Moore v. United States, 180 U. S. 274, to the point that the averment of the embezzlement of a certain amount in dollars and cents is insufficient. Cited, also, in 98 Am. Dec. 154, 155, note.

**40 Cal. 278-281. FULTON v. HANNA.**

**Appeal.**—The fact that a direct appeal from the judgment has been dismissed does not place the appellant in a different or more unfavorable position in respect to this appeal from an order denying a motion for a new trial than he would have occupied had no direct appeal from the judgment ever been taken, p. 281.

The disposition of one of the appeals allowed by the statute does not affect the rights of the party under the other: Sharon v. Sharon, 79 Cal. 654. Referred to in opinion of Thornton, J., in Sharon v. Sharon, 79 Cal. 691; and in Kirman v. Hunnewill, 91 Cal. 157, where it was held that whether appellants are entitled to have the execution of judgment stayed until the determination of an appeal from an order denying a new trial cannot be considered upon a motion to dismiss the appeal from the judgment. The right of appellant to have the execution stayed pending the appeal from the order denying a new trial is not impaired by the fact that the appeal from the judgment is dismissed: Tompkins v. Montgomery, 116 Cal. 123. Referred to in Sharon v. Terry, 36 Fed. Rep. 362; 13 Saw. 423.

**Idem.**—When a full bond is given on an appeal from an order deny-

ing a motion for a new trial, execution is effectually stayed upon the judgment pending such appeal, pp. 280, 281.

Cited in *McCallion v. Savings etc. Society*, 83 Cal. 572; *Owen v. Pomona etc. Co.*, 124 Cal. 333, holding stay so effected; and to same effect, see *Holland v. McDade*, 125 Cal. 354, 355, 356 (quoted in *Starr v. Kreuzberger*, 131 Cal. 43); *Credits etc. Co. v. Superior Court*, 140 Cal. 83, 84, 85, but holding an appeal bond on appeal from order refusing to vacate prior order not to operate as supersedeas upon such prior order.

**Idem.**—A reversal on appeal from an order denying a motion for a new trial, and remanding the cause for retrial, as effectually vacates the judgment as a reversal of the judgment upon direct appeal, p. 280.

Followed in *Bauder v. Tyrrel*, 59 Cal. 100.

**Mandamus.**—Where the clerk of a court refuses to issue an execution upon a simple money judgment, the remedy is by motion in the proper court, or by action against him, and not by application for a writ of mandamus, p. 281.

Mandamus is the proper remedy against an auditor who refuses to issue a county warrant when directed to do so by the board of supervisors: *Babcock v. Goodrich*, 47 Cal. 508, where the leading case is distinguished. Mandamus ought not to issue to compel the trustees of a corporation to issue certain certificates of stock, where it appears from the petition that the stock is also claimed by other persons not parties to the proceedings before the court: *State v. Guerrero*, 12 Nev. 107. Cited in note to *State v. Cone*, 74 Am. St. Rep. 153, on mandamus; *State v. Wright*, 26 Mont. 542, 543, mandamus does not lie to compel district court clerk to issue alias order of sale under foreclosure lien.

#### 40 Cal. 281-284. **MAYO v. FOLEY.**

The decree of a court of competent jurisdiction for the sale of lands for delinquent taxes is conclusive on the owner, and on the premises, of the truth of the matters adjudged, and is not open to mere collateral inquiry, p. 284.

Cited in *Wood v. Jordan*, 125 Cal. 262, noted under *Mayo v. Ah Loy*, 32 Cal. 477; *Crane v. Cummings*, 137 Cal. 202, noted under *Moore v. Martin*, 38 Cal. 428; *New Orleans v. Warner*, 175 U. S. 141, holding such judgment binding especially where entered by consent. Jurisdiction of the court as to a particular tract is not affected by the fact that the taxes upon that tract had previously been paid: *McCarter v. Neil*, 50 Ark. 192, following the rule of the leading case. Defendant cannot defeat title acquired by sheriff's deed under sale made upon judgment, by showing defects in the assessment roll: *Jones v. Gillis*, 45 Cal. 543. Affirmed in *Anderson v. Ryder*, 46 Cal. 137. Cited in *Chauncey v. Wass*, 35 Minn. 20.

**Idem.**—To establish in the purchaser at sheriff's sale such title as the

defendant in execution had, it is sufficient to show a judgment of a court of competent jurisdiction, valid process issued to the sheriff, and a sheriff's deed made upon a sale thereunder, p. 284.

Purchaser is concerned only with the judgment, execution, and sale as evidenced by his deed: *Kelley v. Desmond*, 63 Cal. 519.

#### 40 Cal. 284. PEOPLE v. ATKINSON.

Privileged Communications include those between attorney and client in relation to subject matter under consideration, p. 285.

Cited in note to *O'Brien v. Spaulding*, 66 Am. St. Rep. 217, 238, 243, on general subject.

#### 40 Cal. 286-288. PEOPLE v. TETHEROW.

**Instructions—Criminal Practice.**—The action of the court below upon instructions must be shown, either by an indorsement as provided in the Criminal Practice Act, or by a bill of exceptions, p. 287.

Followed in *People v. Clark*, 84 Cal. 581.

**Evidence.**—The question whether the evidence sustains the verdict cannot be considered where the record does not present an authentic statement of the evidence, p. 287.

The only manner in which the question as to the sufficiency of the evidence can be presented to the supreme court is by a bill of exceptions: *People v. Padilla*, 42 Cal. 539. It was also held in the same case that the stenographer's report could not be substituted for a bill of exceptions.

#### 40 Cal. 288-294. ALEMANY v. WENSINGER.

A court of equity has jurisdiction to decree a sale of property held in trust for charitable or religious purposes when, in its opinion, the objects of the trust would be more effectually carried out by such sale, p. 293.

Cited and principle followed in *Kilpatrick v. Graves*, 51 Miss. 439. Approved in *Tacoma v. Tacoma Cemetery*, 28 Wash. 246, where donor deeds lands for cemetery to trustees selected by town trustees, conveyance reciting that grantee should be such board, "their successors and assigns," trustees may sell portion of land and apply proceeds to betterment of remainder for cemetery purposes.

**Idem—Costs of Litigation.**—The costs of litigation, including reasonable counsel fees, in a proceeding for the sale of property held in trust for charitable purposes, is a proper charge on the trust fund, p. 294.

But a final judgment cannot be opened and changed so as to include attorneys' fees: *Wickersham v. Crittenden*, 103 Cal. 584, where the leading case was distinguished, on the ground that the order allowing

**counsel fees** in that case was made during the pendency of the litigation, **and** became a part of the final judgment. The court cannot decree attorney's fees to be paid to the creditors, plaintiffs, nor to the assignee in insolvency, out of the gross proceeds of the sale of the property, **nor** can it allow costs to the assignee in insolvency out of the fund: *Miller v. Kehoe*, 107 Cal. 344, where the rule of the leading case was expressly approved, but was distinguished by the court. Cited in *Estate of Olmstead*, 120 Cal. 453, holding that upon the successful contest of the probate of the will of a deceased person the court has discretionary power to order costs to be allowed out of the assets of the estate, but cannot allow attorney's fees.

**40 Cal. 294-299. MONTGOMERY v. WHITING.**

**Pre-emption—Sale of Possessory Right.**—A party has a right to pre-empt land after the execution sale of his former possessory right therein, **and** such newly acquired right or title under such pre-emption is sufficient to maintain ejectment against the purchaser at the execution sale, p. 298.

Referred to in *Ritchie v. Johnson*, 50 Ark. 556; 7 Am. St. Rep. 121. Followed in *Rupert v. Jones*, 119 Cal. 112. Cited, also, in 39 Am. Dec. 313, note; and 84 Am. Dec. 573, note.

**EstoppeL**—The judgment in ejectment and sale of the possessory right is no bar to the acquisition of such new title under a new declaration of intention to pre-empt, nor does it operate as an equitable estoppel in pais, against the party acquiring such title, p. 299.

A Party whose possessory rights under a homestead claim have been sold under execution is not estopped from asserting a subsequently acquired title to the same land under a pre-emption right: *Thrift v. Delaney*, 69 Cal. 192. "A party who has been adjudged to deliver possession of land to another claimant is not estopped from purchasing subsequent to the action in which the right to such possession was determined an outstanding title, and asserting again his right to the possession of the same": *Meyendorf v. Frohner*, 3 Mont. 319, 320. Referred to in dissenting opinion of Wade, C. J., in the same case, 3 Mont. 334. Cited, also, in 48 Am. Dec. 775, note.

**Warranty.**—An execution of a conveyance without warranty dissolves all the relations between vendor and vendee, p. 298.

Cited in 78 Am. Dec. 458, note.

**40 Cal. 299-310. JUDSON v. MALLOY.**

To constitute an abandonment, there must be a concurrence of the act of leaving the premises vacant, so that they may be appropriated by the next comer, and the intention of not returning, p. 310.

Applied to water right in *Wood v. Etiwanda Water Co.*, 147 Cal. 234,

and also in *Utt v. Frey*, 106 Cal. 397, where it was held that mere intention to abandon, not coupled with a yielding up of possession, is not sufficient, nor is nonuser alone, without intention to abandon sufficient. Cited in *Wolff v. Canadian etc. Co.*, 123 Cal. 539, noted under *Moon v. Rollins*, 36 Cal. 333; *Barnett v. Dickinson*, 93 Md. 267, holding premises not abandoned, within terms of trust deed, under facts stated; *Saxlehner v. Eisner etc. Co.*, 179 U. S. 31, ruling similarly as to abandonment of trademark; *Manhattan Life Ins. Co. v. Wright*, 126 Fed. 89, applying rule to rights under life insurance policy. Mere lapse of time alone is not sufficient: *Gassert v. Noyes*, 18 Mont. 219. Rule applied to an abandonment of pre-emption claim in *Northern Pac. R. Co. v. Amacker*, 53 Fed. Rep. 53. Cited in dissenting opinion of Knowles, J., in *Hewitt v. Story*, 64 Fed. Rep. 527, 533; and in 40 Am. Dec. 464, 467, note; also in *Beaver Brook Co. v. St. Vrain Co.*, 6 Colo. App. 136; *Putnam v. Curtis*, 7 Colo. App. 442; and *Nichols v. Lantz*, 9 Colo. App. 5.

**Oral Contradiction of Deed.**—The testimony of a witness which tends to contradict or limit the operation of deeds in evidence, one of which was executed to and another by the witness, should be excluded, p. 307.

Principle approved in *Frink v. Roe*, 70 Cal. 319.

**Practice.**—It is the duty of the court, upon motion, to order separate trials in an action for the recovery of land brought against many defendants holding separate portions thereof, and having no common interest, p. 307.

Followed in *Townsley v. Hornbuckle*, 2 Mont. 584.

**General Citation.**—A person entering into the actual possession of land, claiming the whole under a deed to the entire tract, is not limited in his possession to his actual inclosure, but acquires possession to all of the land not in the adverse possession of another at the time of his entry: 85 Am. Dec. 125, note.

#### 40 Cal. 311-344. PEOPLE v. DE LA GUERRA.

**Citizenship.**—The possession of all political rights is not essential to citizenship, p. 343.

A statement in an affidavit of service of summons that the person making the affidavit was a white male citizen of the United States is not equivalent to a statement that he was over eighteen years of age: *Lyons v. Cunningham*, 66 Cal. 44.

**Treaty of Guadalupe Hidalgo.**—All citizens of the ceded territory who did not elect to remain Mexican citizens became, by the terms of the treaty, citizens of the United States, p. 341.

Referred to in *In re Rodriguez*, 81 Fed. Rep. 352.

**40 Cal. 344-348. PEOPLE v. BUSH.**

Certiorari can only issue to an inferior officer or tribunal exercising judicial functions, and the proceedings or act to be reviewed must be judicial in its character. The appointment of a member of the board of supervisors by a county judge is a ministerial and not a judicial act, and is therefore not subject to review upon certiorari, p. 348.

Cited in Brown v. Board, 124 Cal. 277, denying writ to review action of supervisors in closing street; Bank v. Oberhaus, 125 Cal. 324, defining and distinguishing ministerial and judicial acts.

Certiorari does not lie to review the action of the board of supervisors when their action is legislative in character, and consists in the passage of an ordinance or resolution: Spring Valley W. W. Co. v. Bryant, 52 Cal. 136. Will not lie to review the action of any tribunal, board, or officer, in the exercise of legislative functions: People v. Oakland Board of Education, 54 Cal. 377. Superior court law has not jurisdiction to review the action of the board of supervisors in vacating an order directing an additional assessment on the land in a reclamation district: Bixler v. Board of Supervisors, 59 Cal. 702. Followed in Myers v. Hamilton, 60 Cal. 290. The adoption of a child is not a judicial proceeding: In re Johnson, 98 Cal. 547, dissenting opinion of Harrison, J. Act of the supervisors in passing a resolution of intention to open and extend Market street to the Pacific Ocean is legislative in character, and certiorari will not lie to review it: Wulzen v. Board of Supervisors, 101 Cal. 18; 40 Am. St. Rep. 21. Appointment of marshal by a city council cannot be reviewed by certiorari: Lorbeer v. Hutchinson, 111 Cal. 273. Approved in Quinchard v. Board of Trustees, 113 Cal. 669; and in State v. Harrison, 141 Mo. 19. Issuance of an execution by a justice of peace is a ministerial act: Application of Rourke, 13 Nev. 255. Principal case cited and the doctrine approved in State v. California M. Co., 13 Nev. 215; Esmeralda County v. District Court, 18 Nev. 440; State v. Washoe Co. Commrs., 23 Nev. 248; School District v. Lambert, 28 Oreg. 223; and Brown v. Wheelock, 75 Tex. 388; Ellis v. Thorne, 112 Wis. 87. Cited, also, in 12 Am. Dec. 536, note; 18 Am. Dec. 237, note; 79 Am. Dec. 472, 473, note; and 40 Am. Dec. 46, note.

Judicial Officers may by authority of law perform ministerial acts, p. 346.

So a judge of the circuit court may appoint a city commissioner: Terre Haute v. E. & T. R. R. Co., 149 Ind. 183.

**40 Cal. 347-348. PROST v. MORE.**

**Pleadings.**—Where the answer sufficiently alleges facts showing the illegality of the contract sued upon, the plaintiff cannot recover upon the pleadings, although such facts are not pleaded or insisted upon as a defense, p. 348.

It is only where the answer admits, or leaves undenied, the material facts stated in the complaint, that a judgment can be rendered on the pleadings: *Hicks v. Lovell*, 64 Cal. 17. A judgment on the pleadings is not authorized if the answer deny the material allegations of the complaint, although in a special defense separately stated the allegations formerly denied are admitted: *Botto v. Vandament*, 67 Cal. 333 "In a proceeding for the determination of conflicting rights to purchase land from the state, each party is an actor, and must allege and prove all the facts upon which he relies as showing his right to become a purchaser from the state, and the steps he has taken to avail himself of and secure his right to make the purchase": *Cushing v. Keslar*, 63 Cal. 477. When any material allegation is denied by the answer, it is error to render judgment upon the pleadings: *Johnson v. Manning*, 2 Idaho, 1075.

**Void Contract.**—A contract void in part and of such a nature that the good cannot be separated from the bad, is an entire contract and void, p. 348.

Applied in *Mill & Lumber Co. v. Hayes*, 76 Cal. 393, 9 Am. St. Rep. 215, where a contract in restraint of trade was held indivisible and invalid in its entirety; *Getz Bros. & Co. v. Federal Salt Co.* 147 Cal. 118, construing contract in consideration of specified sum that all salt shall be purchased from defendant and not to purchase from others nor to import salt to Pacific Coast, is illegal as being in restraint of trade.

#### 40 Cal. 349-351. LEARNED v. WELTON.

**Deed of Trustee.**—A conveyance by one of two trustees of a trust estate does not pass the legal title, p. 350.

Cited in 64 Am. Dec. 201, note; and 19 Am. St. Rep. 268, 275, important note.

**General Citations.**—Cited in *Harrigan v. Mowry*, 84 Cal. 468; and *Shanahan v. Crampton*, 92 Cal. 14, to the point that if a plaintiff is entitled to a conveyance of the legal title, and the defendant wrongfully refuses to convey it, an action to quiet title under section 738 of the Code of Civil Procedure is not permissible.

#### 40 Cal. 351-354. BARLOW v. BURNS.

**Forcible Entry and Detainer** can be maintained only by one in actual possession at the time of the ouster, and cannot be sustained by merely showing a constructive possession, or a right of possession, p. 354.

To maintain this action plaintiffs must show, first, that at the time of the ouster they were in actual and peaceable possession; second, that defendants made either a forcible entry, or forcibly detained the premises from the plaintiff: *Conroy v. Duane*, 45 Cal. 601. Cited in Tor-

rey v. Berke, 11 S. Dak. 159, holding action not maintainable when based on a scrambling possession; extended note, 77 Am. Dec. 553.

**Pleadinga.**—Each count in the complaint must state a good cause of action within itself and cannot be aided by a preceding count, unless such reference is expressly made, p. 353.

Rule approved in Haskell v. Haskell, 54 Cal. 265, where it held that if the matters omitted and referred to in another count relate to the gravamen of the action, they cannot aid such defective count. Cited and followed in Bidwell v. Babcock, 87 Cal. 33; and Clark v. Whittaker Iron Co., 9 Mo. App. 448.

#### 40 Cal. 355. TODD v. MYRES.

**Physician.**—Frequency of visits will be presumed necessary in absence of evidence to the contrary, p. 357.

Cited in Ebner v. Mackey, 186 Ill. 299, 78 Am. St. Rep. 282, sustaining recovery by physician under facts stated.

#### 40 Cal. 358-373. HASTINGS v. DEVLIN.

**School Land Warrant.**—The location of a school land warrant issued under the act of May 3, 1852, upon unsurveyed lands of the United States, is void and confers no right whatever upon the locator, p. 370.

Approved in Hastings v. Jackson, 46 Cal. 239. But a location upon unsurveyed lands of the United States is valid as between the state and the defendant, and that as soon as the land was listed to the state the title passed to the defendant: Roberts v. Columbet, 63 Cal. 24, where the leading case was distinguished on the ground that there had been a valid and an invalid location upon the land before the passage of the act of 1866, and Congress could not and did not attempt to invalidate valid sales. A selection made upon unsurveyed public lands is utterly void: United States v. Curtner, 14 Saw. 546, 38 Fed. Rep. 9. Cited, also, in 85 Am. Dec. 93, note.

**Evidence.**—A certificate issued by a register of the United States land office, which was unauthorized by statute or by regulation of the land department of the United States, is illegal, and is inadmissible in evidence in an action involving title to the land, p. 371.

Followed in Hastings v. Jackson, 46 Cal. 245. Referred to in People v. Jackson, 62 Cal. 553.

#### 40 Cal. 373-378. BURRELL v. HAW.

**Contested Patent—Land.**—A person must show in himself all the conditions necessary to enable him to pre-empt before he will be permitted to question the proceedings through which another has obtained a patent to public lands, p. 377.

Cited in *Chapman v. Quinn*, 56 Cal. 278, where it was said a patent could be attacked at the instance of the government or any person in privity with the paramount source of title, but not at the instance of a stranger. Doctrine of the leading case applied in *Schiff-ferly v. Tapia*, 68 Cal. 186. The refusal of the register of the land office to allow a person to make a proper application to pre-empt land, and pay the fee required, does not establish any privity with the United States: *Burling v. Tompkins*, 77 Cal. 261. Rule cited and followed in *Peabody v. Prince*, 78 Cal. 516, where it was held that if a patent is valid, no constructive trust can be enforced for fraud in procuring the patent, unless the claimant affirmatively alleges and proves that he possessed the necessary qualifications entitling him to a patent. Applied in *De Toro v. Robinson*, 91 Cal. 377, where the boundaries of a Mexican grant were fraudulently extended. Cited, also, in 87 Am. Dec. 80, note.

#### 40 Cal. 378-383. PACKARD v. BIRD.

**Contract Contrary to Public Policy.**—An agreement between a judgment creditor and one claiming an interest in the land about to be sold under an execution against a third party, that neither shall bid against the other, is void as contrary to public policy, p. 383.

Applied in the case of an agreement between execution creditors and other creditors to prevent competition in the sale of goods under execution: *Crawford v. Maddux*, 100 Cal. 225. Combinations which might possibly prevent competition at sheriff's sales are looked upon with great disfavor by the courts: *Capital Bank v. Huntoon*, 35 Kan. 590.

**Judgment-roll.**—An interlocutory judgment comes within the spirit and meaning of the statutory requirements, and properly constitutes a portion of the judgment-roll, p. 383.

Interlocutory judgments are included under the general expression "all judgments": *Rust v. State*, 31 Tex. Crim. Rep. 76.

**General Citations.**—Cited in *Thompson v. Whitf*, 63 Cal. 509, to the point that an interlocutory judgment often determines the rights of the respective parties.

#### 40 Cal. 384-385. GAGE v. BATES.

**Forfeiture for Nonpayment of Rent.**—To work a forfeiture of a lease for nonpayment of rent, the demand must be made for the precise sum due, on the premises, or wherever the rent is payable, p. 385.

If the amount due is not demanded, a refusal to pay does not work a forfeiture: *O'Connor v. Kelly*, 41 Cal. 434. Cited, also, in *Johnston v. Hargrove*, 81 Va. 122; and in 26 Am. St. Rep. 912, extended note.

**40 Cal. 386-390. CARROLL v. BENICIA.**

**Practice—Appeal.**—The action of the court below cannot be reviewed when the objections to the admission of a deed in evidence are not stated, p. 390.

"A general objection is unworthy of consideration": *Rush v. French*, 1 Ariz. Ter. 125.

**40 Cal. 391-395. STOKES v. STEVENS.**

**Partnership.**—Each copartner has an unlimited power of disposition of his share of the partnership property, subject only to the claims of creditors and the other copartners; but the claims of the creditors and other copartners can only be asserted in a court of equity, p. 394.

Purchaser under execution sale of an interest in the real estate of a partnership acquires the legal title, and not a mere equity; *McCauley v. Fulton*, 44 Cal. 362. See, also, extended note, 30 Am. Rep. 535. Leading case said to be distinguishable in *Thomas v. Stetson*, 62 Iowa, 539; 49 Am. Rep. 150.

**Idem.**—Where one partner, without the consent of his copartner, conveys his interest in the partnership property to another, the latter becomes a tenant in common with the copartner, p. 395.

Merely referred to in *Noonan v. Nunan*, 76 Cal. 48, holding that a plaintiff is not entitled to an accounting upon the mere proof of a tenancy in common.

**40 Cal. 396-408. GRIGSBY v. CLEAR LAKE WATER COMPANY.**

**Evidence—Agency.**—The declarations of an agent are not admissible in evidence against his principal until the fact of his agency is first proven, p. 405.

A declaration by a wife that her husband had sent her to demand the money is not sufficient proof of agency: *People v. Dye*, 75 Cal. 113. Evidence of the declarations of the person claiming to be such agent are inadmissible to establish the agency: *Smith v. Liverpool etc. Ins. Co.*, 107 Cal. 437.

**Agency—Practice on Appeal.**—It will not be presumed that evidence to establish an agency was given, but the statement on appeal must show that fact, p. 405.

If there is a proper specification of the insufficiency of the evidence to justify the decision, the presumption is, that the statement contains all the material evidence in relation to it: *Judson v. Lyford*, 84 Cal. 509.

**Expert Evidence.**—In an action to abate a nuisance caused by the Notes Cal. Rep.—129.

erection of a dam, the evidence of an expert as to the effect of an obstruction in causing the backwater, is admissible, p. 405.

Cited and the rule applied in *Railway Co. v. Lyman*, 57 Ark. 523. It is error to refuse to admit expert evidence to show that the overflow was caused by natural agencies and not by a railroad embankment: *O. & M. Ry. Co. v. Webb*, 142 Ill. 407. Cited in *Ball v. Hardesty*, 38 Kan. 543, where expert evidence was admitted to show the effect of the erection of a mill-dam.

**Idem.**—The evidence of an expert should be received with great caution by the jury, and should not be allowed except upon subjects which require unusual scientific attainments or peculiar skill, p 405.

But it is not error to refuse to instruct the jury that they should exercise caution in accepting the opinion of an expert; *People v. Smith* 106 Cal. 79, where the rule of the leading case is explained. The only plausible objection to such instructions is that they encroach on the province of the jury: *People v. Barthleman*, 120 Cal. 14. Cited in *Estate of Blake*, 136 Cal. 311, but held not to authorize instruction given; *Baxter v. Chicago etc. Co.*, 104 Wis. 332, and applied to expert evidence as to safe boiler pressure. It is not error to exclude the testimony of so-called expert witness as to the effect of a fire in a meadow on the roots of the grass growing thereon: *Gates v. C. & A. Ry. Co.*, 44 Mo. App. 491. Cited, also, in 66 Am. Dec. 229, 231, note.

**Public Nuisance.**—A plaintiff cannot recover damages for a public nuisance, but, if he has suffered damages peculiar to himself, it becomes to that extent a private nuisance for which he may recover damages, p. 406.

Equity has jurisdiction to enjoin a public nuisance at the suit of a private party if such nuisance is specially injurious to such private party: *Redway v. Moore*, 2 Idaho, 1043. If the nuisance complained of only affects the plaintiff in common with the public at large, although in a greater degree, he cannot have his private action: *Fogg v. N. C. O. Ry.*, 20 Nev. 435. Cited, also, in 31 Am. Dec. 134, note; and 71 Am. Dec. 312, note.

**Nuisance.**—If a party is not the original creator of a nuisance, he must have notice of it, and a request must be made to remove it, before any action can be brought, p. 407.

This rule is supported by the weight of authority: *Groff v. Ankenbrandt*, 124 Ill. 55; 7 Am. St. Rep. 344. Cited in *City v. Bozarth*, 153 Ind. 539, but held applicable in case of action against lessee for nuisance created by him on leased ground. When a lessee or grantee continues a nuisance, of a nature not essentially unlawful, erected by his lessor or grantor, he is liable to an action only after notice to reform or abate it: *Slight v. Gutzlaff*, 35 Wis. 677; 17 Am. Rep. 477. The mere

continuance of a dangerous culvert and embankment was insufficient to charge the defendant with liability, in the absence of knowledge or notice that they constituted a nuisance: *Central Trust Co. v. Wabash, St. L. & P. Ry. Co.*, 57 Fed. Rep. 451. Principle followed in *Philadelphia & R. R. Co. v. Smith*, 64 Fed. Rep. 682. Cited, also, in 14 Am. Dec. 339, 340, extended note.

To acquire this right there must have been an uninterrupted enjoyment under a claim of right for the period of five years; there must have been an actual occupation to the knowledge of the plaintiff such as would give plaintiff a right of action; there must have been such a use of the premises, and such damage as will raise a presumption that the plaintiff would not have submitted to it, unless the defendants had acquired a right so to use it, p. 406.

The general doctrine upheld in *Woodruff v. N. Bloomfield Min. Co.*, 18 Fed. Rep. 790; 9 Saw. 517; and in *Union Mill & Min. Co. v. Dangberg*, 81 Fed. Rep. 92. Approved in *Carson v. Hayes*, 39 Or. 107, where upper and subsequent appropriators of water for mining purposes on stream had used stream for carrying off debris for long time, but such use did little injury until a couple of years before suit brought to restrain such use, defendant cannot claim prescriptive right to such use.

#### 40 Cal. 408-419. *SEXEY v. ADKISON*.

**Excessive Levy.**—Where a plaintiff sues to recover property in the hands of a sheriff under an attachment, on the ground that the levy was excessive, and the respective parties have agreed to a general verdict for the whole property, it is too late for the plaintiff to assert a right to a portion of the property upon principles not applicable alike to all the property, p. 418.

The question whether it is illegal to seize and detain more than enough property to satisfy a judgment cannot be raised in detinue: *Thompson v. Jones*, 84 Ala. 281.

#### 40 Cal. 419-421. *EX PARTE SMITH*.

**Construction of Statutes.**—An act of the legislature is repealed by a subsequent act when it appears from the last act that it was intended to take the place of or repeal the former, and when the two acts are so inconsistent, that effect cannot be given both, p. 420.

Rule applied in the construction of a municipal ordinance: In the Matter of *Yick Wo*, 68 Cal. 304. Repeal by implication is not favored, and it is only in cases of clear repugnancy that a repeal by implication occurs: *Cerf v. Reichert*, 73 Cal. 363, Cited in *Town v. Easton*, 113 Fed. 65, discussing conflict between general and special local acts; dissenting opinion of Thornton, J., in *Ex parte Henshaw*, 73 Cal. 506.

**Idem.**—Where an act of the legislature recognizes the existence of a

general law and attempts to create an exception, the exception is not repugnant to the general law, or, if it be, it is only to the extent of the exception, p. 420.

Cited and applied in *Capron v. Hitchcock*, 98 Cal. 432.

#### 40 Cal. 421-426. RAHM v. MINIS.

**Insolvency.**—Where a plea of "discharge in insolvency" is omitted, a judgment rendered after such discharge is conclusive against the insolvent, p. 425.

Where a decree of foreclosure was rendered against an insolvent a few days after his discharge in insolvency, and he failed to ask the court to limit the recovery to the sale of the property under the foreclosure, the discharge will not prevent a recovery for any deficiency remaining after the sale: *Leisure v. Kneeland*, 2 Wash. 539; 26 Am. St. Rep. 889. Cited, also, in 23 Am. St. Rep. 112, note.

**Idem.**—Where a judgment was entered against an insolvent after his discharge, if the insolvent could show that the judgment was taken against him through mistake, surprise, or excusable neglect, he might then set up his discharge as a defense, p. 426.

Allowable under section 473 of the Code of Civil Procedure: *Tuttle v. Scott*, 119 Cal. 589, 63 Am. St. Rep. 193.

**Injunction.**—An injunction cannot be granted in a case where a party has a complete remedy at law, p. 426.

Cited in *Richards v. Kirkpatrick*, 53 Cal. 435, holding that an injunction would not lie where the party could obtain all the relief he was entitled to in an action of claim and delivery.

#### 40 Cal. 426-428. EX PARTE AH CHA.

**Habeas Corpus.**—A judgment upon a conviction of misdemeanor, which punishes the defendant by imprisonment in the state prison, is absolutely void, and defendant will be discharged from custody on habeas corpus, p. 428.

Overruled in *Ex parte Max*, 44 Cal. 581, the court holding that mere questions of error cannot be inquired into under the writ of habeas corpus. *Ex parte Max*, supra, affirmed in *Ex parte Turner*, 75 Cal. 228. If the sentence of the lower court is illegal, the supreme court may modify the judgment and remit the case that the proper judgment may be imposed: *Territory v. Conrad*, 1 Dak. Ter. 355.

**Assault—Verdict.**—The verdict of the jury in a trial for "assault to commit murder," which found the defendant guilty of an "assault to commit great bodily injury," imports that the defendant was guilty of a simple assault only, p. 427.

An indictment charging an assault with intent to do bodily harm

upon the person of another charges only a simple assault. *People v. Martin*, 47 Cal. 112. Battery, being the greater, includes assault, but assault does not include battery: *People v. Helbing*, 61 Cal. 622. Cited in *Sullivan v. State*, 44 Wis. 596.

Under an indictment for assault with intent to commit murder, a verdict is sufficient which found the defendants guilty of assault with a deadly weapon with intent to inflict bodily injury, p. 427.

Cited in *People v. Cargleton*, 44 Cal. 94, where it was held that an indictment for an assault with intent to do bodily injury to another may, in general terms, aver the assault to have been made with a deadly weapon; *State v. Snider*, 32 Wash. 307, since there is no such offense as assault with deadly weapon, words "with deadly weapon" in verdict are surplusage.

**40 Cal. 428-432. STONE v. BUMPUS. S. C. 46 Cal. 220.**

Under an answer denying that the plaintiff is the owner of a certain mining claim, it is competent for the defendant to overcome plaintiff's evidence of title, by showing title in himself, p. 432.

Under an answer denying "each and every allegation" in the complaint, which alleged that the plaintiff was the owner of certain personal property, the defendant may prove title in himself: *Staubach v. Rexford*, 2 Mont. 566.

**40 Cal. 434-439. MORGAN v. STEARNS.**

**Contract—Damages.**—Mere nominal damages do not belong to a case where there is a willful breach of an agreement to convey land because the land has appreciated in value, p. 439.

Where one contracts to convey knowing that he has no title and cannot perform on his part, the damages may include reimbursement for improvements put upon the estate; *Erickson v. Bennet*, 30 Minn. 327.

**40 Cal. 439-447. FELCH v. BEAUDRY. S. C. 47 Cal. 183.**

**Judgment on Pleadings.**—If the complaint be sufficient, and the answer expressly admits the material facts stated in the complaint, or leaves them undenied, or sets up new matter insufficient to debar or defeat the action, judgment may be rendered on the pleadings, p. 443.

This rule has become well established as shown by the following cases citing and applying it: *Hemme v. Hays*, 55 Cal. 339; *Loveland v. Garner*, 74 Cal. 300; *San Francisco v. Staude*, 92 Cal. 563; and *Benham v. Connor*, 113 Cal. 171. Referred to in *Estate of Wooten*, 56 Cal. 324, 325. Cited and applied in *People v. Brown*, 23 Colo. 430.

**Pleadings.**—A defense by a payee of a note that the plaintiff is not the lawful holder or owner of the instrument sued upon, when on its

face it runs to him, and which discloses no issuable fact to support it, is merely frivolous, p. 444.

Cited in important note on sham defenses, in 72 Am. Dec. 523.

**Plea of Another Action Pending** will not avail unless same person is plaintiff in both actions, p. 445.

Cited in Smith v. Smith, 134 Cal. 119, holding plea not maintainable under facts stated.

**40 Cal. 447-456. SCHIERHOLD v. NORTH BEACH & MISSION RAIL-ROAD COMPANY.**

**Contributory Negligence—Nonsuit.**—Negligence is generally an inference from facts and circumstances which it is the province of the jury to find, and in an action for damages for injury caused by negligence, a nonsuit on the ground of contributory negligence should only be granted when, giving the plaintiff the benefit of all controverted questions, it is apparent to the court that a verdict in his favor must necessarily be set aside, pp. 453-454.

The general rule in California.—Negligence is not absolute or intrinsic, but always relates to some circumstance of time, place, or persons, and is generally a question for the jury: Jamison v. S. J. & S. C. R. Co., 55 Cal. 596. Negligence cannot be imputed to a passenger for not anticipating culpable negligence on the part of the carrier: Franklin v. Motor Road Co., 85 Cal. 70. If the evidence presented such a state of facts that the inference to be drawn therefrom might well lead to a difference of opinion between reasonable men, it is a proper question for a jury: Redington v. Pacific P. T. C. Co., 107 Cal. 325; 48 Am. St. Rep. 137. It is only where the undisputed facts are such as to leave but one reasonable inference, and that of negligence, that the court is justified in taking the question from the jury: Davis v. Pacific Power Co., 107 Cal. 575; 48 Am. St. Rep. 182. Rule applied where a child on the streets, unattended, was run over: Daly v. Hinz, 113 Cal. 389. Whether the conduct of a mother in permitting her child to be out of her sight for a period of fifteen minutes without satisfying herself of its whereabouts was a want of ordinary care is a fairly debatable question, which the jury are to determine: Fox v. Oakland Con. St. Ry., 118 Cal. 62, 63. Cited in West Chicago etc. Co. v. Liderman, 187 Ill. 472, 473, 79 Am. St. Rep. 231, quoting Fox v. Oakland etc. Co., 118 Cal. 55. Followed in Wall v. Helena St. Ry. Co., 12 Mont. 49, 50, and Solen v. V. & T. R. R. Co., 13 Nev. 148. Referred to in Nehrbas v. Central Pacific R. R. Co., 62 Cal. 336. See, also, important note, 55 Am. Dec. 669. The doctrine of imputable negligence is discussed and the leading case cited in Battishill v. Humphreys, 64 Mich. 504. Whether the negligence of the mother contributed to the injury is a question for the jury: Lynch v. Metropolitan Street Ry. Co., 112 Mo. 440. Lead-

ing case followed in *Bowers v. N. P. R. R. Co.*, 4 Utah, 225. See, also, 57 Am. Rep. 475, note.

**General Citations.**—Referred to in *Air-Line Ry. Co. v. Gravitt*, 93 Ga. 374, 44 Am. St. Rep. 149, as an illustration of a case applying the doctrine of imputable negligence.

**40 Cal. 463-466. BATES v. RYBERG.**

**Executor—Appeal.**—The executor of an estate cannot maintain an appeal from a final order of distribution, upon the ground that the property was improperly divided between the legatees, pp. 465, 466.

The rule of the leading case is well settled in this state as a general rule. Approved in *Estate of Murphy*, 145 Cal. 467, executrix cannot urge that petitioning legatees had forfeited rights to legacies because of alleged violation of will that if any one named therein should contest same he should take nothing under it. Followed in *Estate of Wright*, 49 Cal. 551. Cited in dissenting opinion of Myrick, J., in *Rosenberg v. Frank*, 58 Cal. 420. Followed in *Estate of Maney*, 65 Cal. 287, holding that a legatee, who is also an executor, cannot maintain a suit for his own benefit as legatee in the capacity of executor, and charge the expense of the suit to the estate. No appeal lies by an administrator from a decree of distribution where he has no interest as administrator in the matter sought to be reviewed: *Merrifield v. Longmire*, 66 Cal. 181. An administrator cannot propose cross-interrogatories to be annexed to a commission, issued at the request of one heir to take the depositions of witnesses in support of his claim: *Roach v. Coffey*, 73 Cal. 282. Attorney's fees for resisting the claim of an heir are not allowable: *In re Jessup*, 80 Cal. 826. Rule cited and applied in *Goldtree v. Thompson*, 83 Cal. 422; *Jones v. Lamont*, 118 Cal. 503, holding that an attorney, who is attorney for an administrator, may act for one of the heirs as against other heirs, in an adversary proceeding relating to the property of the estate; and *In re Dewar's Estate*, 10 Mont. 425.

**Rule Limited.**—The general rule does not admit of question, but it has its limitations. "Where an order or decree involves a construction of the proper exercise of the duties of the officer, wherever it presents a question of the right or power of the trustee to comply with it, wherever obedience to it might subject him to liability, the will does not operate: *In re Welch*, 106 Cal. 429, holding that an administrator may appeal from an order directing him to pay the arrearage of family allowance, and also from a decree of partial distribution. The executors may appeal from an order of the court requiring them, in pursuance of the will, to redeem certain land from a foreclosure sale: *In re Heydenfeldt*, 117 Cal. 552, 554, where it was said that the rule of the leading case had been carelessly applied. The leading case was distinguished in *Nichols v. Reyburn*, 55 Mo. App. 6. An executor cannot prosecute an appeal from a final order of distribution where he is not

pecuniarily affected by such order: *Merrick v. Kennedy*, 46 Neb. 269. Where an executor is fully protected by the decree of distribution he cannot appeal: *Schlegel v. Sisson*, 8 S. Dak. 478.

**40 Cal. 471-474. TAYLOR v. UNDERHILL.**

**Tide Lands.**—A certificate of purchase from the state of land, as swamp and overflowed land, over which the tide ebbs and flows, is void, p. 473.

A sand beach between ordinary high and low water mark could not be converted into private ownership: *Kimball v. Macpherson*, 46 Cal. 107. Sale of tide lands validated under the curative act of March 27, 1872: *Upham v. Hosking*, 62 Cal. 258.

**Patent for Land.**—A court of equity will not restrain the issuance of a patent for land, where such patent would not be a cloud on plaintiff's title, p. 473.

A sale under a judgment for the foreclosure of a lien would not create a cloud upon the title of one owning the fee and in actual possession of the land, but not a party to the judgment, and equity will not enjoin the sale at his instance: *Archbishop of S. F. v. Shipman*, 69 Cal. 591. An application to purchase accretions as swamp and overflowed land is a mere nullity, and casts no cloud on the title of the riparian owner: *Minto v. Delaney*, 7 Oreg. 345.

**State can Sell Land Below High-water Mark** and authorize purchaser to extend waterfront so as to enable him to build upon this land, p. 473.

Referred to in *Oakland v. Oakland Water Front Co.*, 118 Cal. 185, where it was held that the state has full power to alienate lands covered by the daily flux and reflux of the tides, subject only to the right of navigation and fishery, especially where of advantage to navigation and commerce. The state may dispose of its tide lands free from any easement of the upland owner: *Pacific Gas Imp. Co. v. Ellert*, 64 Fed. Rep. 434.

Approved in *United States v. Mission Rock Co.*, 189 U. S. 406, California may convey title to tide lands, surrounding Mission Rock in San Francisco bay free from any easement appurtenant thereto.

**Accretion.**—A party as riparian owner cannot be protected as to accretions to his land not yet in existence, pp. 473, 474.

The right of a riparian owner to future accretions is not a vested right: *Eisenbach v. Hatfield*, 2 Wash. 250. Referred to in the dissenting opinion of Stiles, J., in the same case, 2 Wash. 260.

**40 Cal. 474-479. ROBINSON v. HAAS.**

**Sale of Personal Property** passes to purchaser only such title as vendor has, p. 479.

A sale of personal property by one mentally incapacitated does not transfer title, and is void, both as against the vendee and subsequent purchasers from him: *Harris v. Harris*, 64 Cal. 110. Cited in *Shafer v. Lacy*, 121 Cal. 579, applying rule to pledgee of property from one who was merely its bailee for safekeeping; *Turnbow v. Beckstead*, 25 Utah, 478, possession of personality by one not the owner will not protect purchaser from him against the claims of the owner.

A contract to herd and take care of sheep for a specified time, and at the end of such period to return to the original owner the same number of sheep as were intrusted to him, and the increase to be equally divided between them, does not constitute a partnership between the contracting parties, p. 478.

An agreement to farm upon shares does not create a partnership: *Smith v. Schultz*, 89 Cal. 535. Cited in *Woodward v. Edmunds*, 20 Utah, 126, holding transaction discussed to be a bailment of sheep and not an absolute sale.

#### 40 Cal. 479-480. PEOPLE v. COUNTY JUDGE.

Certiorari can only issue to review the final adjudications of an inferior tribunal or board exercising judicial functions, p. 480.

Followed in *Amerding v. Macham*, 40 Cal. 656. Will not issue to review orders and proceedings in a cause preliminary to final judgment: *Schwarz v. County Court*, 14 Colo. 50. Cited in *In re Gauld*, 122 Cal. 19, noted under *Wilson v. Supervisors*, 3 Cal. 386. Principle of the leading case affirmed in *Territory v. District Court*, 4 Dak. Ter. 316; *State v. Edwards*, 104 Mo. 127, holding an interlocutory order insufficient as a foundation for certiorari; and *State v. Schneider*, 47 Mo. App. 675. Cited, also, in 12 Am. Dec. 531, note.

*Idem*.—Petitioner for a writ of certiorari who is seeking redress for private wrongs has no right to use the name of the "people" in serving out the writ, p. 480.

The "people" are a necessary party when the question is whether the act establishing the court is constitutional: *Fraser v. Freelon*, 53 Cal. 647, referring to the leading case.

#### 40 Cal. 484-488. TREAT v. FORSYTH.

**Forcible Entry and Detainer.**—If the plaintiff alleged an entry during his absence and a demand for the surrender of the premises, it is not necessary for him to prove an entry which was in fact forcible, p. 488.

Referred to in *Lewis v. State*, 99 Ga. 698, 59 Am. St. Rep. 260, where the rule of the leading case was held not to be the common-law rule and hence not authoritative in Georgia.

**Specification of Particulars of insufficiency of evidence held nugatory, p. 488.**

Cited in *Van Pelt v. Park*, 18 Utah, 147, holding bill insufficient in equity case under local statutes.

**40 Cal. 489-493. ROSENCRANTZ v. ROGERS.**

**Fictitious Names.**—When a party is sued by a fictitious name, the ignorance of the name must be real, and not willful ignorance or such as might be removed by mere inquiry, and if there is no averment in the complaint that plaintiff was ignorant of defendant's true name, and no offer was made by plaintiff to insert the true name of defendant in the complaint when he appeared in court, a motion to dismiss the action was properly granted, p. 492.

Where a defendant is sued under a fictitious name he is not entitled to have the action dismissed, on the ground that reasonable diligence in examining the public records would have disclosed his true name: *Irving v. Carpenter*, 70 Cal. 27, where the leading case is distinguished. Distinguished in *Hoffman v. Keeton*, 132 Cal. 197, holding substitution of real for fictitious defendant properly made. Cited in *Bachman v. Cathry*, 113 Cal. 501; and in *Kentucky S. M. Co. v. Day*, 2 Saw. 472.

**40 Cal. 493-497. BROAD v. BROAD.**

**Community Property.**—Under the act of 1850, upon the dissolution of the community by the death of either husband or wife, one-half of the common property shall vest in the descendants of the deceased husband or wife, who thereupon become tenants in common with the survivor, p. 496.

Cited in *Plass v. Plass*, 121 Cal. 133, 134, sustaining right of such co-tenant to adjudication of right to possession by ejectment.

Principal case followed in *Broad v. Murray*, 44 Cal. 229. If a homestead was terminated by the death of the wife, her interest in the property immediately vested in her children, who thereupon became tenants in common with their father: *Johnston v. Bush*, 49 Cal. 201. But a wife cannot maintain an action while the marriage bond exists, to set aside a transfer of the common property, made by the husband for the purpose of defrauding her: *Greiner v. Greiner*, 58 Cal. 120. Leading case referred to in *Smith v. Shrievs*, 13 Nev. 324.

**Subject to Debts of Deceased.**—The community property of the deceased is subject to his debts, p. 496.

The entire community property is subject to the payment of community debts, and surviving husband has the right to sell the community property for the payment of such debts, but the children are entitled to an accounting. Although a surviving husband has the power to keep alive a debt and a mortgage made before his wife's death he

had no authority to make an entirely new mortgage to raise money for the prosecution of entirely new enterprises: *Johnston v. S. F. Savings Union*, 75 Cal. 144, 7 Am. St. Rep. 135.

*Alcalde's Grant* passed title to the grantee named therein, p. 496.

But the power of such officers ceased upon the conquest, and was not transferred to the military officers, *de facto*, who succeeded them: *Scott v. Dyer*, 54 Cal. 434.

**General Citations.**—Referred to in *Irvine v. Adler*, 44 Cal. 561, to the point that in the leading case the word "tenant," as used in the *Van Ness Ordinance*, includes "tenant in common."

**40 Cal. 497-531. CHAMBERS v. SATTERLEE.**

An act assessing each lot in proportion to its frontage is not unconstitutional as in contravention of that provision of the constitution providing that "taxation shall be equal and uniform throughout the state," p. 514.

This construction is uniformly supported by the following cases: *Mayor v. Klein*, 89 Ala. 467; *Whiting v. Townsend*, 57 Cal. 519, referring to the leading case: *State v. Dodge County*, 8 Neb. 130; 30 Am. Rep. 823; *Jennings v. Le Breton*, 80 Cal. 15; and *Cleveland v. Tripp*, 13 R. I. 61. Cited in *English v. Mayor*, 2 Marv. (Del.) 89, noted under *Emery v. Gas Co.*, 28 Cal. 345, 73 Am. Dec. 522, note.

In providing for street improvement the statute must be strictly followed, and, if not strictly followed, the assessment levied to pay for such improvements will be void, p. 516.

The superintendent of streets has no power to enter into a contract before the expiration of five days from the first publication of the award, and his action in so doing was void: *Burke v. Turney*, 54 Cal. 487. Cited in *Kutchin v. Engelbret*, 129 Cal. 637, noted under *Argenti, v. San Francisco*, 16 Cal. 255; *Berwind v. Galveston etc. Co.*, 20 Tex. Civ. App. 430, noted under *Dougherty v. Hitchcock*, 35 Cal. 523.

**Street Improvements.**—If the act of the legislature provides for the publication of the "resolution of intention," it is unnecessary that the board of supervisors should order a publication, p. 517.

Referred to in *Dyer v. North*, 44 Cal. 160, as an undecided point. But in *Napa v. Easterby*, 61 Cal. 517, Temple, J., was sustained, and it was held that where the charter requires the trustees to publish all ordinances, this means that the board shall order the publication.

All objections not involving questions of jurisdiction must be submitted for settlement to the board of supervisors, and if not appealed to the board such objections shall be deemed waived, p. 520.

The doctrine of the leading case limited in *Brady v. Bartlett*, 56 Cal. 369, where it was held that fraud would vitiate the assessment and render it a nullity; the principal case explained as being decided under a different statute not allowing such a defense. Where a con-

tractor fails to complete the work, or where there is misconduct on the part of street superintendent, objection thereto must be made by appeal to the board of supervisors: Jennings v. Le Breton, 80 Cal. 11. Certificate of surveyor and superintendent of streets, assessment and warrant signed by street superintendent and countersigned by auditor, are *prima facie* evidence that the contract has been duly and fully performed: Ede v. Knight, 93 Cal. 163. An objection that a street was not properly graded should be taken on appeal to the supervisors: Fanning v. Leviston, 93 Cal. 188. There is no valid lien of a street assessment where the contract signed does not define the work to be done, nor refer to any specifications in which it is described: Schwiesau v. Mahon, 110 Cal. 547, where the court held the leading case overruled in so far as it conflicted with this holding.

A street superintendent has no power to make a contract other than that authorized by the board of supervisors, p. 519.

Followed in Hellman v. Shoulters, 114 Cal. 159; and in Sievers v. San Francisco, 115 Cal. 656, 56 Am. St. Rep. 157.

**Street Work.**—Appeal must be taken in all cases not involving jurisdiction, p. 529.

Cited in De Haven v. Berendes, 135 Cal. 182, noted under Hewes v. Reis, 40 Cal. 263.

**General Citations.**—Chambers v. Satterlee, 40 Cal. 531, affirmed on the authority of the leading case. Cited in Mahoney v. Braverman, 54 Cal. 569, to the point that the legislature has constitutional power to invest the supervisors with authority to make street improvements. *et cetera*. Referred to in Taylor v. Boyd, 63 Tex. 539, as an illustration of a common mode of levying and collecting a street assessment; and in 16 Am. St. Rep. 371, note, as an example of a street improvement.

**40 Cal. 532-535; 6 Am. Rep. 623. MCCOY v. CALIFORNIA PACIFIC RAILROAD.**

**Negligence.**—Where an unfenced railroad passes through a field in which the live stock of the owner are running, and some of the stock of such owner stray on the road and are killed by the train, these facts, unexplained, make a *prima facie* case of negligence against the railroad company, p. 535.

This rule is, with but one exception, upheld by the cases citing the leading case. Evidence, however, that the horses killed came through an open gate in the fence on to the track is inadmissible in the absence of any allegation in the complaint showing that the gate was left open through the negligence of the defendant company; Jahant v. C. P. R. R. Co., 74 Cal. 10. Principle followed in A. T. & S. F. R. R. Co. v. Riggs, 31 Kan. 628; and in Johnson v. Railroad Co., 25 W. Va. 577. Cited, also, in 49 Am. Dec. 264, note; 49 Am. Dec. 371, note; 7 Am. Rep. 47, note; and 58 Am. Rep. 704, note. Mere fact of killing does not

raise a presumption of negligence: *A. T. & S. F. R. Co. v. Walton*, 3 N. Mex. 322, where the court refused to follow the leading case.

**Contributory Negligence.**—Owner of stock is not guilty of contributory negligence, from the fact that he knew the road was unfenced, when he turned his stock in the field, p. 535.

Principle followed in the citations: *Missouri Pac. Ry. Co. v. Bradshaw*, 33 Kan. 539, holding that it did not alter the rule, even though there was a law prohibiting stock from running at large; *Wilder v. Maine Central*, 65 Me. 340; 20 Am. Rep. 700; *Cressey v. Railroad*, 59 N. H. 568; 47 Am. Rep. 230; *Railroad Co. v. Scudder*, 40 Ohio St. 176, where the rule was applied in a case of the neglect of the railroad company to keep its fence in good repair; and *Moses v. S. P. R. R. Co.*, 18 Oreg. 397. Cited in *Siglin v. Coos Bay Co.*, 35 Or. 84, 76 Am. St. Rep. 467, holding owner of stock entitled to recover under facts stated.

<sup>40</sup> **Cal. 535-543. BARFIELD v. PRICE.**

**Mutual Mistake—Deed.**—In the case of a mutual mistake as to the subject matter of a contract, the remedy for the aggrieved party is an entire rescission of the contract, p. 542.

Either party may rescind when the consent was given by mistake or obtained by fraud: *Loaiza v. Superior Court*, 85 Cal. 31, 20 Am. St. Rep. 208. Applied where vendee by mistake of fact views the wrong lot, and contracts to purchase without knowledge of the mistake: *Goodrich v. Lathrop*, 94 Cal. 58; 28 Am. St. Rep. 92. "Mutual mistake, as used in equity, means a mistake common to all the parties to a written contract or instrument, and it usually relates to a mistake concerning the contents or the legal effect of the contract or instrument": *Page v. Higgins*, 150 Mass. 31. This principle is as applicable to contracts for the sale and conveyance of land, induced by mutual mistake, as to contracts concerning personalty: *Irwin v. Wilson*, 45 Ohio St. 437.

**Idem.**—To enable a party to maintain an action to rescind or reform a contract, reasonable diligence must be used in pursuing the remedy, pp. 542, 543.

An unexplained delay of fifteen months after the discovery of the fraud was held unreasonable and fatal in *Burkly v. Levy*, 70 Cal. 254. A delay of four months after the fraud is discovered, during which the partnership business was carried on as usual under the contract, is fatal to a claim of right to rescind for fraud: *Bailey v. Fox*, 78 Cal. 396. Cited in *Oppenheimer v. Clunie*, 142 Cal. 320, denying rescission of contract for fraud because of delay; *Wills v. Porter*, 132 Cal. 522, holding action for rescission barred by two years' delay. Four or five years after learning the facts is too late for the party to rescind: *Brown v. Brown*, 142 Ill. 429. "Where a party is entitled to rescind, he must act

promptly and not sleep on his rights": *Trinity University v. McFarland*, 1 Tex. Civ. App. 761. Referred to in *Dawson v. Sparks*, 1 Posey, 760. Said to be the general rule of law, in *Crutchfield v. Stanheld*, 2 Posey, 482.

In suits by or against executors or administrators their representative character must be averred in pleading, p. 543.

Cited in *Flinn v. Gouley*, 139 Cal. 624, holding complaint defective. The leading case is cited and the rule followed in *Dambmann v. White*, 48 Cal. 450, but the court held it unnecessary, in an action brought by an assignee of a bankrupt to recover assets, to allege the bankruptcy of the bankrupt, nor the appointment of plaintiff, as assignee; *Judah v. Fredericks*, 57 Cal. 392, holding insufficient, as an allegation of official character, "that the plaintiff is the duly qualified and acting executrix of the last will and testament of J. F., deceased"; *C. B. U. P. R. R. Co. v. Andrews*, 34 Kan. 568.

v 40 Cal. 543-547. **EMERSON v. COUNTY OF SANTA CLARA.**

A verdict of a jury in disobedience to the instructions of the court is a verdict against law, although the instruction itself was incorrect in point of law, p. 545.

Rule of the leading case followed in *Trenor v. C. P. R. R. Co.*, 50 Cal. 233; *Helbing v. Svea Insurance Co.*, 54 Cal. 159; *Simmons v. Hamilton*, 56 Cal. 496, where the rule was said to be applicable to the findings of a court or the report of a referee; *S. C. 56 Cal. 497*, in dissenting opinion of Ross, J., in which he held the rule of the leading case inapplicable; *Aguirre v. Alexander*, 58 Cal. 30; *Declez v. Save*, 71 Cal. 553; *Loveland v. Gardner*, 79 Cal. 321; *Beasley v. San Jose Fruit Packing Co.*, 92 Cal. 391; *Mattingly v. Pennie*, 105 Cal. 517; 45 Am. St. Rep. 89; but if contradictory instructions are given, and the jury follow one instruction but disregard another, the rule of the leading case is inapplicable; *Altoona Q. M. Co. v. Integral Q. M. Co.*, 114 Cal. 104; *Murray v. Heinze*, 17 Mont. 364; *Drew v. Watertown Ins. Co.*, 6 S. Dak. 339; and *Pepperall v. City Park Transit Co.*, 15 Wash. 181. Overruled in concurring opinion in *Edwards v. Wagner*, 121 Cal. 378, main opinion ruling similarly when disregard of instruction was held nonprejudicial. Cited in *Roehr v. Gt. N. etc. Co.*, 7 N. Dak. 97, reversing verdict; 20 Am. Dec. 136, extended note.

40 Cal. 547-572. **LOVE v. WATKINS.** 6 Am. Rep. 624.

**Married Woman—Contract.**—An executory contract for the sale of the wife's separate property, executed by the husband and wife in the mode prescribed by the statute, is valid and binding on the wife, and may be enforced by a decree of specific performance. p. 562.

Denied in *Felkner v. Tighe*, 39 Ark. 362. The specific performance of the unacknowledged executory contract of a married woman to convey

her real property cannot be compelled; *Jackson v. Torrence*, 83 Cal. 537, holding that the leading case in nowise opposes this rule. Cited, also, in 85 Am. Dec. 145, note; 3 Am. St. Rep. 302, note; and 11 Am. St. Rep. 244, note.

**Idem.**—A court of equity has no power to enforce any claim or demand as a charge or encumbrance on the separate estate of a married woman, unless such claim or demand has become a charge, lien, or encumbrance thereon by virtue of a contract evidenced by an instrument in writing, signed and acknowledged by the wife, p. 558, approving *Maclay v. Love*, 25 Cal. 374, 375, 85 Am. Dec. 134.

Rule limited by the amendment of 1862; *Terry v. Hammonds*, 47 Cal. 37, holding that the rule is not applicable to the separate personal estate of the wife.

**Executory Contract—Ejectment.**—A vendee in possession under an executory contract, the conditions of which have been fully performed on his part, may avail himself of his equitable title as a defense to an action of ejectment brought against him by the holder of the legal title, p. 563.

Followed in *Talbert v. Singleton*, 42 Cal. 396. A vendee cannot be moved by ejectment, if he has performed the conditions of the contract and is in a position to demand a conveyance; *Central Pacific R. R. Co. v. Mudd*, 59 Cal. 590. Ejectment is not maintainable by a vendor of real property against his vendee in possession under an executory contract of sale, who is not in default in the performance of his contract or who has performed it; *Hicks v. Lovell*, 64 Cal. 20; 49 Am. Rep. 682. Cited as authoritative in *Arguello v. Bours*, 67 Cal. 450. Referred to in *Meeker v. Dalton*, 75 Cal. 158, holding that a defendant, having the equitable title coupled with possession, could set up that title as a defense to an action of ejectment brought by the holder of the legal title; and *Wallace v. Maples*, 79 Cal. 436. Cited, also, in 73 Am. Dec. 599, note.

**Contract—Specific Performance.**—Where a vendee under a contract to convey land has fully performed his part, he is regarded in equity as the absolute owner of an indefeasible estate and the vendor has a naked trustee against whom the contract may be enforced by a decree of specific performance, p. 565.

Cited in *Whittier v. Stege*, 61 Cal. 240, 241. Referred to in *Adams v. Lombard*, 80 Cal. 435. Said to be a well-recognized principle in *Howell v. Budd*, 91 Cal. 351. Cited in *Luco v. De Toro*, 91 Cal. 417, 418. Referred to in the dissenting opinion of McFarland, J., in the same case, 91 Cal. 428, in which the leading case was declared out of point. Cited in *Fogarty v. Fogarty*, 129 Cal. 49, in case of executed oral agreement as to easement for pipes; 99 Am. Dec. 397, note.

**Statute of Limitations** does not run in favor of a trustee as against

the cestui que trust, where the latter is in possession of his estate, and there has been no adverse holding on the part of the trustee, p. 571.

Cited and followed in *Gilbert v. Sleeper*, 71 Cal. 294; *McClure v. Colyear*, 80 Cal. 381; *Butler v. Myland*, 89 Cal. 582, holding that the statute of limitations does not run against a cestui que trust, where the trust, voluntarily assumed, was by the understanding of the parties to be a continuing one. "It is common learning that in cases of resulting trusts, so long as the trust relation is admitted and there is no adverse holding by the trustee, no lapse of time will bar the cestui que trust." Cited in *Plass v. Plass*, 122 Cal. 15, holding beneficiary under resulting trust not barred by laches; *Fleishman v. Woods*, 135 Cal. 259, holding vendee's action for specific performance not barred; *Pinkham v. Pinkham*, 60 Neb. 611, holding person in possession not barred by limitations from asserting equitable defense; *Warren v. Adams*, 19 Colo. 525. Courts will not enforce a resulting trust after a great lapse of time, but there is an exception to the rule in favor of a cestui que trust in possession of the estate: *Snider v. Johnson*, 25 Oreg. 331. Statute of limitations does not begin to run until ouster, no matter whether the trust be express or implied: *Fawcett v. Fawcett*, 85 Wis. 338; 39 Am. St. Rep. 847; and *Lakin v. Sierra Buttes Gold Min. Co.*, 25 Fed. Rep. 344, 347; 11 Saw. 243, 246. Cited, also, in extended note discussing the statute of limitations in 12 Am. Dec. 369, 373.

**Idem.**—Statute of limitations does not run against a vendee in possession, who has paid the purchase money, and is rightfully in possession under an executory contract of purchase, p. 566.

Leading case affirmed in *Gerdes v. Moody*, 41 Cal. 350, 351. Cited in *Brennan v. Ford*, 46 Cal. 15; *McCauley v. Harvey*, 49 Cal. 506; *Wormouth v. Johnson*, 58 Cal. 624; and *Davis v. Baugh*, 59 Cal. 575. The equitable right of a vendee in possession under an executory contract for the sale of land to a specific performance is not affected by the statute of limitations so long as he does not abandon the contract: *Day v. Cohn*, 65 Cal. 508. The right of a grantor to have his title quieted as to land included in a deed by mistake cannot become barred while the grantor remains in the actual possession of the land and claiming to be the owner thereof: *Smith v. Matthews*, 81 Cal. 121. Rule applied to tenancy in common in *Watson v. Sutro*, 86 Cal. 529. Referred to in *Galvin v. Palmer*, 113 Cal. 53. Cited in *Dutertree v. Shallenberger*, 21 Nev. 509; and in 94 Am. Dec. 742, note.

**Resulting Trusts** defined and distinguished from constructive trusts, p. 568.

Cited in *Scadden etc. Co. v. Scadden*, 121 Cal. 39, holding resulting trust established under facts stated.

**Vendor** cannot obtain possession while vendee has performed or offers to perform his contract, p. 567.

Cited in *Woodward v. Hennegan*, 128 Cal. 302, but sustaining action when vendee has disaffirmed his contract.

**General Citations.**—*Klecka v. Ziegler*, 81 Md. 486, to the point that in the leading case the power of a married woman to make an executory contract for the sale of land is maintained only after a most liberal construction of all the provisions of the statute taken together: *Shaffer v. Kugler*, 107 Mo. 64, to the point that the wife's statutory separate estate seems to be placed on the same footing as her technical equitable separate estate. (See leading case, p. 559.) Cited in 11 Am. Dec. 441, note, as to the language of *Temple, J.*, p. 567, in discussing *Kane v. Bloodgood*, 7 Johns. Ch. 91.

#### 40 Cal. 572-578. *HANCOCK v. PRUESS.*

**Service of Summons.**—After a summons has been served on some of the defendants, and returned, it is competent to the court to order it delivered to the plaintiff for further service on other defendants, p. 577.

Cited in *Coffin v. Bell*, 22 Nev. 184; 58 Am. St. Rep. 740; *Rue v. Quinn*, 137 Cal. 657, sustaining order for withdrawal for publication.

#### 40 Cal. 578-586. *WADE v. THAYER.*

**Damages—Assault.**—A party guilty of a wanton, malicious, and unprovoked assault upon the person is liable for exemplary damages, p. 585.

Referred to but not followed in *Pegram v. Stortz*, 31 W. Va. 268, where the subject of penal damages is discussed. In vindictive actions the jury are always permitted to give damages for the double purpose of setting an example and of punishing the wrongdoer: *Brown v. Evans*, 17 Fed. Rep. 914; 8 Saw. 491. Cited, also, in 50 Am. Dec. 773, note. Affirmed in *Bundy v. Maginess*, 76 Cal. 534.

**Damages—Liability of Employer.**—Although the principal is liable for the actual damages caused by the act of his agent in the course of his employment, he is not responsible for wanton and malicious damage done by the agent without the consent or subsequent ratification of the principal, p. 586.

Affirmed in *Mendelsohn v. Anaheim Lighter Co.*, 40 Cal. 662. Railroad company cannot be mulcted in exemplary damages for the malicious acts of a conductor, unless authorized or ratified, but it liable only for actual damages: *Warner v. Southern Pacific Co.*, 113 Cal. 116, 117; 54 Am. St. Rep. 335.

**Evidence—Rebuttal.**—Where a plaintiff in rebuttal introduces evidence in contradiction of the witnesses of the defendants, it is competent to the latter, after the plaintiff has rested, to support their credibility by additional testimony, p. 585.

Cited in *Nutter v. O'Donnell*, 6 Colo. 259.

Notes Cal. Rep.—130.

**40 Cal. 586-593. PEOPLE v. COYODO.**

Criminal Law—Challenge of Sheriff.—A challenge may be made to the panel on account of bias of the officer summoning them, which would be good ground of challenge to a juror, p. 592.

"The test of the sheriff's qualification to summon a jury is whether he would be qualified to sit as a juror in the case: State v. Kent, 4 N. Dak. 601.

**40 Cal. 593-599; 6 Am. Rep. 639. GRAHAM v. PLATE.**

Trademark—Measure of Damages.—In an action for damages for violation of plaintiff's trademark, the proper measure of damages is the profit realized from the sale of the spurious article under the trademark, but the damages are not limited to the amount of such profits, p. 598.

Referred to, but the leading case distinguished, in Gregory v. Spreker, 110 Cal. 154; 52 Am. St. Rep. 74. May recover profits and damages resulting from violation of trademark. Cited in Hennessey v. Wilmerding etc. Co., 103 Fed. 94, discussing rules as to damages in infringement cases; N. K. Fairbank Co. v. Windsor, 118 Fed. 97, profits recoverable for unfair competition include all made on the goods sold by defendant in the simulated dress or packages, and in violation of complainant's rights; El Modello Cigar Mfg. Co. v. Gato, 25 Fla. 915; 23 Am. St. Rep. 544. Approved in Avery v. Meikle, 85 Ky. 445; 7 Am. St. Rep. 610. In an action for impairing the value of the goodwill of a business sold with the goodwill by the defendant, proof is competent to show how much less than the purchase price the property is worth with the goodwill thus impaired; Burckhardt v. Burckhardt, 26 Ohio St. 366, 51 Am. Rep. 848, referring to the leading case. A similar rule upheld in Benkert v. Feder, 34 Fed. Rep. 635, 13 Saw. 231. Cited, also, in extended note, 23 Am. Rep. 27.

**40 Cal. 599. PEOPLE v. STAKEM.**

Receiver of Stolen Goods is not, as such, liable as accessory after the fact, p. 601.

Cited in Street v. State, 39 Tex. Cr. 136, holding receiver not such an accessory in burglary case.

**40 Cal. 603-613. INGERSOLL v. TRUEBODY.**

Where a conveyance is made to the wife after the death of her husband, under a contract of sale made by him, it is competent for the wife to show by parol that the consideration was paid out of her separate estate, p. 612.

While the general rule of law is, that recitals in a deed bind all the persons who are parties or privies thereto, it does not extend to that which is mere description, or an averment that is not essential: Moffatt

v. Bulson, 96 Cal. 110; 31 Am. St. Rep. 195. A description in a deed of lands excepted from the conveyance, "as having been conveyed to another," does not estop the grantor, nor one to whom he shall convey the excepted lands, from alleging that no such conveyance had been made: Ambs v. Chicago, St. Paul, M. & O. Ry. Co., 44 Minn. 269. Though a deed conveying land contains only the usual covenants, a warranty as to the quality of the land which was a part of the agreement of sale may be shown by parol: Green v. Batson, 71 Wis. 58; 5 Am. St. Rep. 197. See, also, 85 Am. Dec. 84, note, as to recitals in sheriff's deed; and 89 Am. Dec. 205, note, to the point that where a deed to the wife recites a valuable consideration, not stated to be the separate estate of the wife, the presumption is that such consideration was paid out of the common property.

If a husband purchase an estate and pay for it out of the common property and cause it to be conveyed to the wife with the intent that it shall become her separate estate, the transaction will operate as a gift from the husband to the wife, p. 610.

If the deed be on its face an ordinary deed of grant, bargain, and sale, reciting a valuable consideration, it is competent to show by parol the real facts, in order to rebut the presumption that it is common property: Woods v. Whitney, 42 Cal. 361. Rule said to be well settled in Higgins v. Higgins, 46 Cal. 263. Husband may make the gift effectual by simply directing the deed of bargain and sale to be made to her: Jackson v. Torrence, 83 Cal. 532. Cited in Sackman v. Thomas, 24 Wash. 688, quoting Higgins v. Higgins, 46 Cal. 263.

**Evidence.**—The declarations of a wife regarding her separate property made in the presence of her husband and not denied by him, are competent evidence in an action by the devisees of the husband involving her title to the property, p. 613.

Cited in Moore v. Jones, 63 Cal. 16.

#### 40 Cal. 613-614. PEOPLE v. BANGENEAUR.

**Criminal Law.**—In a criminal case, a new trial can be granted only on application of the defendant, p. 614.

Cited in 27 Am. Dec. 472, note.

#### 40 Cal. 614-627. PARROTT v. BYERS.

Where the relations between the parties are such that a demand and a refusal is a condition precedent to the right to maintain the action, a denial in the answer of the relation on which the action is founded will dispense with the necessity of an averment in a complaint of a previous demand and refusal, p. 622.

The law does not require a useless act to be performed: Ashton v. Dashaway Assn., 84 Cal. 70. Where it appears from defendant's act in

expressly repudiating a contract of sale that a demand for a deed would have been refused, defendant cannot object that no demand was made: *Remy v. Olds*, 88 Cal. 542. Followed in *Smith v. Doran*, 96 Cal. 79. Applied in an action by a client to recover money collected by his attorney, where the attorney denied the relation between them: *Cox v. Delmas*, 99 Cal. 121. Approved in *Davis v. Winona Wagon Co.*, 120 Cal. 247. Cited in *Thompson v. Whitney*, 20 Utah, 8 holding proof of demand unnecessary when it would have been unavailing if made; and cf. *Rogers v. Nashville etc. Co.*, 91 Fed. 308, 62 U. S. App. 67, applying principle to demand on corporate directors to bring suit on behalf of corporation; *Winchester v. Howard*, 136 Cal. 446, noted under *Neall v. Hill*, 16 Cal. 182.

A transfer of stock which has not been entered on the books of the company as provided by statute is valid against all the world except a subsequent purchaser in good faith without notice, p. 625.

Said to be a long-settled rule in *Farmers' Nat. Gold Bank v. Wilson*, 58 Cal. 604. Cited in *West Coast etc. Co. v. Wulff*, 133 Cal. 317, 85 Am. St. Rep. 172, noted under *Weston v. Mining Co.*, 5 Cal. 186; also in 63 Am. Dec. 120, 121, note; 57 Am. St. Rep. 389, note; and in *Beckwith v. Burrough*, 13 R. I. 298.

#### 40 Cal. 627. PEOPLE v. SCHUSTER.

**Habeas Corpus.**—Appeal does not lie from order admitting to bail under the act, p. 627.

Cited in *State v. Kennie*, 24 Mont. 52, ruling similarly as to order denying writ, under local statutes, and *Mead v. Metcalf*, 7 Utah, 106, as to order discharging petitioner from arrest.

#### 40 Cal. 628-634. REED v. BERNAL.

**New Trial—Appeal.**—An appellant will not be permitted to allege that the evidence did not justify the judgment, except on an appeal from an order denying a motion for a new trial, p. 633.

Cited and followed in *Brown v. Willoughby*, 5 Colo. 8; *Burbank v. Rivers*, 20 Nev. 84, holding the rule applicable also to equity cases; and *Spencer v. Cott*, 2 Utah, 342. But the rule is not applicable to errors of law: *Sanford v. D. & D. Elevator Co.*, 2 N. Dak. 11. Cited, also, in 94 Am. Dec. 775, note.

#### 40 Cal. 634-637. ROBERTS v. WARE.

**Resulting Trust.**—A resulting trust will not arise unless the plaintiff paid the whole or some part of the purchase money and unless the money so paid formed the consideration of the purchase, p. 637.

A resulting trust must grow out of the facts existing at the time of the conveyance, and cannot grow out of a mere parol agreement that the

purchase shall be for the benefit of another: Hunt v. Friedman, 63 Cal. 513. May be shown by parol evidence: Tripp v. Duane, 74 Cal. 91. Cited, also, in Towle v. Wadsworth, 147 Ill. 99.

**40 Cal. 639-641. HAWKINS v. ABBOTT.**

Where the evidence is conflicting verdict will not be set aside, p. 641.

Approved in Green v. Soule, 145 Cal. 102, applying rule in action for personal injuries.

**40 Cal. 642-647. PEOPLE v. ELKINS.**

Certiorari will not lie to an inferior court to annul an order merely erroneous but not void, in a matter of which the court had acquired jurisdiction, p. 647.

The writ cannot be used as a mere writ of error for the correction of mistakes: Central Pac. R. R. Co. v. Placer Co., 46 Cal. 667. If the county commissioners act within their jurisdiction certiorari will not lie: Hetzel v. County Commissioners, 8 Nev. 362. Can only determine whether the inferior tribunal has exceeded its jurisdiction or regularly pursued its authority: Phillips v. Welch, 12 Nev. 169. Cited, also, in 12 Am. Dec. 535, note.

**40 Cal. 648-656. PEOPLE v. MELLON.**

In larceny, the venue may be laid in the county to which the stolen property has been taken, and it is unnecessary to state in the indictment facts showing the commission of the larceny in another county, p. 654.

Cited in People v. Prather, 134 Cal. 388, sustaining information for grand larceny under section 786, Penal Code; People v. Scott, 74 Cal. 96, but it was held in a prosecution for burglary, that the indictment should charge the facts as they exist where a burglary is committed in one county and the property taken into another county. When goods are stolen in one jurisdiction and taken to another, larceny is committed in both: People v. Staples, 91 Cal. 27. An indictment in the county into which stolen goods were taken must allege the offense to have been committed in such county, or that the bringing the property into such county was felonious: State v. Brown, 8 Nev. 212.

**40 Cal. 657-662. MENDELSON v. ANAHEIM LIGHTER COMPANY.**

**Damages—Common Carrier.**—A principal is not liable to punitive damages for the wanton and malicious acts of his agent without the consent, approval, or subsequent ratification of the principal, p. 662.

Rule applied to the malicious act of a conductor in wrongfully ejecting a passenger: Warner v. Southern Pacific Co., 113 Cal. 116; 54 Am. St. Rep. 335.

**Verdict.**—A verdict which finds the plaintiff entitled to a certain amount of money is not void for uncertainty, but is equivalent to saying that they find the issues in favor of plaintiff and assess his damages at that sum, p. 660.

Referred to in the dissenting opinion of Thornton, J., in *Murphy v. Bennett*, 68 Cal. 533. Cited in *Dwyer v. Carroll*, 86 Cal. 303.

**Instruction.**—It is error for the court to give an instruction where there is no evidence to support it, p. 662.

Cited and followed in *Perkins v. Eckert*, 55 Cal. 405; and *Shepherd v. Jones*, 71 Cal. 224.

40 Cal. 662-672. **YATES v. SMITH.** S. C. 38 Cal. 60; 42 Cal. 620; 48 Cal. 408.

**Appeal.**—The law of a case as settled by the court on a former appeal, will not be reopened or disregarded in a subsequent appeal of the same case, p. 670.

The leading case cited and the principle adhered to in *Headley v. Challiss*, 15 Kan. 606; *Davenport v. Kleinschmidt*, 8 Mont. 481; *Plymouth County Bank v. Gilman*, 3 S. Dak. 178; 44 Am. St. Rep. 787; and *Venard v. Green*, 4 Utah, 458. Cited, also, in 27 Am. Dec. 634, 635, note.

**Practice.**—The function of a bill of exceptions is to present for review a question of law, p. 669.

Cited in *Southern Pacific Co. v. Johnson*, 69 Fed. Rep. 563.

## **VOLUME XLI.**

**By WILLIAM FOSTER.**

**Revised to include citations to Volume 147, by CHARLES L. THOMPSON.**

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### **41 Cal. 15-17. CARUTHERS v. McGARVEY.**

Sale of corn is not complete until it is weighed or separated from the other corn in the field, p. 16.

Cited in Blackwood v. Cutting Packing Co., 76 Cal. 217, 9 Am. St. Rep. 203, holding that under section 1140 of the Civil Code the sale of a crop of apricots on the trees was not complete, because they were not identified; Cited in Carpenter v. Glass, 67 Ark. 139, denying right of purchaser of flour to maintain replevin therefor, under facts stated.

### **41 Cal. 17-21. WATSON v. SAN FRANCISCO & HUMBOLDT BAY RAILROAD COMPANY.**

Complaint, that is a jumble of several causes of action in one count, lacks the directness and precision required by the code, p. 20.

Cited in Cosgrove v. Fisk, 90 Cal. 77, holding that a complaint where several causes of action were mingled in one count, contrary to section 427 of the Code of Civil Procedure, was demurrable; Clafin Co. v. Simon, 18 Utah, 161, noted under Buckingham v. Waters, 14 Cal. 146.

Opening a Default rests in the legal discretion of the trial court, upon such conditions as the circumstances warrant; if the application is made so immediately after entry of default as to cause no considerable delay to plaintiff, the discretion of the court should tend toward obtaining a judgment on the merits, pp. 20, 21.

Cited in Melde v. Reynolds, 129 Cal. 311, and Winchester v. Black, 134 Cal. 127; noted under Roland v. Kreyenbergen, 18 Cal. 455; Hanthorn v. Oliver, 32 Or. 62, 67 Am. St. Rep. 519, holding application improperly denied; Coos Bay etc. Co. v. Endicott, 34 Or. 576, holding application properly granted. Cited in the following cases, where the lower court refused to open the default, and it was held an abuse of discretion on appeal; Reidy v. Scott, 53 Cal. 73; Pearson v. Drobaz Co., 99 Cal. 428; Grady v. Donahoo, 108 Cal. 214; Miller v. Carr, 116 Cal. 381, 58 Am. St. Rep. 182; Benedict v. Spendiff, 9 Mont. 88; Horton v. New Pass Co., 21 Nev. 189; Simpkins v. White, 43 W. Va. 204. Cited in the following cases, where the lower court opened the default, and the

appellate court refused to interfere; *Vinson v. Los Angeles Pac. R. R. Co.*, 147 Cal. 483, applying rule to order granting relief from default in preparing statement on motion for new trial; *Cameron v. Carroll*, 67 Cal. 501; *Dougherty v. Nevada Bank*, 68 Cal. 276; *Lodtman v. Schluter*, 71 Cal. 97, where the lower court revoked an order of dismissal for want of prosecution; *Chamberlin v. Del Norte Co.*, 77 Cal. 151; *Wolf v. Canadian Pacific Co.*, 89 Cal. 337; *Harbaugh v. Honey Lake Co.*, 109 Cal. 72. Cited in the following cases, where the lower court refused to open the default, and this action was affirmed on appeal; *Garner v. Erlanger*, 86 Cal. 62; *Williamson v. Cummings Co.*, 95 Cal. 653; *Bauer v. Wolf*, 115 Cal. 101; *Evans v. Fall River Co.*, 4 S. Dak. 123; *Masten v. Indiana Car etc. Co.*, 25 Ind. App. 187. Cited in note to 56 Am. Dec. 394, 397, on discretion in opening default.

#### 41 Cal. 22-29. HENLEY v. HOTLING.

The evidence ought to be so clear as to leave no doubt that the real intention of the parties was to execute a mortgage. . . . A mortgage is a security for the performance of an agreement, which is usually to pay a sum of money. . . . If there is no debt, there is no mortgage, pp. 27, 28.

Cited in *Holmes v. Warren*, 145 Cal. 463, where there was controversy as to whether deed absolute in form was mortgage or absolute deed, evidence is admissible for plaintiff to show receipts for purchase money and contract for sale and purchase of land; *Montgomery v. Spect*, 55 Cal. 353, holding that a deed was intended as a mortgage; *Manasse v. Dinkelpiel*, 68 Cal. 406, holding that a deed given in satisfaction of a debt was not a mortgage, and could not be varied by an oral agreement; *Eaton v. Rocca*, 75 Cal. 97, to similar effect; *Mahoney v. Bostwick*, 96 Cal. 58, 31 Am. St. Rep. 177, holding that evidence of a deed being a mortgage was plain and convincing; *Ganceart v. Henry*, 98 Cal. 284, holding that parol evidence of a deed being a mortgage was not sufficiently clear "to establish an equity superior to the deed"; *Rawlins v. Ferguson*, 133 Cal. 473, *McGinn v. Lee*, 10 N. Dak. 189, *Tripler v. Campbell*, 22 R. I. 268, and *Ewing v. Keith*, 16 Utah, 318, holding mortgage not so established; *Blumberg v. Beikman*, 121 Mich. 653, and *Spalding v. Brown*, 30 Or. 167, conditional sale shown; *Muller v. Flavin*, 13 S. Dak. 609, holding mortgage shown; *Larson v. Dutiel*, 14 S. Dak. 482, holding deed not a mortgage; *Hays v. Carr*, 83 Ind. 284, holding that one who alleges a conditional sale to be a mortgage must prove it; *Winters v. Swift*, 2 Idaho, 66, 69, holding that a deed was not a mortgage because it contained no acknowledgment of debt or promise to repay; *Reed v. Bond*, 96 Mich. 140, holding a deed to be a conditional sale, not a mortgage; to same effect in *Buse v. Page*, 32 Minn. 114, 115, and *Gassert v. Bogk*, 7 Mont. 599; *Rockwell v. Humphrey*, 57 Wis. 416, holding a deed to be a mortgage, because the relation of debtor and creditor existed; *Schriber v. Le Clair*, 66 Wis.

599, and *Cowell v. Craig*, 79 Fed. Rep. 685, 689, holding a deed to be a conditional sale, not a mortgage; notes to 17 Am. Dec. 300, 304, and 4 Am. St. Rep. 699, on the point that intention of parties is to govern; and note to 50 Am. Dec. 196, 197, on burden of proof.

**41 Cal. 29-33. EX PARTE VOLLM.**

**Bail after Conviction** is a matter of discretion, p. 30.

Cited in *Ex parte Hoge*, 48 Cal. 5, admitting a defendant to bail pending appeal; *Ex parte Smallman*, 54 Cal. 36, refusing to allow bail pending appeal; to same effect in *Ex parte Brown*, 68 Cal. 177, 183, holding that bail should not be allowed after conviction, unless extraordinary circumstances have intervened: *Ford v. State*, 42 Neb. 420, holding that bail may be taken pending a writ of error, upon a showing of probate error causing reversal: *United States v. Hudson*, 65 Fed. Rep. 75, holding that allowance of bail after conviction is a matter of statute in state courts, and there is no statute allowing it in federal courts; and *In re Boulter*, 5 Wyo. 267, 272, holding that one convicted of a felony is not entitled to bail pending proceedings is error.

**41 Cal. 34-37. RICH v. TUBBS.**

**Homestead**, under the law of 1862, was vested in the surviving spouse upon the death of either, and could not be set apart by the probate court as it was under the law of 1860, p. 36.

Cited in *Estate of Fath*, 132 Cal. 612 (quoted in *Saddlemire v. Stockton etc. Soc.*, 144 Cal. 654), holding such title not affected by order creating probate homestead; *Estate of Headen*, 52 Cal. 297, 299, holding that the amendment of 1874 to section 1265 of the Civil Code did not make the section a statute of succession so that the homestead of a deceased husband descended to his heirs, but the wife as survivor was entitled to the whole: *Herrold v. Reen*, 58 Cal. 447-449, holding that under the statute of 1862 the homestead vested in a wife after death of a husband, and a mortgage of it by her was valid; *Watson v. Creditors*, 58 Cal. 557, 558, holding that under the statute of 1862 the homestead vested in a husband after his wife's death and was liable for his debts thereafter; *Estate of Burton*, 63 Cal. 38, holding that under section 1465 of the Code of Civil Procedure a probate court might set apart for the wife a homestead out of her husband's estate, though none had been declared in his lifetime: *Levins v. Rovegno*, 71 Cal. 282-284, holding that the law of 1860 the homestead of a deceased wife descended one-half to her daughter and one-half to her husband, and "no act on the part of the probate court was necessary to or could change the title"; *Tyrrell v. Baldwin*, 78 Cal. 474, holding that under the statute of 1862 a surviving husband took the homestead after death of his wife, "and the law in force at the time of the death we think controls on the subject of homesteads and rights of survivors," so that the homestead

was not thereafter liable for the husband's debts: *Estate of Ackerman*, 80 Cal. 210, 13 Am. St. Rep. 117, holding that a surviving husband, who had sold the homestead after the wife's death, had no right to have another homestead out of the wife's separate estate: *Gruwell v. Seybolt*, 82 Cal. 10, holding that under the law in force at the death of a husband, his wife had the right to a homestead that she had previously declared on his separate property: *Collins v. Scott*, 100 Cal. 451, holding that upon death of a husband the wife succeeded to a homestead that had been declared on community property, and the children had no rights therein; and *Smith v. Shrieves*, 13 Nev. 309, 317, 323, holding that where a declaration of homestead has been filed the whole goes to a surviving spouse, but if there has been no declaration, one-half goes to the survivor and one-half to the children.

#### 41 Cal. 37-40. PEOPLE v. RENFROW.

**Challenge of Juror**, for actual or implied bias, must specify the grounds relied on, pp. 38, 39.

Cited in *People v. Owens*, 123 Cal. 486, noted under *People v. Dick*, 37 Cal. 277; *People v. Walsh*, 43 Cal. 448, holding that a challenge "for implied bias, specifying nothing, was properly denied"; to same effect in *People v. Buckley*, 49 Cal. 242; *People v. Cochran*, 61 Cal. 549, holding that "I challenge the juror" was insufficient: *State v. Raymond*, 11 Nev. 107, holding that the grounds of bias must be specified; to same effect in *Southern Pacific Co. v. Rauh*, 49 Fed. Rep. 701, and *Shields v. State*, 149 Ind. 400.

**Circumstantial Evidence** may be ground for a verdict, p. 40.

Cited in *State v. Van Winkle*, 6 Nev. 352, holding that it depends on the circumstances whether circumstantial evidence is better than direct.

#### 41 Cal. 41-55. MAHONEY v. MIDDLETON.

**Constructive Notice**.—The purchaser from a vendee of land has constructive notice of an earlier deed of the first vendor to a stranger, that was not recorded until after the recording of the second deed, but before the making of the third, p. 50.

Affirmed in *Clark v. Sawyer*, 48 Cal. 143. Cited in *County Bank v. Fox*, 119 Cal. 64, holding that a second mortgage had no priority over a first mortgage by being recorded first, because the second mortgagee and his assignees had constructive notice of the first mortgage; *Parrish v. Mahany*, 10 S. Dak. 285, 66 Am. St. Rep. 721, holding mortgagor under facts entitled to protection as bona fide purchaser; *Woods v. Garnett*, 72 Miss. 85, as to the purchaser of a second mortgage; and, as to the purchaser of a mortgage on a vessel, in *The W. B. Cole*, 59 Fed. Rep. 186.

**Judgment-Roll** being silent as to the issuing and service of process, it will be presumed that process was duly issued and served on the defendants, p. 51.

Distinguished in *Weeks v. Garibaldi Co.*, 73 Cal. 603, where the judgment below was held invalid as to certain defendants, for failure of the record to show affirmatively that the court had jurisdiction of their persons; because the attack on the judgment, by appeal therefrom, was direct, while in the principal case it was collateral. Cited in *Estate of Eichhoff*, 101 Cal. 601, holding that where the record in a divorce suit was made evidence in a petition for administration, service in the divorce suit was presumed, and saying that if a court "makes a record of the facts giving it jurisdiction, or of its exercise of such jurisdiction, there is no occasion to invoke any presumption. It is only where the record is silent that the necessity for presumption arises." Cited in *Lee v. Rogers*, 2 Sawy. 567, holding that the purchaser of land affected by a judgment need not "look beyond the record to see whether the judge committed any error or not"; and note to 94 Am. Dec. 765, as to collateral attack on a judgment.

**Appearance by Attorney** gives the court jurisdiction of the person of the client, p. 51.

Cited in *Shay v. Superior Court*, 57 Cal. 542, holding that on application for certiorari it was too late to complain of the insufficiency of notice and undertaking on appeal from a justice's court, because petitioner had appeared by counsel at the trial in the appellate court and defended the suit upon its merits; and *Blyth Co. v. Swenson*, 15 Utah. 363, to the point that where a defendant moves to set aside a valid judgment on the ground that the attorneys appearing for him had no authority, he must show: "1. That he has a good defense; 2. That he has been diligent in presenting his grievances to the court; 3. That the attorneys in truth had no authority to represent him."

**Judgment in Ejectment** "does not transfer to the successful party the title of the adverse party, but if presented in the proper mode, whenever such adverse title is drawn in issue, it shuts out all proof of such adverse title," p. 53.

Cited in *Breon v. Robrecht*, 118 Cal. 472, 62 Am. St. Rep. 248, holding former judgment conclusive; *Hentig v. Redden*, 46 Kan. 236, 26 Am. St. Rep. 95, holding a judgment in ejectment final as to matters that could have been litigated therein; and in note to 54 Am. Dec. 546, on estoppel by judgment.

**Judgment on Ejectment** may determine the interests had by each of two plaintiffs. Plaintiff cannot recover a part of the land already in his possession. The judgment is evidence in a later suit for damages and mesne profits, pp. 53-55.

Cited in *Burgel v. Prisser*, 89 Cal. 73, holding that in a suit by co-

tenants for mesne profits the court may settle the respective interests of the parties; and notes to 54 Am. Dec. 416, and 50 Am. St. Rep. 845, on recovery by plaintiff in ejectment.

**41 Cal. 55-60. CURTIS v. SPRAGUE.**

Counterclaim by maker of note in suit against him by indorsee thereof; commented on without decision, p. 59.

Cited in Leavitt v. Peabody, 62 N. H. 192, holding that in a suit by the indorsee of an overdue note the maker cannot set off debts due from the payee.

**41 Cal. 61-63. WALSWORTH v. JOHNSON.**

Pending Suit between the same parties is no ground for abatement, where the plaintiff in one suit is defendant in the other, p. 63.

Affirmed in Monroe v. Reed, 46 Neb. 330. Cited in Valley Bank v. Shenandoah etc. Bank, 109 Iowa, 46, holding former judgment not res judicata when issues and relief were different; Pratt v. Howard, 109 Iowa, 506, noted under Ayres v. Bensley, 32 Cal. 630.

**41 Cal. 63-66. CRANE v. SALMON.**

Quitclaim Deed to a rancho, for which a patent issued later, conveyed all rights under the patent to the grantee of the deed, p. 66.

Affirmed in Stanway v. Rubio, 51 Cal. 46. Cited in note to 58 Am. Dec. 588.

**41 Cal. 66-67. PEOPLE v. MURRAY.**

Refusal of an Instruction, substantially given, is not error, p. 67.

Affirmed in People v. Ah Chung, 54 Cal. 403.

Circumstantial Evidence need not be absolutely incompatible with the innocence of the accused, and incapable of explanation upon any other reasonable hypothesis than that of his guilt, p. 67.

Cited in People v. Padillia, 42 Cal. 540, holding that the jury must be "entirely satisfied of the guilt of the accused"; People v. Ramirez, 56 Cal. 538, holding instructions on circumstantial evidence correct; People v. Gosset, 93 Cal. 644, holding that facts proven must be "inconsistent with any reasonable hypothesis" of defendant's innocence; State v. Willingham, 33 La. Ann. 539, holding that "conclusion" and "hypothesis" are synonymous in this connection; State v. Rover, 13 Nev. 24, holding it correct to refuse to charge that circumstantial evidence must be absolutely incompatible with innocence of defendant; Territory v. Lermo, 8 N. Mex. 571, holding instruction on subject improperly refused; but see Johnson v. State, 53 Neb. 106, where requested instruction was held to be erroneous; note on this point in 62 Am. Dec. 183.

**41 Cal. 68-78. TILDEN v. SACRAMENTO COUNTY.**

**Mandamus** does not lie to control judicial functions of a board of supervisors in disallowing a claim against the county, p. 70.

Cited in *Sullivan v. Gage*, 145 Cal. 767, mandamus does not lie to compel state board of examiners to allow claim for fees for attorney for receiver illegally ordered by court in action by state to dissolve corporation; *Mountain v. Multnomah Co.*, 8 Oreg. 474, holding that the action of a county court in dealing with certain matters regarding the militia, intrusted to it by statute, could be examined by the statutory writ of review; *Sawyer v. Mayhew*, 10 S. Dak. 23, denying writ to review discretionary action by state auditor as to adjustment of claims.

**41 Cal. 78-85. GAMBETTE v. BROCK.**

**Judgment Against a Married Woman**, in a case where coverture would have been a defense if pleaded, cannot be impeached collaterally on this ground; though erroneous, it is not void until reversed or set aside, pp. 82, 83.

Cited in *Crane v. Cummings*, 137 Cal. 202, noted under *Moore v. Martin*, 38 Cal. 428; *Vantilburg v. Black*, 3 Mont. 468, holding that a judgment against husband and wife on their joint note, secured by mortgage of husband's property, was not void until set aside in a direct proceeding, the wife having failed to plead coverture; *McCurdy v. Baughman*, 43 Ohio St. 84, holding that although coverture would have been a good defense if pleaded, enforcement of a judgment could not be enjoined for this cause, "unless the facts bring the case within some such ground of relief as fraud, conclusion or coercion"; *Smith v. Borden*, 17 R. I. 221, 33 Am. St. Rep. 868, holding such a judgment binding until set aside by appeal or some appropriate method; and notes on this point in 55 Am. Dec. 600, 601, and 57 Am. St. Rep. 169.

**Wife may Establish a Homestead**, by her own residence upon it with her family, if the husband has no home or fixed residence elsewhere, or [no] other family than his wife, p. 84.

Cited in *Boreham v. Byrne*, 83 Cal. 26, 27, holding that under the law of 1860 a declaration of homestead by the husband alone, failing to state that "he or his wife was at the time residing with their family on the premises . . . was manifestly insufficient"; *Stout v. Rapp*, 17 Neb. 470, holding that where a husband lived on the wife's land, he was not entitled to an exemption of personal property from execution, allowed by statute to persons who had no homestead, for there could not be two homesteads in the same family; and notes on homestead in 60 Am. Dec. 613; 70 Am. Dec. 346, 349; 91 Am. Dec. 644.

**41 Cal. 85-88; 10 Am. Rep. 266. UPTON v. ARCHER.**

**Filling Blank in Deed**, by inserting name of grantee, cannot be done by grantor's agent, unless authorized in writing, p. 87.

Cited in Dolbeer v. Livingston, 100 Cal. 620, 622, holding that a surety on a bond, who signed and gave it to the obligor before certain blanks in it were filled, was estopped from disputing the validity of the bond: Herr v. Denver Co., 13 Colo. 414, holding that a chattel mortgage, with the grantee's name omitted, was invalid as against the rights of third parties; and State v. Matthews, 44 Kan. 604, 605, holding that where an agent, authorized by parol to fill a blank in a deed, filled it with the name of a wrong grantee, who obtained a loan upon mortgage of the land, the deed was good with regard to the mortgagee's rights. Affirmed, as to parol authority being insufficient, in Adamson v. Hartman, 40 Ark. 61, and Ayres v. Probasco, 14 Kan. 189. Denied in Swartz v. Ballou, 47 Iowa, 194, 29 Am. Rep. 475, holding that "the decided weight of modern authority and reason is in favor of the rule. . . . in Drury v. Foster, 2 Wall. 24," which is, that parol authority is sufficient to authorize an alteration or addition to a sealed instrument; Cribben v. Deal, 21 Oreg. 218, 28 Am. St. Rep. 751, holding that parol authority is sufficient for inserting the grantee's name in a deed; and to same effect in Lafferty v. Lafferty, 42 W. Va. 789. Cited in notes on this point in 13 Am. Dec. 670; 14 Am. Rep. 439; 8 Am. St. Rep. 250; 28 Am. St. Rep. 751.

**41 Cal. 88-93. BROWN v. BROWN.**

**Statement on Appeal**.—If there is any evidence to support the judgment, it must be affirmed, no motion for new trial having been made, pp. 92, 93.

Cited in Wilson v. Southern Pacific Co., 62 Cal. 171, holding on an appeal from refusal of new trial, that "if there was any evidence to warrant the verdict, we cannot review it on appeal"; Lufkins v. Colllins, 2 Idaho, 238, holding that an instruction that there was no evidence to support plaintiff's claim was properly refused. Affirmed in Burbank v. Rivers, 20 Nev. 86.

**41 Cal. 94-96. TOMLINSON v. MONROE.**

**Material Variance** between allegation and proof of a contract is ground for nonsuit, p. 96.

Cited in Owen v. Meade, 104 Cal. 183, holding that a contract proved was not the one alleged; Elmore v. Elmore, 114 Cal. 519, 521, holding it error to give judgment on a cause of action "not set up in the complaint and not warranted by the averments of the complaint"; McMahon v. Canadian Ry., 40 Or. 152, where plaintiff pleaded oral agreement but on trial admitted execution and validity of written contract.

for same services, radically different from alleged oral one, nonsuit properly granted.

#### 41 Cal. 97-100. SMITH v. CUSHING.

**Defective Findings.**—If no objections are made in the lower court, the presumption is that the court found all the facts for the party in whose favor judgment was ordered, p. 99.

Cited in Warren v. Quill, 9 Nev. 264, holding that if a finding is omitted, exception must be taken, and the point specified on which a finding is wanted; More v. Lott, 13 Nev. 380, holding findings that ought to have been made should be presumed.

**Abandonment** is the leaving without intent to return, p. 99.

Affirmed in Beaver Brook Co. v. St. Vrain Co., 6 Colo. App. 136. Cited in note to 40 Am. Dec. 464, 467, on abandonment.

#### 41 Cal. 100-103. DAVENPORT v. TURPIN.

**On Whom Judgments are Binding.**—Grantee of mortgagor, under deed recorded before foreclosure sale, who was not made a party to the suit, held to be a tenant in common with the purchaser at foreclosure sale, p. 103.

Cited in Walker v. Goldsmith, 14 Oreg. 148, holding that the grantee under an unrecorded deed was not bound by a decree quieting title against his grantor in a suit begun after execution of the deed and to which the grantee was not a party.

#### 41 Cal. 103-109. EVANS v. EVANS.

**Adultery.**— If a husband enters a house of prostitution in the evening and comes out the next morning, it raises a strong presumption of his adultery, p. 107.

Cited in Muagrave v. State, 133 Ind. 309, a case of conspiracy to defraud, to the point that one is presumed to intend the consequences of his acts; Musick v. Musick, 88 Va. 15, holding that association by the husband with unchaste women was sufficient proof of adultery.

**Admissions** of defendant in a divorce case are evidence, but must be corroborated, p. 107.

Cited in note on confessions in 30 Am. Dec. 548, 549.

**Some Corroboration** of plaintiff's evidence is required by statute in a divorce suit, but the statute does not say how much, p. 108.

Cited in Cooper v. Cooper, 88 Cal. 48, holding there was some corroboration of plaintiff as to defendant's cruelty; Venzke v. Venzke, 94 Cal. 227, to same effect; Smith v. Smith, 119 Cal. 191, holding that plaintiff's evidence was corroborated by that of defendant; Clopton v. Clopton, 11 N. Dak. 219, in divorce suit where plaintiff testified as to

results produced on health by alleged cruelty, and testified to medical treatment for ailments caused by such cruelty, corroboration of attending physician as to such treatment is sufficient; *Andrews v. Andrews*, 120 Cal. 186, 187, saying that as to successive acts of cruelty, "it is not necessary that there should be direct testimony of other witnesses to every act sworn to by the plaintiff," and holding there was sufficient corroboration under section 130 of the Civil Code.

**41 Cal. 109-111. SEIGEL v. EISEN.**

**Contributory Negligence.**—Standing on the rear platform of a street car is not contributory negligence, as matter of law, p. 111.

Affirmed in *Cummings v. Worcester Co.*, 168 Mass. 223, as to leaning out of a street-car window; *Upham v. Detroit Co.*, 85 Mich. 17, as to riding on street-car platform; *Dahlberg v. Minneapolis Co.*, 32 Minn. 437, 438, 50 Am. Rep. 588, 589, as to placing hand on street-car window sill; *Solon v. Virginia Co.*, 13 Nev. 148, as to walking on a railway track; *Bailey v. Tacoma Co.*, 16 Wash. 62, as to sitting on front platform of an electric-car.

**Proximate Cause of injury from negligence is for the jury, p. 111.**

Cited in *Orcutt v. Pacific Coast Co.*, 85 Cal. 299, holding that contributory negligence of plaintiff in allowing horses to run loose near a railway track was too remote to be the proximate cause of their being run over by a train; and note to 16 Am. St. Rep. 251.

**41 Cal. 111-116. GROSS v. KIERSKI.**

**Seller of Chattels**, in his possession, is held by implication of law to warrant the title; and there is no breach until the buyer's possession is disturbed by reason of the title of the true owner, pp. 113-115.

Cited in *McLeod v. Barnum*, 131 Cal. 608, noted under *Peabody v. Phelps*, 9 Cal. 213; *Barnum v. Cochrane*, 143 Cal. 645, on point that purchaser cannot recover for breach of warranty of title while remaining in undisturbed possession; *Rockwell v. Young*, 60 Md. 569, holding that where the widow of a decedent sold his mules, taking a note in part payment, and the buyer paid the amount of the note to the decedent's administrator, this was a good defense to a suit by the widow on the note; *Kennard Co. v. Dornan*, 64 Mo. App. 25, holding that where it was a custom of trade that a carpet should not show spots caused in manufacture, the right of action on a warranty of quality ran from the time the spots appeared; *Hodges v. Wilkinson*, 111 N. C. 60, holding that after warranty of title on sale of a horse, the buyer need not delay suit until the horse is taken from him, but it is enough if he shows paramount title in another; *Hull v. Caldwell*, 3 S. Dak. 455, holding that the buyer of a buggy and harness could not sue on a warranty of title unless he showed actual damage from the breach; and notes on this point in 35 Am. Dec. 607; 39 Am. Dec. 500; 62 Am. Dec. 464.

**41 Cal. 117-118. WEAVER v. HAYWARD.**

**Affidavit for Attachment** need not state the facts of the indebtedness, already stated in the complaint, p. 118.

**Affirmed in Bank v. Boyd**, 86 Cal. 388; **Newell v. Whitwell**, 16 Mont. 259; **Crawford v. Roberts**, 8 Oreg. 326.

**41 Cal. 119-122. CLARK v. GRIDLEY.**

**Partial Settlement of Partnership accounts** is evidence in a suit for dissolution and final settlement, p. 122.

**Affirmed in Stretch v. Talmadge**, 65 Cal. 511. Cited in **Lay v. Emery**, 8 N. Dak. 524, quoting **Stretch v. Talmadge**, 65 Cal. 511.

**41 Cal. 123-128. TEVIS v. HICKS.**

**Res Gestae**.—Evidence of a grantor, as to what took place at the time of conveyance, held admissible in a later suit against the grantee, attacking the conveyance as being in fraud of creditors, p. 126.

Cited in **Deasey v. Thurman**, 1 Idaho, 777, holding that statements of owners of a pack-train, in derogation of their title, made two years prior to the suit, were not part of the res gestae; and note to 95 Am. Dec. 58.

Jury cannot determine the question as to what facts are admitted by the pleadings, but it is for the court, p. 127.

Cited in **Dean v. Grimes**, 72 Cal. 446, holding that whether pleadings in an insolvency case were defective was a question of law, and should not have been submitted to the jury; **Cook v. Merritt**, 15 Colo. 215, to the point that the jury cannot construe the pleadings.

**Findings** of the jury cannot be contrary to or inconsistent with the pleadings. "If a pleading does not correctly state the facts, application should be made to amend," p. 127.

Cited in **Simmons v. Hamilton**, 56 Cal. 496, 497, holding that where a court draws erroneous conclusions of law from its finding of facts, a new trial must be granted; **Ortega v. Cordero**, 88 Cal. 226, granting a new trial because findings of fact were inconsistent with the pleadings and outside of the issues; and **Fisk v. Cuthbert**, 2 Mont. 599, holding that defendant cannot on appeal argue inconsistently with his answer.

**41 Cal. 133-136. PATTERSON v. SHARP.**

**Judgment-Roll**.—The evidence need not be brought up on an appeal for reduction of amount of a judgment rendered on facts in a complaint not denied by the answer, p. 135.

Cited in **Heinlen v. Heilbron**, 71 Cal. 564, to the point that "the ap-

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pellate court will take notice of errors appearing in the judgment-roll, even if not named in the specification of errors in the statement."

**Tender of amount due and accrued interest stops further interest, p. 135.**

Cited in *Easterbrook v. Farquarson*, 110 Cal. 316, holding that as tender could not be made of an undetermined sum, interest did not run until the amount was determined.

**41 Cal. 136-138. McABEE v. RANDALL.**

**Order Denying Motion for Judgment on the pleadings cannot be reviewed on appeal from the judgment, there being no statement or bill of exceptions, p. 137.**

Cited in *Emeric v. Alvarado*, 64 Cal. 594, holding that an order appointing a guardian ad litem is not part of the judgment-roll; *Hermans v. Jacksonville, etc. Co.*, 40 Fla. 91, applying rule to affidavits used on hearing; *Graham v. Linehan*, 1 Idaho, 781, to the point that an appeal must be decided on the judgment-roll, where there is no statement or bill of exceptions; *Reinhart v. Company D*, 23 Nev. 372, holding that where the facts did not appear in the judgment-roll, and there was no statement, an order refusing to open default could not be disturbed.

**Pleading.—Where the answer is treated as a counterclaim at the trial, it cannot be considered a cross-complaint for the first time on appeal, p. 138.**

Cited in *Haskell v. Haskell*, 54 Cal. 264, holding that in a suit for divorce a count for extreme cruelty is not sustained by proof of excessive drinking, not amounting to habitual intemperance; *Erkins v. Ayer*, 58 Cal. 313, holding that where defendant in a foreclosure suit treated his pleading as an answer, he could not on appeal call it a cross-complaint; and *Shain v. Belvin*, 79 Cal. 264, holding that calling an answer a cross-complaint did not make it such.

**41 Cal. 138-143; 10 Am. Rep. 269. LAVERONE v. MANGIANTI.**

**Owner of Ferocious Dog is liable for injury occasioned by it, p. 140.**

Cited in *Kippen v. Ollasson*, 136 Cal. 641, sustaining instructions as to dog; *Clowdis v. Fresno Flume Co.*, 118 Cal. 320, 323, holding that the owner of a vicious bull was liable for his injuring a man on the road, while driven by the owner's servants. Affirmed in *Melsheimer v. Sullivan*, 1 Colo. App. 26, as to a dog; to same effect in *Conway v. Grant*, 88 Ga. 42; 30 Am. St. Rep. 146; *Vredenburg v. Behan*, 33 La. Ann. 639, as to a bear; and notes on this point in 2 Am. St. Rep. 458; 16 Am. St. Rep. 631; 35 Am. St. Rep. 879.

**41 Cal. 147-202. STOCKTON RAILROAD COMPANY v. STOCKTON.**

Statute will be sustained unless clearly unconstitutional, p. 162.

Cited in dissenting opinion in *Tucker v. Barnum*, 144 Cal. 271, noted under *Borland v. Hildreth*, 26 Cal. 161.

Unconstitutionality of a statute can be declared by the court only where the federal or state constitution has deprived the legislature of the power to enact it, or limited it to something else than the subject to which the legislature has applied it. It will not do to talk about the spirit of the constitution as imposing a limitation upon the legislative power, p. 162.

Cited in *University v. Bernard*, 57 Cal. 613, to the point that "an act should not be declared unconstitutional and void unless there is a clear repugnance between the act and the constitution; and where there is a reasonable doubt whether the act is repugnant to the constitution, its constitutionality should be affirmed"; also in *Gilchrist v. Schmidling*, 12 Kan. 271, holding that a city ordinance, opposed to an unexpressed spirit supposed to pervade the constitution, was not unconstitutional; *Southern Pacific Co. v. Orton*, 6 Saw. 186, 32 Fed. Rep. 473, holding that a statute allowing a railway to change its line of road was not in violation of the constitutional provision that corporations should not be created by special acts; and note on this point in 63 Am. Dec. 519.

What is a Public Use, as regards eminent domain, seems to have been left, in large measure, to the determination of the legislature, p. 168. When the legislature has determined a given purpose to be a public purpose, we must so consider it, unless we can see at first blush that it is not possible that it could be such, p. 175.

Cited in *Consolidated Co. v. Central Pacific Co.*, 51 Cal. 273, holding that lands of a railway company could not be condemned for use as a flume site by a mining company, because it was not a public use; *Lux v. Haggan*, 69 Cal. 304, holding it "safe to say" that supplying water for irrigation to "farming neighborhoods" was for a public use, and "the judgment of the legislature that it is such ought not, therefore, to be disturbed by the courts"; *In re Madera District*, 92 Cal. 310, 27 Am. St. Rep. 114, to the point that "if the subject matter of the legislation be of such nature that there is any doubt of its character, or if by any possibility the legislation may be for the welfare of the public, the will of the legislature must prevail over the doubts of the court"; *County v. Cobrun*, 130 Cal. 634, affirming location by supervisors of public road; *State v. Cornel*, 53 Neb. 559, 68 Am. St. Rep. 631, applying rule to imposition of tax for an alleged public purpose; *Varner v. Martin*, 21 W. Va. 551, to the point that while the court will incline to hold a use public for which land is condemned, it will not hesitate in a proper case to declare a statute unconstitutional, as in the present case, where private property is attempted to be taken for a private road; and notes on this

point in 22 Am. Dec. 690, 691, 692, 695; 28 Am. Dec. 423; 31 Am. Dec. 372; 60 Am. Dec. 595.

"Railroads Concern the Public Interest, as matter of legal judgment," p. 178. "Railroads, though operated by private companies, are by mere legal conclusion for public use; . . . aid may be extended to the construction of such roads by means of the power of eminent domain, or of subscription to capital stock, and by donations made by cities and other political subdivisions of the state, under the authority of the legislature," p. 192.

Cited in Leavenworth Co. v. Miller, 7 Kan. 541, 12 Am. Rep. 465, holding that the weight of authority, and the more recent decisions, are in favor of the validity of statutes authorizing municipal aid to railways; Harcourt v. Good, 39 Tex. 472, holding that a tax to aid construction of a railway bridge was valid, and giving a long list of authorities; and note to 59 Am. Dec. 783.

#### 41 Cal. 202-208. TREAT v. DE CELIS.

Power of Attorney held not to authorize sale of land, p. 208.

Cited in Quay v. Presidio Co., 82 Cal. 6, holding that a power to exchange old certificates of stock for new ones "did not authorize a transfer of the property"; Grant v. Ede, 85 Cal. 421, 20 Am. St. Rep. 238, holding that a letter authorizing an agent to find a purchaser for land at a certain price did not give him power to bind the principal by a contract of sale; Martin v. Ede, 103 Cal. 160, holding that the agent in the last preceding case had only to find a purchaser in order to be entitled to his commission; McFarland v. Lillard, 2 Ind. App. 163, 50 Am. St. Rep. 236, holding that where a broker was authorized to find a buyer for land, his right to the stipulated commission was not defeated by the fact that the seller's wife changed her mind about selling; and note to 17 Am. Dec. 59.

Specific Performance.—Whether a probate court has jurisdiction, not decided, p. 208.

Referred to in note to 73 Am. Dec. 560, on probate and equity jurisdictions.

#### 41 Cal. 211-220; 10 Am. Rep. 272. EX PARTE McLAUGHLIN.

Discharge of Jury, in a criminal case, for failure to agree on a verdict, is not an acquittal of defendant, pp. 213-219.

Distinguished in People v. Cage, 48 Cal. 326, 17 Am. Rep. 437, holding that discharge of a jury for failure to agree, by adjoining the court for the term, without calling in the jury, operated as an acquittal. Cited in Dreyer v. People, 188 Ill. 49, holding second trial after such discharge not barred; People v. Smalling, 94 Cal. 117, holding that where a jury was

discharged for failure to agree, the defendant could not, on a second trial, introduce the stenographer's record of such proceeding for the purpose of showing an abuse of discretion in discharging the jury; *People v. James*, 97 Cal. 401, holding that discharge of jury for failure to agree was no bar to subsequent conviction of defendant, notwithstanding that the court at the first trial instructed the jury to acquit and they ought to have done so. Distinguished in *Ex parte Maxwell*, 11 Nev. 436, holding that discharge of jury for failure to agree was equivalent to acquittal, because the record failed to show properly the reason for the discharge or an adjudication of the point. Cited in *State v. Shaffer*, 23 Oreg. 556, holding that defendant was not put twice in jeopardy by discharge of jury at the first trial; and notes on this point in 12 Am. Dec. 547; 61 Am. Dec. 95; 72 Am. Dec. 201; 25 Am. St. Rep. 527.

**Habeas Corpus** is not a proper proceeding for trying the question of whether the trial court erred in discharging a jury for failure to agree, for defendant has his remedy by appeal, p. 220.

Cited in *Ex parte Hartman*, 44 Cal. 35, holding that an order of the trial court, remanding defendant to await further action of the grand jury, must be reviewed on appeal, not on habeas corpus, the order being "regular on its face, and one which the court had power to make."

**General Citation.**—*Smith v. Crosby*, 86 Tex. 19.

#### 41 Cal. 221-231. THOMPSON v. MCKAY.

**Former Judgment.**—Omission of the court to give plaintiff in ejectment any relief is an adjudication that he is not entitled to it, p. 227.

Cited in *Lamb v. Wahlenmaier*, 144 Cal. 95, applying rule to omission to give affirmative relief prayed for by defendant; *Hodge v. Shaw*, 85 Iowa, 143, 39 Am. St. Rep. 294, holding a former judgment for damages conclusive; *Nashua Railroad v. Boston Railroad*, 164 Mass. 226, 49 Am. St. Rep. 458, holding that where a decree for accounting fund for plaintiff on two issues and was silent on a third, it was a decree for defendant on the third issue; *Ankeny v. Fairview Co.*, 10 Oreg. 397, holding that failure of a court to issue a statutory order for abatement of a nuisance was equivalent to a refusal to issue it; *Rackley v. Fowlkes*, 89 Tex. 816, holding that in an action for rent on two issues, where the judgment was on one issue only for plaintiff, it was *prima facie* an adjudication that he was not entitled to recover on the other, unless he could show that the other issue was withdrawn or the court refused to pass on it; and notes to 85 Am. Dec. 209, and 44 Am. St. Rep. 570.

**In Construing Doubtful Contract**, court ascertains relation of parties to each other, and to subject matter, and construes it to give effect to intent, if it can be done without disregarding language of instrument, p. 228.

Cited in *Bank v. Bowers*, 141 Cal. 262, applying rule to construction of

guaranties; Burke Land etc. Co. v. Wells etc. Co., 7 Idaho, 57, construing mortgage for purchase price.

Trust Deed held to convey the fee, and the grantee had the right, to transmit the legal title to a purchaser, in execution of the trust, p. 230.

Affirmed in More v. Calkins, 95 Cal. 438, 29 Am. St. Rep. 129, 130, saying: "Whether the conveyance is to be treated as a mortgage or as a deed of trust must depend upon its essential character, as shown by its terms, and not whether the grantee is a creditor whose debt is to be paid out of the proceeds to arise from the execution of the trust which is declared"; also in Savings & Loan Society v. Burnett, 106 Cal. 528, holding a conveyance to be a deed of trust, not a mortgage, and saying that "the decisions of this court upon such instruments have never been in flux, but, to the contrary, have been set and consistent since first they came before it." Cited in notes to 64 Am. Dec. 200; 19 Am. St. Rep. 274; 31 Am. St. Rep. 26; 63 Am. St. Rep. 473. Distinguished in Brown v. Bryan, 6 Idaho, 16, trust deed given to secure debt payable at specified time is a mortgage and cannot be foreclosed by notice, and sale under power in such trust deed.

Offer to Prove a fact, excluded by the court on objection of the other side, precludes the party objecting from claiming a failure of proof on the point, p. 230.

Affirmed in Union Pacific Co. v. Harris, 63 Fed. Rep. 804. Cited in Missouri etc. Co. v. Elliott, 102 Fed. 103, holding party so estopped.

Supplemental Answer must be filed in ejectment, if title acquired pending suit is relied on, p. 231.

Cited in People's Bank v. Hodgdon, 64 Cal. 98, holding that title acquired pending suit was not affected by the judgment, because not pleaded by supplemental answer.

#### 41 Cal. 232-234. LYNCH v. KELLY.

Justice of the Peace.—His failure to make a formal entry of judgment in his docket, after verdict and before issuing execution, though irregular, does not invalidate the execution sale, p. 233.

Cited in Montgomery v. Superior Court, 68 Cal. 411, holding that an appeal from a justice's court was valid, though taken before entry of judgment by the justice, but after verdict; Turner v. Harrison, 43 Ark. 237, holding that failure of the justice to enter judgment after verdict did no harm; Corthell v. Mead, 19 Colo. 394, holding that a justice may be compelled to enter judgment, saying: "He has no discretion in the premises; it is his duty to enter judgment upon the verdict; he is to enter the judgment, not render it." Cited in Porter v. Parker, 4 Dak. Ter. 401, holding that rights of parties were determined by the verdict, and entry of it by the justice was enough; Jones v. Carnahan, 63 Ind. 234, holding that an execution prematurely issued by the clerk of a

circuit court was irregular but not void, and could be objected to only by a party to the execution; *Cross v. Knox*, 32 Kan. 733, holding that an order of sale by a district court, and proceedings of the sheriff under it, though irregular, were not void, but could be set aside on petition of the judgment debtor at any time prior to confirmation; *Swain v. Gilder*, 61 Miss. 672, holding that if a justice failed to perform the clerical duty of entering a judgment, "but dealt with the record as if it were completed, then the judgment, however irregular, informal or defective, will be upheld"; *Humboldt Co. v. Terry*, 11 Nev. 245, holding that a judgment entered irregularly by the clerk of a district court must be treated as a valid judgment; *McClain v. Davis*, 37 W. Va. 338, 341, in dissenting opinion, a majority of the court holding that a judgment entered by justices of the peace *nunc pro tunc*, two years after verdict, was irregular.

41 Cal. 234-237. **PEOPLE v. HUGHES.**

Variance between indictment and proof, though immaterial, causing an acquittal, precludes another trial; but if the variance is material, the acquittal is no bar to a later conviction, p. 236.

Cited in *People v. Terrill*, 132 Cal. 500, as to forgery prosecution, acquittal where held conclusive, although variance was immaterial; *People v. Leong Quong*, 60 Cal. 108, holding that where Chinese defendant was described by one name, the fact that he was also known by another did not constitute a variance; *People v. Tonielli*, 81 Cal. 280, holding a variance of one word in a letter as alleged and proved was immaterial; *People v. Arras*, 89 Cal. 226, holding a variance as to initials of a name immaterial; *Dill v. People*, 19 Colo. 473, 41 Am. St. Rep. 257, holding a plea of former acquittal bad, because evidence to support the second indictment was inadmissible on the first; *State v. Sullivan*, 9 Mont. 496, holding a variance as to name of person assaulted material, and therefore former acquittal could not be pleaded; *State v. Van Cleve*, 5 Wash. 643, where the trial court allowed the first name of the alleged owner of stolen property to be changed after the trial had begun, and this was held ground for reversal.

Ownership of property stolen is essential in an indictment for larceny, where the offense is otherwise not described with sufficient certainty, p. 237.

Affirmed in *People v. Wallace*, 94 Cal. 501.

41 Cal. 239-242. **HUSSEY v. CASTLE.**

Conveyance by Husband to Wife raises no presumption of fraud as against one who recovers judgment for a tort, three months later, against the husband. p. 241.

Cited in *Kane v. Desmond*, 63 Cal. 465, holding that the gift of a piano

by husband to wife was not void as to a subsequent creditor; *Wilhoit v. Lyons*, 98 Cal. 413, holding that an assignment for benefit of creditors, not recorded as prescribed by law, was good as against subsequent creditors; *Hill v. Meinhard*, 39 Fla. 117, holding good a conveyance by husband to wife as against a judgment recovered a year later; *Walsh v. Byrnes*, 39 Minn. 528, holding that "where voluntary conveyances are actually fraudulent, and the purpose or effect of the same is to prejudice subsequent creditors, such conveyances will also be void as to them"; *Farr v. Swigart*, 13 Utah, 156, holding that in a suit against a constable, for levying on property of the wife under an execution against the husband, evidence of a gift from husband to wife, before the debt was incurred was inadmissible; and notes to 86 Am. Dec. 634, 642.

#### 41 Cal. 242-247. RANDALL v. FALKNER.

If Defendant Appears and Answers, in an action of unlawful detainer he waives any defect in the summons, p. 245.

Cited in *Taylor v. Hill*, 115 Cal. 151, holding, in a suit to compel a sheriff to pay preferred claims out of proceeds of execution, that "by their voluntary appearance and answer the defendants submitted themselves to the jurisdiction of the court."

**Unlawful Detainer.**—Entry on public land, not open for pre-emption and in the occupation of another, is unlawful, though the entry was in good faith for the purpose of claiming title as soon as the land should be open for entry, p. 246.

Cited in *Phoenix Co. v. Lawrence*, 55 Cal. 146, holding that entry on a mining claim, in possession of another, was unlawful, for "a party cannot enter for the purpose of obtaining title or color of right. He must have it before he entered." Cited in note to 77 Am. Dec. 554.

**Costs.**—Fees of witnesses, subpoenaed but not called, allowed, p. 247.

Cited in *Cole v. Ducheneau*, 13 Utah, 46 holding such fees taxable, unless it appeared that the witnesses were unnecessarily numerous; and note to 88 Am. Dec. 181.

#### 41 Cal. 247-253. QUINN v. WETHERBEE.

**Relief in Equity**, against a judgment at law, on the ground of mistake, cannot be granted where the mistake occurred through negligence of the attorney of the party who seeks relief, p. 252.

Cited in *Hollenbeak v. McCoy*, 127 Cal. 23, holding injunction to prevent enforcement of justice's judgment properly denied under facts stated; *Champion v. Woods*, 79 Cal. 22, 12 Am. St. Rep. 129, holding it negligence on the part of a wife to allow a decree of divorce in her favor to omit reference to property to which she was entitled, and the mistake could not be relieved in equity; *Davis v. Chalfant*, 81 Cal. 631, holding that where undertaking on appeal was not filed in time, through negli-

gence of an attorney, equity would not interfere to order a new trial; *State v. Jones*, 12 Mo. App. 94, holding that ignorance, stupidity, and silliness of the attorney for defendant in a criminal case was ground for reversal of the judgment; *Tederall v. Bouknight*, 25 S. C. 281, to the point that the purchaser of land at a probate sale was not affected by an error that did not appear on the face of the record; and note to 19 Am. Dec. 606.

**41 Cal. 253-256. CHASE v. CHRISTIANSON.**

**Erroneous Decision** on a question arising in a case, where the court has jurisdiction of the subject and the person, does not invalidate the judgment when questioned collaterally, pp. 255, 256.

Cited in *Hutchinson v. Inyo Co.*, 61 Cal. 121, to the point that "having jurisdiction, any error committed by the court in the exercise of its jurisdiction is not reviewable by certiorari"; *Schwartz v. Palm*, 65 Cal. 55 to the point that if a decree of foreclosure orders the sale of a greater or less estate than that described in the complaint and mortgage, it is erroneous and should be corrected on motion; *Hodgdon v. Southern Pacific Co.*, 75 Cal. 648, holding that the appointment of a guardian for a minor by a probate court could not be attacked by the minor in a suit by him to quiet title to his lands; *Meyer v. Sulzbacher*, 76 Ala. 127, holding where a decree, making a woman a sole trader, gave her more power than the statute authorized, the excess was properly treated as surplusage on collateral attack; *Gay v. Bowles*, 74 Mo. 424, holding that although a judgment in a tax suit was erroneous, it did not invalidate the title of the purchaser at execution sale; *Hagerman v. Sutton*, 91 Mo. 530, holding that an error in a foreclosure judgment could not be attacked in a later suit of ejectment for the land; *Babb v. Bruere*, 23 Mo. App. 607, holding that where a circuit court issued execution on transcript from an irregular judgment of a justice of the peace, the circuit court could recall the execution and make it and the judgment conform to the law; *Vantilburgh v. Black*, 2 Mont. 377, holding that an irregular decree in a lien case could not be collaterally attacked; *Mach v. Blanchard*, 15 S. Dak. 439, default judgment erroneously granting more relief than demanded is not void and cannot be collaterally attacked; *George v. Nowlan*, 38 Or. 541.

**41 Cal. 256-262. SOUTHERN PACIFIC COMPANY v. REED.**

**Condemnation of Street for Railroad** entitles the owner of an abutting lot to damages, notwithstanding that he has already received compensation for a former condemnation of the same street by another railroad, p. 261.

Distinguished in *Montgomery v. Santa Ana Co.*, 104 Cal. 196, 43 Am. St. Rep. 97, holding that the owner of a lot abutting on a street cannot maintain ejectment against a railroad company that uses the street un-

der a city ordinance permitting such use, because the use of the easement by the railroad does not exclude the plaintiff or the public from the street, and therefore there was no ouster; and disapproving the distinction made between street-cars and railways as to imposing an additional burden on the servitude. Cited in Colorado Co. v. Mollandin, 4 Colo. 161, holding that where a city ordinance allows a railway to cross a street, the company is not liable for injury thereby to the property and business of an abutting owner, so long as the company keeps within the bounds of its lawful authority and does nothing wantonly or negligently; Canastota Co. v. Newington Co., 69 Conn. 184, holding that the proposed construction of an electric railway on a public road, the soil of which belongs to the adjacent owners, can be enjoined, where the line proposed deviates from the route prescribed by the charter of the company; Kucheman v. C. & D. Co., 46 Iowa, 372, holding the owner of the fee in a street entitled to damages for use of the street by a railway; Chicago K. & W. Co. v. Woodward, 47 Kan. 194, holding that "the weight of authority is in support of the rule that the construction of a railroad along a highway imposes an additional burden and constitutes a taking within the constitution"; Pierce v. Drew, 136 Mass. 84, 49 Am. Rep. 15, in dissenting opinion, a majority of the court holding that the legislature may authorize the construction of a telegraph line on a highway, without compensation to owners of the fee; Detroit Railway v. Mills, 85 Mich. 669, in dissenting opinion, a majority of the court holding that a street railway does not impose an additional servitude on a street; White v. Northwestern Co., 13 N. C. 616, 37 Am. St. Rep. 644, holding that "where the public have only an easement in the street, and the fee of the soil of the street is retained in the abutting owner, a steam railroad cannot, under the constitutional guaranty of private property, be lawfully constructed and operated thereon against his will and without compensation"; Gulf Co. v. Fuller, 63 Tex. 470, holding that a railroad company, authorized to lay track in a street must pay damages occasioned to the owner of an abutting lot by depreciation of his property; and note on this point in 18 Am. St. Rep. 612.

**41 Cal. 263-278. PEOPLE v. KLUMPKE.**

**False Call** in a deed must be rejected, p. 278.

Cited in Dutch v. Boyd, 81 Ind. 148, as to whether a description in a mortgage, by township, section, and range was sufficient, and the point not decided.

**41 Cal. 278-290. GREGORY v. NELSON.**

Judgment should be a simple sentence of the law upon the material ultimate facts, admitted by the pleadings or found by the court, p. 282.

Cited in Rankin v. Newman, 107 Cal. 610, holding that where plaintiff refused to receive an amount tendered to him by defendant, and

the record showed the amount was due, "the appropriate sentence of the law should have emanated from the court, the previous contumacy of the plaintiff notwithstanding," and judgment should have been rendered for the amount tendered; *Perkins v. Sierre Nevada Co.*, 10 Nev. 413, holding a judgment final in spite of a proviso therein, for the proviso was surplusage; *Humboldt Co. v. Terry*, 11 Nev. 243, holding that entry of judgment by the clerk was valid, though not strictly in the proper form.

Judgment, on a point entirely outside of any issues made or tendered by the pleadings, as a finding of fact, conclusion of law, or judgment of the court upon the subject matter embraced therein, is superfluous and nugatory, p. 284.

Cited in *Balfour etc. Co. v. Sawday*, 133 Cal. 231, as to default judgment in ejectment including property not embraced in complaint; *Benton v. Benton*, 122 Cal. 398, noted under *Burnett v. Stearns*, 33 Cal. 468; *Emeric v. Alvarado*, 64 Cal. 594, to the point that the supreme court, "on appeal from a judgment," considers only questions that arise on "the judgment-roll, and any bill of exceptions, statement on motion for new trial, and statement of the case on which the appellant relies"; *White v. Douglass*, 71 Cal. 119, to the point that where the answer admits an allegation of the complaint, a finding against the admission is outside the issues, and a judgment based on such finding is erroneous; *Cummings v. Cummings*, 75 Cal. 441, holding that a decree regarding distribution of property in a divorce suit was improper, because it was "neither consistent with the case made by the complaint nor embraced within the issues made by the answer"; *Reinhart v. Luggo*, 75 Cal. 640, holding that partition suits are governed by the same rule as ordinary actions, that a finding and judgment, "contrary to the facts admitted by the pleadings and outside of the issues made or tendered, are erroneous"; *Noonan v. Nunan*, 76 Cal. 49, holding in a suit for dissolution of partnership that "as the appellant neither asked for the judgment which it is now claimed should have been entered in the court below, nor alleged facts upon which such a judgment could properly have been entered, he cannot here demand a reversal of the judgment which responded to the issues actually made and submitted to the trial court"; *Ortega v. Cordero*, 88 Cal. 225, 228, holding that a finding, setting forth an agreement of a different date and consideration from that alleged in the complaint, was "entirely outside of the issues made by the pleadings"; *Rudel v. Los Angeles Co.*, 118 Cal. 287, a suit to restrain supervisors from diverting water in a canyon, holding that a finding outside of the issues could not be regarded, and the record did not show facts sufficient to create an estoppel in favor of the findings. Cited in *Brown v. Tucker*, 7 Colo. 39, holding that a judgment properly omitted any order as to disposition of attached property, because there was no reference to it in the pleadings; *Dutro v. Kennedy*, 9 Mont. 107, holding that as the pleadings in a mortgage foreclosure raised no is-

sue as to fixtures, the general law governed the question, and if the court had found otherwise, it would have been outside the issues; *Harris v. Lloyd*, 11 Mont. 405, 28 Am. St. Rep. 485, holding that findings of fact as to a partnership were not within the issues; *Gaston v. Drake*, 14 Nev. 183, 33 Am. Rep. 553, holding that the rule does not apply to a case where relief is denied because a contract is against public policy; *Harkins v. Cooley*, 5 S. Dak. 231, holding that the finding that a deed was a mortgage was outside of any issues.

**Prior Occupant of a Mining Ditch** is entitled to an injunction against a later holder of land over which the ditch passes, to prevent the latter from substituting a flume for the ditch for his own convenience, pp. 288, 290.

Cited in *Allen v. San Jose Co.*, 92 Cal. 140, enjoining a water company, owning an easement in a ditch through another's land, from substituting an iron pipe for the ditch, because it "would result in the creation of a new and different servitude"; *Ives v. Edison*, 124 Mich. 410, 411, 83 Am. St. Rep. 335, 336, enjoining under fact stated a change in flight of stairs over which plaintiff had an easement; *Geddis v. Parrish*, 1 Wash. 591, to the point that a later locator on public lands cannot obstruct the water rights of a prior occupant.

#### 41 Cal. 290-298. MONTGOMERY v. STURDIVANT.

**Habendum clause** in a deed may create an estate for life, though the granting clause conveys a fee simple, pp. 296-298.

Cited in *Klumpke v. Baker*, 68 Cal. 561, holding that a fee simple title passed by a "grant" from husband to wife, and an after-acquired title by the husband "did not inure to the community, but passed by operation of law to his wife, by virtue of his former conveyance to her by grant"; *Anderson v. Yoakum*, 94 Cal. 228, 28 Am. St. Rep. 122, holding that although the habendum clause in a quitclaim deed professed to convey after-acquired title, it did not have that effect, because the grantor "had no interest whatever in the realty at the date of his deed to plaintiff, and it follows that no title, either present or future, vested in her through this conveyance"; *Barnett v. Barnett*, 104 Cal. 200, holding that "it was the intention of the grantor that the habendum should operate as a proviso or limitation to the granting clause, and control it to the extent of limiting the estate conveyed to the plaintiff to a life estate, with a remainder to the issue and heirs of his body"; *Rupert v. Penner*, 35 Neb. 601, holding that a habendum and granting clause construed together conveyed a life estate; *Hart v. Gardner*, 74 Miss. 158, saying: "The rule which required the habendum to yield to the granting clause, when repugnant intents are expressed in the two as to the estate to be conveyed, is applicable only where these intents are both the actual intents of the grantor, and not intents arising by implication of law from the use of the words to which the statute

has affixed a certain meaning. The distinction is between the actual intent of the grantor, expressed in terms of his own, selected to declare that intent, and an intent merely implied by law."

**41 Cal. 298-305. McCULLOUGH v. CLARK.**

Nonverification of Answer cannot be objected to for the first time on appeal, after trial on the merits, p. 302.

Cited in Hearst v. Hart, 128 Cal. 328, on point that plaintiff may in such case move for judgment on pleadings, or take default after striking out answer on motion; People v. Reis, 76 Cal. 276, holding that where the defendant to a petition for mandamus went to trial without objecting to the lack of verification of the petition, he could not raise the objection on appeal; San Francisco v. Itsell, 80 Cal. 61, holding that objection could not be raised on appeal to lack of verification of an answer; San Luis Co. v. Estrada, 117 Cal. 172, holding that plaintiff "will not be allowed to raise the point for the first time in this court that certain allegations of the complaint are not specifically denied."

Proceedings Supplementary to Execution are but a substitute for a creditor's bill at common law. Parties to the proceedings are estopped from again litigating the same matters in another form of action. The judgment debtor may appeal from the decision that a specific parcel of property should be applied to the satisfaction of the judgment, pp. 302, 303.

Cited in Southern Cal. etc. Co. v. Superior Court, 127 Cal. 421, noted under Gilman v. Contra Costa Co., 8 Cal. 52; New Mexico etc. Bank v. Brooks, 9 N. Mex. 126, discussing nature of proceedings and holding jury trial not demandable therein; Herrlich v. Kaufman, 99 Cal. 275, 37 Am. St. Rep. 53, holding that the statutory procedure must be followed, and a creditor's bill cannot be filed unless it is shown "that remedies at law have been exhausted or would be unavailing, and with certain exceptions . . . a necessary averment in a creditor's bill is that an execution has been returned unsatisfied"; Deering v. Richardson, 109 Cal. 79, holding that an order applying money in bank to payment of a judgment was appealable; Lyons v. Marcher, 119 Cal. 383, holding that the court need not make written findings in supplementary proceedings; Hexter v. Clifford, 5 Colo. 170, to the point that the proceedings are a substitute for a creditor's bill; Hoge v. Norton, 22 Kan. 378, holding that the decision of a district court, dissolving an attachment, was conclusive in a suit on the attachment bond; Barber v. Briscoe, 9 Mont. 347, holding that an order refusing to set aside an order for examination of a judgment debtor was appealable; Hayes v. First District Court, 1 Mont. 226, holding that an order to pay money into court, on supplementary proceedings, is appealable, saying of the principal case that "this view may be obiter in the opinion, but as it is stated as a proposition too plain for argument, we have a positive expression of the

view of the California supreme court upon the subject"; *Hagerman v. Tong Lee*, 12 Nev. 334, 335, holding that an order in supplementary proceedings, adjudging a garnishee in contempt for failure to pay over money, was appealable; *Hall v. Harris*, 1 S. Dak. 288, 36 Am. St. Rep. 737, holding that an order denying motion to dissolve attachment is appealable; and notes to 90 Am. Dec. 294, and 100 Am. Dec. 501, on supplementary proceedings.

**Specification of Particulars**, in statement on motion for new trial, wherein the evidence is insufficient to justify the judgment, should "direct the attention of the adverse party to the particular point on which the evidence is claimed to be insufficient," p. 304.

Cited in *In re Yoakam*, 103 Cal. 505, where specifications were held sufficient; and to same effect in *Livestock Co. v. Union Co.*, 114 Cal. 450.

**General Citation**.—*Thornburgh v. Savage Mining Co.* Fed. Cas. No. 13986.

**41 Cal. 308-312. ANDERSON v. FISK.**

**Probate Court** has no jurisdiction, on petition of an executor, to order him to reconvey to the grantor land named in a deed, intended for a mortgage, upon payment of principal and interest of the loan, p. 312.

Cited in note on surviving contracts in 68 Am. Dec. 761.

**41 Cal. 314-318. KING v. BLOOD.**

**Summons** held to sufficiently state "the cause and general nature of the action," as required by section 24 of the Practice Act, a certified copy of the complaint having been filed with the summons, p. 317.

Cited in *Bewick v. Muir*, 83 Cal. 370, holding that a summons contained a sufficient "statement of the nature of the action in general terms," as required by section 407 of the Code of Civil Procedure, saying that "it is injustice to turn a party out of court or reverse a judgment on a view of the summons merely technical, when the summons points to the complaint where the particular statement is made, and if a copy of the complaint is not served on the moving party, he knows where to find it"; *Clark v. Palmer*, 90 Cal. 506, holding that a notice that plaintiff would "take judgment" for the relief demanded in the complaint was in substance a notice that he would "apply to the court" for that relief, for "that being the only lawful way he could take it (Code Civ. Proc., sec. 585), the notice, as expressed, implies that he intended to take it in that mode, and not in any unlawful manner"; *People v. Dodge*, 104 Cal. 490, holding that although a summons made a "lame effort" to state the "cause and general nature" of the action, it was good in the absence of a special demurrer; *Schuttler v. King*, 12 Mont. 161, in dissenting opinion, a majority of the court holding that the statement in

a summons was sufficient under the code; to same effect in *Higley v. Pollock*, 21 Nev. 205; and note to 76 Am. Dec. 580.

41 Cal. 318-322. **ALLEN v. CURREY.**

**Judgment Cannot be Set Aside**, by a suit in the nature of a bill of review, on the ground of newly discovered evidence, three years after entry of the judgment, and where the evidence is solely to the point that the plaintiff in the former suit fraudulently suppressed relevant facts, pp. 321, 322,

Cited in *Estate of Griffith*, 84 Cal. 113, to the point that "the failure of a party to introduce evidence known to him to exist, tending to overthrow his case, is not ground for a suit to set aside the judgment"; *Pico v. Cohn*, 91 Cal. 135, 25 Am. St. Rep. 164, refusing to vacate a decree in a former suit, obtained by bribery of a witness, and saying: "That a former judgment or decree may be set aside and annulled for some frauds there can be no question, but it must be a fraud extrinsic or collateral to the questions examined and determined in the action. And we think it is settled beyond controversy that a decree will not be vacated merely because it was obtained by forged documents or perjured testimony"; *Whitney v. Kelley*, 94 Cal. 154, 28 Am. St. Rep. 111, holding that a bill in equity by the grantee in a deed did not lie to vacate a judgment in ejectment against his grantor, for fraud practiced on the grantor, because the bill was not filed "within the time prescribed for an appeal from the original judgment," and because "plaintiff's grantors had nothing but a mere naked right, and could obtain nothing without filing a bill"; *Steen v. March*, 132 Cal. 618, holding equitable action not maintainable to vacate judgment because obtained on perjured testimony; and to same effect, *McDougall v. Walling*, 21 Wash. 486, 75 Am. St. Rep. 855; *McMillan v. Wooley*, 6 Idaho, 44, bill of review must be filed within time within which an appeal could be taken from the judgment sought to be reviewed; *Miller v. Perris District*, 85 Fed. Rep. 701, holding that the decrees of the superior court, in two counties of California, approving the organization of an irrigation district, were conclusive against attack by a subsequent bill in equity asking that such organization be declared illegal; and citing the principal case to the point that "the frauds for which a bill in chancery will be sustained, to set aside a judgment or decree between the same parties rendered by a court of competent jurisdiction, are frauds extrinsic or collateral to the matter tried by the first court, and not a fraud which was in issue in that suit." Cited in note to 20 Am. Dec. 163, on bills of review.

41 Cal. 322-325. **GUY v. BIBEND.**

**Parol Agreement**, contemporaneous with the making of a note, that it should be payable out of a particular fund, does not go to the con-

sideration, but varies the terms of the note, and is inadmissible as a defense to a suit on the note, p. 325.

Cited in dissenting opinion, Ames v. S. P. Co., 141 Cal. 734, discussing modifications of railroad ticket; Bradford Co. v. Joost, 117 Cal. 209, 210, holding that in a suit to foreclose a chattel mortgage, where the answer alleged an agreement that there should be no personal judgment for a deficiency, it was not necessary to aver that the agreement was written, but if it was not written it would not avail as a defense.

#### 41 Cal. 325-331. KENYON v. QUINN.

**Execution.**—Sale of Land passes to the buyer of the land the title that the judgment debtor had “at the time of the levy, and such as he acquired between the time of the levy and sale,” p. 329.

Cited in Frink v. Roe, 70 Cal. 303, saying: “It is the sale and deed thereunder which passes the title of the execution debtor; . . . the interest or estate of the judgment debtor in and to the property at the date of the sale passes to the purchaser, although acquired after the levy of the execution.”

**Equitable Title** must be pleaded, if relied on as a defense in ejectment, p. 330.

Cited in Hicks v. Lovell, 64 Cal. 18; 49 Am. Rep. 682, holding that where the vendor of land brought ejectment against the vendee for failure to pay the purchase price as agreed, and the defendant's answer included a cross-complaint in equity, plaintiff was entitled to recover, because defendant could not repudiate the contract and retain the land; Arguello v. Bours, 67 Cal. 450, holding that whether defendant relies on his equities as a defense or bases on them a claim for equitable relief, the facts must be set forth in the answer “as fully as it would be necessary to allege them on the stating part of a bill in equity, praying a decree for a conveyance of the legal title”; Reed v. Roush, 2 Mont. 590, holding that a prayer in the answer for costs is for equitable relief; and Lamme v. Dodson, 4 Mont. 590, to the point that equitable title must be pleaded.

#### 41 Cal. 331-335. MORRIS v. DE CELIS.

**Motion for New Trial** should not be granted before the statement is engrossed and certified; and an order, refusing to set aside the order granting the new trial under such circumstances, must be reversed on appeal, p. 334.

Cited in Whitney v. Superior Court, 147 Cal. 540, where motion for new trial brought up ex parte by opposing counsel and was by court inadvertently denied without consideration of merits, court could on ex parte showing by affidavit vacate order and restore motion; Baker v. Borello, 131 Cal. 618, discussing and denying right of supreme court to amend record on appeal from order on motion for new trial,

pending the appeal; *Calderwood v. Peyser*, 42 Cal. 118, holding that an order striking from the files a statement on motion for new trial was erroneous and must be reversed on appeal; *De Gaze v. Lynch*, 42 Cal. 367, holding that it was error to grant a new trial before the statement was engrossed; *Coombs v. Hibberd*, 43 Cal. 454, holding that after a motion for new trial had been denied, the trial court had no power to vacate the order of denial and grant a new trial; and to same effect in *Odd Fellows' Bank v. Deuprey*, 66 Cal. 170; *Carpenter v. Superior Court*, 75 Cal. 598, holding that a writ of certiorari lay where a probate court, after a verdict and judgment against the validity of a will, and denial of a motion for new trial, set the proceedings aside on motion; for the lower court "was not authorized to set aside its action for mere error. . . . The objection that the court has acted in an unauthorized mode goes to the power of the court, and hence its action may be reviewed on certiorari." Cited in *Stonesifer v. Kilburn*, 94 Cal. 42, holding that an order refusing to settle a bill of exceptions was appealable. Affirmed in *Thomas v. Sullivan*, 11 Nev. 283, and *Crosby v. North Bonanza Co.*, 23 Nev. 75.

#### 41 Cal. 335-351. *GERDES v. MOODY*.

**Equitable Defense of defective execution of a power of attorney, sustained in an action of ejectment, brought by vendor of land against his vendee, p. 348.**

Cited in *Hicks v. Lovell*, 64 Cal. 20, 49 Am. Rep. 682, to the point that a vendee in possession, who has performed his part of the contract, has an equitable defense to an action of ejectment by the vendor.

**Statute of Limitations** does not run against the equitable claim of a vendee against his vendor, as to the title in the land, until after the vendor refuses to convey, p. 349.

Cited in *Wormouth v. Johnson*, 58 Cal. 624, holding that the statute did not run against the right of defendant in ejectment to assert a resulting trust arising from the fact that she furnished the purchase money as she had lived on the land since it was bought.

#### 41 Cal. 351-356. *PEOPLE v. WHYLER*.

**Tax for construction of a levee, levied on all the property in the district, is a tax, not an assessment, p. 354.**

Affirmed, as to opening of a street, in *Williams v. Corcoran*, 46 Cal. 555; *Wilson v. Supervisors*, 47 Cal. 92, as to a levee; *Smith v. Farrelly*, 52 Cal. 81, as to a drawbridge.

**Act Taxing Property of District for local improvement, which exempts personal property from its operation is void, p. 355.**

Approved in *Northwestern etc. Ins. Co. v. Lewis etc. Co.*, 28 Mont.

Notes Cal. Rep.—132.

496, holding last clause of Civil Code, section 681, relating to taxation of insurance companies void.

**Clause in Tax Statute** allowing supervisors to remit tax upon such property as they may deem just does not render whole statute void, p. 355.

Approved in *Northwestern etc. Ins. Co. v. Lewis etc. Co.*, 28 Mont. 501, upholding part of Civil Code, section 681, relating to taxation of insurance companies.

**41 Cal. 360-363. ROUSSEL v. KELLY.**

**Unlawful Detainer.**—Tender of rent due, with interest and costs, is no defense, p. 361.

Affirmed in *Ralph v. Lomer*, 3 Wash. 407.

**41 Cal. 363-386. WILSON v. FITCH.**

**Colloquium** is necessary in a complaint for libel, where the words used are not actionable per se, to explain the subject matter and to bring to light the true interpretation of the libelous words, p. 378.

Affirmed in *Clarke v. Fitch*, 41 Cal. 480, holding that "the want of a colloquium cannot be supplied by an innuendo."

Cited in *Cole v. Naustader*, 22 Oreg. 199, holding that an innuendo did not make words in a letter libelous.

**Mitigating Circumstances**, provable in defense of libel, must be such as tend to rebut the presumption of malice or to reduce its degree, p. 380. Public rumors and general suspicion cannot be proved in mitigation, p. 384.

Cited in *Leonard v. McPherson*, 146 Cal. 621, upholding sufficiency of complaint for libel alleging publication by defendants of letter purporting to be written by plaintiff to wife of defendant charging her with boycotting plaintiff's business; *Hearne v. De Young*, 132 Cal. 369, holding inadmissible evidence that newspapers other than defendant's had published similar libels; and to same effect, *Palmer v. Matthews*, 162 N. Y. 103; *Lick v. Owen*, 47 Cal. 258, holding that testimony of mitigating circumstances cannot be in bar of the action, and an instruction to the jury that the presumption of malice was "fully rebutted" was erroneous, for the legal conclusion of malice cannot be rebutted, "and the court cannot assume as matter of law that the plaintiff is entitled to only nominal damages"; *Chamberlin v. Vance*, 51 Cal. 85, holding in an action for slander that evidence of rumors as to the truth of the slanderous charge was inadmissible; to same effect in *Preston v. Frey*, 91 Cal. 110; *Taylor v. Hearst*, 107 Cal. 269, 270, to the point that such proof is not sufficient to defeat the action or to prevent the plaintiff from recovering such damages as he has actually sustained by

reason of the publication, and holding that a "retraction published was properly pleaded and given in evidence, but it could operate only in mitigation of damages, and not as a full defense to the action"; Republican Co. v. Miner, 12 Colo. 87, 88, to the point that circumstances not mitigating are inadmissible; Thompson v. Powning, 15 Nev. 205, holding that circumstances were not mitigating; People v. Glassman, 12 Utah, 247, holding that evidence to rebut malice is admissible in defense of a criminal prosecution for libel; and note to 13 Am. Dec. 490, as to evidence in mitigation of damages for slander.

Defamatory publication is not privileged simply because it relates to a subject to public interest and was published from laudable motives; but the publisher should be allowed the fullest opportunity to show the circumstances under which the publication was made, the sources of his information, and the motives which induced the publication, pp. 382, 383.

Cited in Swan v. Thompson, 124 Cal. 197, holding certain evidence admissible on question of malice though not as to justification; Edwards v. San Jose Society, 99 Cal. 438, 37 Am. St. Rep. 75, holding that the statement, "It is also reported that Edwards is to have charge of the sack," was libelous in a newspaper comment on an election; Gilman v. McClatchy, 111 Cal. 614, holding that an article falsely charging rape was not privileged, though "published in the ordinary course of newspaper business without personal malevolence"; Hearne v. DeYoung, 119 Cal. 681, holding it error to refuse to allow a newspaper correspondent "to testify as to the sources of the information upon which the publication was based, and as to the precautions taken by him in verifying that information"; Pokrok Co. v. Zizkoosky, 42 Neb. 77, holding that a libel against the secretary of a cemetery association was not privileged; Fenstermaker v. Tribune Co., 13 Utah, 536, holding a publication not privileged, though made in good faith as a matter of news; Evison v. Cramer, 54 Wis. 226, holding it unnecessary to decide whether a publication was privileged; Post Publishing Co. v. Hallam, 59 Fed. Rep. 542, holding that a libel against a candidate for congress was not privileged, and saying: "The danger that honorable and worthy men may be driven from politics and public service, by allowing too great latitude in attacks upon their character, outweighs any benefit that might occasionally accrue to the public from charges of corruption that are true in fact but are incapable of legal proof." Cited in notes to 86 Am. Dec. 88, 90, and 15 Am. St. Rep. 359, on libels on candidates.

There is no accurate standard by which to compute the injury, and the jury must necessarily be left to the exercise of a wide discretion, to be restricted by the court only when the sum awarded is so large that the verdict shocks the moral sense and raises a presumption that it must have proceeded from passion or prejudice, p. 386.

(Cited in Dunn v. Hearst, 139 Cal. 241, Grayville v. De Young, 140 Cal. 327, 330, and Lowe v. Herald Co., 6 Utah, 180, sustaining verdicts in this regard; Rhodes v. Naglee, 66 Cal. 682, in dissenting opinion, a

majority of the court holding that a verdict of three thousand dollars for slander was excessive; Harris v. Zanone, 93 Cal. 72, holding a verdict of five thousand dollars for slander not excessive; Lee v. Southern Pacific Co., 101 Cal. 121, holding a verdict of twenty-five thousand dollars for loss of a leg by an employee of a railway company, excessive; Childers v. San Jose Co., 105 Cal. 289, 45 Am. St. Rep. 43, holding an instruction as to exemplary damages in a libel case erroneous, because it assumed that malice in fact had been proven, whereas there was evidence to the contrary and it was a question for the jury; Gilman v. McClatchy, 111 Cal. 616, and Taylor v. Hearst, 118 Cal. 367, 368, holding a verdict of five hundred dollars for libel not excessive; Thirkfield v. Mountain View Assn., 12 Utah, 83, holding that damages in a case of trespass were not exorbitant; Fenstermaker v. Tribune Co., 13 Utah, 540, holding an instruction erroneous for failure to charge that damages should be compensatory only; Speck v. Gray, 14 Wash. 592, holding that damages awarded for crim. con. were not excessive.

#### 41 Cal. 387-393. HILDEBRAND v. STEWART.

**State Lands.**—Location under the statute of April 27, 1863, is invalid, if the land is already settled or occupied, and the affidavit of the applicant does not comply with the statute, p. 392.

Cited in Woods v. Sawtelle, 46 Cal. 391, holding that a defective application was not cured by the approval of the surveyor general; Copp v. Harrington, 47 Cal. 240, holding that the statute of March 24, 1870, curing defective applications, "does not supply the defects in the application, but declares that with all its defects it shall be held good and valid"; Johnson v. Squires, 55 Cal. 104, holding that as an applicant was not an "actual settler," the constitution forbade the sale of state lands to him; Rowell v. Perkins, 56 Cal. 223, holding a defective application cured by the statute of 1870; McCoy v. Byrd, 65 Cal. 93, holding an application void for its failure to specify whether other settlers were on the land; Millidge v. Hyde, 67 Cal. 7, holding an application void because the affidavit did not comply with section 3500 of the Political Code; Cucamonga Co. v. Moir, 83 Cal. 105, holding an affidavit void for failure to describe the land, and the defect was not cured by later statutes; Shively v. Pennoyer, 27 Oreg. 37, holding that a purchaser must show he is legally qualified.

#### 41 Cal. 393-408. HARRIS v. SAN FRANCISCO SUGAR COMPANY.

**Motion for New Trial** is the mode for reviewing an issue of fact, in law or equity, p. 404.

Affirmed in Thompson v. White, 63 Cal. 509; Pico v. Sepulveda, 66 Cal. 337; Allport v. Kelley, 2 Mont. 344. Cited in First Nat. Bank v. Irvine, 2 Mont. 555, holding that the clerk's entry of refusal of new

trial did not relieve the appellant from his duty to file a bill of exceptions.

**Findings of Referee**, on a collateral matter, do not have the effect of a special verdict, and a motion for new trial is not necessary to review such findings, pp. 404, 405.

Cited in *Jones v. Clark*, 42 Cal. 196, holding that on a reference to take an accounting between partners, it was not necessary to move for a new trial in order to have some of the referee's findings changed; *Thompson v. Patterson*, 54 Cal. 546, holding that errors on the face of a referee's report and findings are part of the judgment-roll, and "it is only upon an appeal from the judgments that the court can consider errors apparent on a judgment-roll, or review the verdict or decision of a case if excepted to, or errors assigned on a statement on appeal"; *Faulkner v. Hendy*, 103 Cal. 21, criticising *Thompson v. Patterson*, *supra*, and the principal case, as to the use of the word "report," and holding that on an appeal from the judgment the report of a referee is not part of the judgment-roll and cannot be referred to; *Murphy v. Patterson*, 24 Mont. 583, holding referee's findings on partnership dissolution matter merely advisory and not conclusive on the court.

**Interlocutory Decree**, confirming referee's report and ordering judgment for plaintiff, is not appealable, p. 407.

Cited in *Thompson v. White*, 63 Cal. 509, holding that courts of equity have power to make interlocutory decrees under the code; *Etchebarne v. Roeding*, 89 Cal. 521, holding that an order setting aside a former order, settling a referee's account, was not appealable; *Arnold v. Sinclair*, 11 Mont. 567; 28 Am. St. Rep. 494, holding that a judgment settling partnership affairs was final, and the fact that it appointed a receiver to execute it did not make it interlocutory; *Rhodes v. Williams*, 12 Nev. 26, holding a motion for new trial premature, because a decree dissolving a partnership was interlocutory only.

Stockholder held not entitled to undivided profits, or to a money dividend in lieu of a stock dividend, p. 408.

Cited in note to 99 Am. Dec. 762, on this point.

#### 41 Cal. 409-410. PEOPLE v. HOLLOWAY.

**Motion for New Trial**, in a case of mandamus brought in the supreme court and referred to a district court for trial, should be made in the supreme court, p. 410.

Cited in *In re Philbrook*, 108 Cal. 15, holding that after denial of a petition for rehearing by the supreme court, in the matter of an attorney's disbarment, a motion for new trial did not lie; *People v. George*, 2 Idaho, 850, holding that after the supreme court had decided a mandamus case on issues of law, a motion for new trial did not lie, because a new trial is a re-examination of questions of fact.

**41 Cal. 410-420. SCOTT v. UMBARGER.**

Purchaser from a Trustee, of land fraudulently sold by the trustee, is not protected if he had knowledge of facts sufficient to put him on inquiry as to the fraud, not only at the time of purchasing but at any time before payment of the price and receipt of the deed, p. 419.

Cited in Eversdon v. Mayhew, 65 Cal. 167, to the point that if the purchaseer "had notice, actual or constructive, at any moment of time before the payment of the money, he is not a bona fide purchaser"; Davis v. Ward, 109 Cal. 189, 50 Am. St. Rep. 31, holding that where the purchaser from a mortgagor had paid only a part of the price before notice of defective title, "he was entitled to protection only to the extent that he was hurt"; Murphy v. Clayton, 113 Cal. 158, holding that the claim of the mother of a decedent to a resulting trust in his land should be preferred to the right of the administrator of the estate to sell the land to pay debts, there being no proof that creditors of the estate were induced to give credit by the fact that the land stood in the decedent's name.

**41 Cal. 420-423. ENGLANDER v. ROGERS.**

Tender of performance on his own part must be averred by the party claiming default of the other. To constitute a valid tender by vendee of balance of price, he "must have the money at hand, immediately under his control, and must then and there not only be ready and willing, but produce and offer to pay it," p. 422.

Cited in Hicks v. Lovell, 64 Cal. 20, 49 Am. Rep. 683, holding that "one who appeals to a court of equity to defend him against the legal title to land, of which he is in possession, must do equity by paying the price which he agreed to pay"; Heine v. Treadwell, 72 Cal. 220, holding that an averment in the answer was insufficient as to tender of purchase money by vendee; Cleary v. Folger, 84 Cal. 319, 18 Am. St. Rep. 190, holding that where both parties to a contract of sale of land had failed to perform, time being of the essence of the contract, it was at an end, and a forfeit deposited by vendee with vendor could be recovered by the former, less any damage accruing to the latter by the noncompletion of the purchase; Dennis v. Strassburger, 89 Cal. 589, holding, in a suit by vendee to recover his deposit, that he had failed to show the vendor in default, for conceding the title to be defective, the vendor had thirty days in which to perfect it, and the time had not expired; Newton v. Hull, 90 Cal. 492, 493, a suit to enforce a vendor's lien, disapproving Cleary v. Folger, 84 Cal. 319, and holding that although time was of the essence of the contract, the vendor was not bound to tender a deed except upon tender of payment by the vendee, and having tendered the deed after the payment was overdue, the vendor was entitled to recover on his lien, the vendee having refused to pay; Anderson v. Strassburger, 92 Cal. 41, holding

that a vendee had no right to recover his deposit, because he was allowed ten days to examine title, and he had no right to rescind until after he had given the vendor notice of a defect and the vendor had failed within a reasonable time to remedy it, and the vendee had offered to perform on his part; *Merrill v. Merrill*, 95 Cal. 337, holding a vendee entitled to recover what he had paid on account, without tendering the balance due, because the vendor had placed his deed in escrow and later withdrawn it and rescinded the contract, without demanding any further payment from the vendee; *Phelps v. Brown*, 95 Cal. 575, holding the vendee entitled to recover her deposit; for although she was in default, the vendor had rescinded the contract; also commenting on the previous decisions of the court on this question, and saying that where a vendee had been held not entitled to recover his deposit, "the decision went upon the ground that the vendee was not only not in default, but the contract was still in force." Cited in *Peckham v. Stewart*, 97 Cal. 150, 151, a suit by vendee to recover damages from vendor for his failure to give a perfect title, holding that a written offer by vendee to pay the price was a sufficient tender under section 1496 of the Civil Code, which had changed the common-law rule as to actual production of the money, which was adopted by the principal case; *Hansen v. Slaven*, 98 Cal. 382, holding that the buyer, under an agreement for sale of shares of stock upon call, was properly nonsuited in his action against the seller for failure to deliver, because the buyer did not offer to pay for the stock when he made the call, and the reply of the seller, that the stock was hypothecated and would be delivered as soon as redeemed, was not a refusal to deliver; *Naftzger v. Gregg*, 99 Cal. 86, 37 Am. St. Rep. 26, a case of estoppel by judgment, to the point that the covenants of vendor and vendee are mutual; *Bailey v. Lay*, 18 Colo. 418, holding that where it was agreed that the deed should be delivered upon payment of the first installment of price, the vendor need not deliver the deed until payment or offer to pay; *Stakke v. Chapman*, 13 S. Dak. 272, holding no valid tender established under facts stated; *Arnett v. Smith*, 11 N. Dak. 62, where covenants in contract for sale of land are mutual and dependent, vendor's obligation to convey being dependent upon cash payment and execution of notes and mortgage by vendee, tender necessary to rescission of contract by vendee; *Telfner v. Russ*, 162 U. S. 180, 181, holding that where the vendor of public lands was unable to perform his part of the agreement, on account of his failure to file his surveys in time, he had no right to recover the purchase price from the vendee.

41 Cal. 423-428. **MAHONEY v. BERGIN.**

Attorney held entitled to his fee, according to his agreement with the client, p. 427.

Cited in note 3 McCrary, 68, on champerty.

## 41 Cal. 429-431. PEOPLE v. McGUNGILL.

Challenge for Implied Bias of juror must specify one of the statutory causes; and defendant is not prejudiced by the disallowance of such challenge if it does not affirmatively appear that defendant had exhausted his peremptory challenges at the time the full panel was accepted and sworn, p. 430.

Cited in People v. Durrant, 116 Cal. 196, to the point that "if the judge errs in disallowing a challenge for cause, and the defendant thereafter excuses the obnoxious juror under a peremptory challenge, and the jury is completed without the exhaustion by the defense of all its peremptory challenges, the error of the court will not be reviewed upon appeal, because no injury could have resulted to the defendant"; Shields v. State, 149 Ind. 400, to the point that the challenge must specify the ground; State v. Fourchy, 51 La. Ann. 244, noted under People v. Gatewood, 20 Cal. 148; Territory v. Hart, 7 Mont. 58, 497, holding that alienage of a juror was waived by failure to challenge on that ground; Territory v. Campbell, 9 Mont. 19, holding that refusal to allow questions to a juror as to bias was not a ground for exception, because it did not appear that he was sworn, or that peremptory challenges had been exhausted; State v. Raymond, 11 Nev. 107, 108, to the point that ground of challenge for implied bias must be specified: To same effect in People v. Hopt, 4 Utah, 250, and Southern Pacific Co. v. Rauh, 49 Fed. Rep. 701; Territory v. O'Hare, 1 N. Dak. 42, to the point that no advantage can be taken of the disallowance of a challenge for cause, when peremptory challenges had not been exhausted; State v. Reddington, 7 S. Dak. 375, holding that where peremptory challenges had not been exhausted, a ruling fixing the order in which the challenges should be exercised could not be complained of.

**Defendant as a Witness.**—If he offers himself, counsel for prosecution cannot comment on his refusal to answer questions on cross-examination. The fact that he offers himself does not change the rules as to the limit of cross-examination, and he cannot be made a witness against himself, p. 431.

Cited in People v. Rozelle, 78 Cal. 93, holding that the effect of section 1323 of the Penal Code, as to testimony by defendant, is that he can be cross-examined only as to matters about which he was examined in chief; People v. Crowley, 100 Cal. 481, holding that it was proper to ask defendant on cross-examination if he had not been previously convicted of a felony; People v. Sanders, 114 Cal. 238, to the point that "defendant's failure to testify upon any particular point should not be commented on in argument"; Cited in People v. Arighini, 122 Cal. 126, holding such cross-examination improper under the circumstances detailed; Lockard v. Commonwealth, 87 Ky. 207, holding that defendant waives his constitutional privilege by being a witness, and may be examined on any matter pertinent to the issue;

**State v. Clinton**, 67 Mo. 388, 29 Am. Rep. 509, holding that defendant may be treated like any other witness, and cross-examined as to any pertinent matter; **State v. Harrington**, 12 Nev. 129, 131, holding that the prosecution may comment on defendant's failure to answer questions on cross-examination; **Hanoff v. State**, 37 Ohio St. 188, in dissenting opinion, a majority of the court holding that the trial court properly compelled defendant to answer a question on cross-examination; **Peck v. State**, 86 Tenn. 266, holding that the testimony of defendant may be impeached like that of any other witness, but the court correctly instructed the jury not to allow the impeaching testimony to weaken the presumption of defendant's innocence; and note in 88 Am. Dec. 322, on discrediting a witness.

**41 Cal. 435-439. PEOPLE v. HUNT.**

**Repeal** of a repealing act, as to a county assessor, does not revive the original statute, p. 439.

Cited in **Meek v. McClure**, 49 Cal. 626, holding that a county assessor was properly elected under the existing law; and note to 94 Am. Dec. 220, as to repeal of criminal statutes.

**41 Cal. 439-444. DOOLY v. NORTON.**

**Order Retaxing Costs** is appealable if made after judgment; if made before, it may be reviewed on an appeal from the judgment, pp. 441, 442.

Cited in **Calderwood v. Peyser**, 42 Cal. 118, holding that an order striking from the files a statement on motion for new trial was appealable; **Empire Co. v. Bonanza Co.**, 67 Cal. 410, 411, holding that an order made after judgment, refusing to retax costs, being appealable, it could not be reviewed on an appeal from the judgment; **Stonesifer v. Kilburn**, 94 Cal. 42, holding that an order refusing to settle a bill of exceptions was appealable; **Schallert Co. v. Neal**, 94 Cal. 194, 195, holding that an order allowing an attorney's fee, after judgment in a mechanic's lien case, was appealable, and could not be reviewed on an appeal from the judgment; **In re Eaton**, 7 N. Dak. 273, also discussing and denying right to costs on dismissal of disbarment proceedings; **Reay v. Butler**, 118 Cal. 114, holding that a bond, given on appeal from an order refusing to strike out a cost bill, was improperly made under section 942 of the Code of Civil Procedure, for the appeal was not from "an order directing the payment of money," but was "in effect the denial of a motion to modify a judgment"; **Quitzow v. Perrin**, 120 Cal. 260, holding that orders made after judgment, striking out a cost bill and retaxing costs, were proceedings "having relation to the original or final judgment and became part of it, and the error may be corrected on the appeal from the judgment"; **Commissioners v. McIntosh**, 30 Kan. 236, 239, holding that a motion to retax costs being

an appealable order, a decision on the motion was conclusive against further trial of the question in a later suit. Disapproved in *Orr v. Haskell*, 2 Mont. 351, holding an order refusing to retax costs not appealable, and saying of the principal case: "No new authorities are referred to. . . . and the cases which have been heard by that court are in conflict with its doctrines are not reconsidered and overruled." Cited in *Granite Mountain Co. v. Weinstein*, 7 Mont. 348, holding an order taxing costs after judgment to be appealable; *Reinhart v. Company D*, 23 Nev. 372, holding that no appeal lay from an order refusing to set aside a default; and note in 87 Am. Dec. 109, on appeal from taxation costs.

#### 41 Cal. 444-448. PURDY v. BULLARD.

**Rescinding Sale of Land.**—Fraudulent representations of the vendee, as to property given by him as security for payment, are not ground for the vendor to rescind when it does not appear that the security is inadequate or that the vendor has been injured by the false representations, p. 447.

Cited in *Marriner v. Dennison*, 78 Cal. 213, an action for damages by vendee against vendor for breach of contract to convey, alleging fraud of vendor, holding that a demurrer should have been sustained, by the fraud; *Wainscott v. Occidental Assn.*, 98 Cal. 257, holding that plaintiff in a suit to recover damages for fraud of defendant in exchange of land had not alleged injury from the fraud.

Rescission must be of the whole contract. Vendor cannot rescind without offering to return money paid on account by the vendee, p. 448.

Cited in *Haynes v. White*, 55 Cal. 41, holding that vendee cannot rescind, and recover his purchase money, unless he surrenders the land; *Crossen v. Murphy*, 31 Oreg. 118, holding that in suit by the seller of goods to rescind the contract for fraud, the contract must be annulled as a whole, and cannot be treated as valid in part; and note to 4 Am. St. Rep. 704.

#### 41 Cal. 449-452. ARAM v. SCHALLENBERGER.

Public Nuisance cannot be prevented or abated at suit of a private individual, unless he shows some special damage to him in addition to that received by the public, p. 450.

Cited in *Hogan v. Central Pacific Co.*, 71 Cal. 87, holding that the running of railway cars on a street caused to plaintiff no injury "different in character or kind from that which other land-owners fronting on the line of the street have suffered." To same effect in *San Jose Co. v. Brooks*, 74 Cal. 465, 467, as to obstructing a public road; *Hargro v. Hodgdon*, 89 Cal. 628, holding that an abutting owner on a

public alley could sue to abate a nuisance caused by a neighboring owner building a house in the alley, saying that so far as the house cuts off access from the plaintiff's premises to the public highway, "it becomes a private nuisance. . . . His complaint is not that it obstructs the street or road, but that it prevents him from reaching it." Affirmed in Jacksonville Co. v. Thompson, 34 Fla. 350, as to laying railway tracks in a street. Cited in note on this point in 31 Am. Dec. 132, 133, 134.

**41 Cal. 452-455. PEOPLE v. JOHNSON.**

**Confession of defendant in a criminal case must be voluntary, p. 454.**

Cited in People v. Eckman, 72 Cal. 583, holding that a statement made voluntarily by defendant was not a confession; and note in 6 Am. St. Rep. 246.

**Subsequent Confession is presumed to have been made and influenced by the same hopes and fears as the first, p. 455.**

Cited in Coffee v. State, 25 Fla. 511, 512, 23 Am. St. Rep. 532, 533, holding that if a confession is made under illegal influence, the same influence is presumed to continue through subsequent confessions, unless the contrary is clearly shown; and note in 6 Am. St. Rep. 249.

**41 Cal. 455-458. KOHLER v. HAYES.**

**Conditional Sale.—The buyer cannot transfer the title until he has performed his part of the contract, pp. 457, 458.**

Cited in VanAllen v. Francis, 123 Cal. 477, 479, noted under Putnam v. Lamphier, 36 Cal. 151; Perkins v. Mettler, 126 Cal. 105, 107, holding sale of stock merchandise a conditional one under facts stated; Lippincott v. Rich, 19 Utah, 149, holding sale conditional and discussing rights of parties thereto after condition broken; Chase v. Whitmore, 68 Cal. 547, holding that purchase of a note, after maturity, from one holding it as bailee, gave the buyer no title as against the real owner; Palmer v. Howard, 72 Cal. 205, 1 Am. St. Rep. 61, holding that the intention, in a sale of personal property, was "to transfer the ownership of the property, reserving a security for the price," making it in effect a mortgage, governed by the provisions of the code as to chattel mortgages; Lowe v. Woods, 100 Cal. 412, 38 Am. St. Rep. 304, holding that the buyer of a horse, under a conditional sale, had no power to create a lien on the animal in favor of a stable-keeper, under section 3051 of the Civil Code, for he was not the owner; Vermont Co. v. Brow, 109 Cal. 241, 50 Am. St. Rep. 40, holding that the buyer of goods under a conditional sale had no title that subjected them to levy and sale on execution for his debts; Rodgers v. Bachman, 109 Cal. 556, 557, holding that an agreement regarding sheep created a conditional sale of them, and it was the duty of the court to carry out the in-

tention of the parties; Gilman Co. v. Norton, 89 Iowa, 443, 48 Am. St. Rep. 403, holding that the unauthorized sale of chattels by an agent, who had power only to loan them, passed no title as against the real owner; Sanders v. Keber, 28 Ohio St. 640, holding that the seller of a mirror, on the installment plan, was entitled to it as against an innocent purchaser from the buyer's wife; Singer Co. Graham, 8 Oreg. 22, 34 Am. Rep. 575, holding that the sale of a sewing machine, by one who had bought it on the installment plan and not fully paid for it, passed no title; to same effect in Russell v. Harkness, 4 Utah, 206, as to sale of machinery; Truman v. Hardin, 5 Saw. 118, holding that where the seller of mules had replevied them for failure of the buyer to pay the price according to agreement, the assignee in bankruptcy of the buyer had no right to recover them; and notes on this point in 89 Am. Dec. 127, and 37 Am. Rep. 668.

#### 41 Cal. 458-462. PEOPLE v. McCRRORY.

Continuance of a murder case should have been granted, on defendant's motion, for absence of material witnesses, it being the first application for a continuance, p. 461.

Cited in People v. Plyler, 121 Cal. 165, noted under People v. Dodge, 28 Cal. 445; dissenting opinion in Territory v. Harding, 6 Mont. 339, a majority of the court holding that such continuance should not be granted if the prosecution would admit that the witnesses would testify as they had in their affidavits.

Plea of Guilty should be made by defendant himself in open court, and he may be allowed to withdraw it if entered inadvertently or ignorantly or in hope of mitigating his sentence, pp. 461, 462.

Cited in People v. Scott, 59 Cal. 342, holding that defendant should have been allowed to withdraw the plea, there being some doubt of his sanity at the time he made it; People v. Villarino, 66 Cal. 230, to the point that where a defendant without counsel pleads not guilty, he may apply before trial for leave to withdraw the plea and demur or move to dismiss; Salina v. Cooper, 45 Kan. 16, allowing a plea of guilty to be withdrawn; and State v. Blake, 5 Wyo. 120, holding that defendant had sufficiently assented to pleading guilty of a lower degree in the hope of mitigation of sentence.

#### 41 Cal. 462-466. CRANMER v. PORTER.

Destruction of Deed after delivery does not revest title, p. 466.

Cited in Slaughter v. Bernard, 97 Wis. 190, noted under Killey v. Wilson, 33 Cal. 690.

Defendant in Ejectment where plaintiff relies on a paper title, may show the true title to be outstanding in a third person without connecting himself with it, p. 466.

**Affirmed**, as to an action to quiet title, in McGrath v. Wallace, 85 Cal. 627, 630. Distinguished in Robrecht v. Reid, 114 Cal. 361, holding that in ejectment by a mortgagee, who had bought in the mortgaged premises at foreclosure sale, the mortgagor could not set up an outstanding title in his assignee in bankruptcy, who had deeded the premises to him before the mortgage was made, and the deed had been declared void in a later suit by the mortgagor to quiet his title as against the mortgagee.

**41 Cal. 467-469. LORENZANA v. CAMARILLO.**

**Abuse of Discretion** by the trial court, in granting or refusing a new trial, for insufficiency of the evidence to justify the verdict, is the only ground for reversal of the order on appeal, p. 469.

Cited in Braithwaite v. Aiken, 2 N. Dak. 62, holding that granting a new trial was an abuse of discretion, saying: "The party recovering a judgment has valuable rights, which cannot be dissipated by the judicial breath"; Serles v. Serles, 35 Or. 295, noted under Walton v. Maguire, 17 Cal. 92.

**41 Cal. 469-472. VILLA v. PICO.**

**Homestead** is not exempt from execution sale, unless it is actually a homestead at the time of the sale, p. 472.

Affirmed in Power v. Burd, 18 Mont. 26.

**41 Cal. 472-481. CLARKE v. FITCH.**

**Judicial Notice**.—"Whatever the phrase 'squatter riot' may elsewhere mean, in its popular sense, it has a well understood meaning in this state, which is so general and notorious that we will take judicial notice of it," p. 477.

Cited in note to 89 Am. Dec. 692, on this point.

**Libel**.—The accusation that plaintiff "figured prominently in squatter riots" is not libelous per se, there being no colloquium to explain it nor anything in other parts of the alleged libel to show its meaning, p. 481.

Cited in Thompson v. Powning, 15 Nev. 212, holding that when the language of an article alleged to be libelous is susceptible of different constructions, it must be submitted to the jury.

**41 Cal. 481-485. SALMON v. VALLEJO.**

**Covenant in Deed**, that a rancho contains four square leagues, does not run with the land, p. 484.

Cited in note, on real and personal covenants, in 47 Am. Dec. 577.

**41 Cal. 485-488. SANCHEZ v. NEARY.**

**Motion for Nonsuit** should distinctly state the grounds, p. 487.

Affirmed in Coffey v. Greenfields, 62 Cal. 609; Loring v. Stuart, 79 Cal. 201. Cited in White v. Rio Grande etc., 22 Utah, 141, holding motion properly denied for such insufficiency; Lewis v. Mining Co., 22 Utah, 53, noted under Kiler v. Kimball, 10 Cal. 268. Distinguished in Daley v. Russ, 88 Cal. 117, saying that "the reason of the rule is to afford an opportunity to correct such defects as admit of correction. . . . The reason does not apply where the defects do not admit of correction." Affirmed in Wright v. Fire Ins. Co., 12 Mont. 477; also, Mattoon v. Fremont Co., 6 S. Dak. 198, as to a motion to direct verdict for defendant.

**41 Cal. 489-494. WESTERN PACIFIC COMPANY v. TEVIS.**

**Right of Way** over public lands, or any other right which is of less magnitude than the entire title, or the right to acquire the title by purchase, may be granted to a railway company by an act of Congress, p. 493.

Cited in Farley v. Spring Valley Co., 58 Cal. 143, holding that an irrigating company had right of way for its ditch over public lands preempted but not paid for; Southern Pacific Co. v. Burr, 86 Cal. 282, holding that a railway company has the right to bring ejectment for a right of way, as against a settler thereon, the right of way being more than a mere easement; Hamilton v. Spokane Co., 2 Idaho, 907, holding that a grant of right of way is distinct from a grant in aid of a railway, and is superior to inchoate rights of a pre-emptor; Wilkinson v. Northern Pacific Co., 5 Mont. 547, holding that a grant of right of way over public lands is absolute as against the rights of miners. Distinguished in Spokane etc. Co. v. Ziegler, 61 Fed. 394, denying right of way as against pre-emptor who was entitled to final receipt.

**Claimant of public lands**, as against a right of way of a railroad, is one having some interest in the land which is recognized by the laws of the United States, p. 494.

Cited in McLaughlin v. Menotti, 89 Cal. 364, 365, holding that under a federal statute providing that a railway land grant shall not "impair any pre-emption, homestead, swamp-land or other lawful claim. . . . one who has simply entered upon a parcel of public land and improved it, without complying with the laws providing for the acquisition of the title, cannot be said to be possessed of a lawful claim."

**41 Cal. 494-500. ARMSTRONG v. DAVIS.**

**Newly Discovered Evidence**, if only cumulative, is not ground for new trial, p. 500.

Affirmed in Barton v. Laws, 4 Colo. App. 219; Hines v. Driver, 100

Ind 325. Cited in *Snell v. Cisler*, 1 Utah, 301, holding that evidence was not newly discovered.

Surprise, at proof of a fact put in issue by the pleadings, is not ground for a new trial, p. 499.

Cited in note on this point in 78 Am. Dec. 519.

#### 41 Cal. 501-504. **SOUTH BEACH ASSOCIATION v. CHRISTY.**

Writ of Possession in ejectment does not lie against one in possession, adversely to plaintiff, at beginning of the action, and not made a party thereto, p. 504.

Cited in *Miller v. Blackett*, 47 Fed. Rep. 549, holding that a tenant in common in possession of land, not made a party to a suit in ejectment against his cotenant, is not affected by the judgment; and notes on this point in 39 Am. Dec. 313, 314, and 15 Am. St. Rep. 61.

#### 41 Cal. 507-511. **PEOPLE v. DUNCAN.**

Franchise for a turnpike road, being a personal trust, not assignable without the consent of the granting power, does not pass to the assignee in bankruptcy of the grantee, p. 511.

Cited in *Gregory v. Blanchard*, 98 Cal. 313, holding that section 388 of the Civil Code, providing that the franchise of a corporation for a toll road may be sold on execution, does not authorize such sale when the franchise is held by an individual; *Atlantic & Pacific Co. v. St. Louis*, 66 Mo. 280, holding that sale of a franchise was valid, because the state was the grantor and had authorized the sale; *Montgomery v. Multnomah Co.*, 11 Oreg. 353, 356, holding it unnecessary to decide whether a ferry franchise could be assigned, but even if it could, only the state could object, in an appropriate proceeding; *Hackett v. Wilson*, 12 Oreg. 37, 40, being the same case and opinion as 11 Oreg. 353, 356, *supra*; *Hackett v. Multnomah Co.*, 12 Oreg. 127, conceding for the purposes of the case that a ferry franchise was not assignable, but holding *an assignment valid because the granting power had consented*; *Nixon v. Reid*, 8 S. Dak. 516, holding it unnecessary to decide whether a ferry license was assignable, because the granting power had consented to the assignment; *In re Scott*, 6 Saw. 235, 11 Fed. Rep. 134, to the point that a franchise of a toll bridge does not pass to the assignee in bankruptcy of the owner; and elaborate note, on transfer of franchise, in 35 Am. St. Rep. 396. Distinguished in *Carter v. Meuli*, 122 Cal. 369, noted under *Wood v. Turnpike Co.*, 24 Cal. 474.

#### 41 Cal. 512-514. **MATHEWS v. KINSELL.**

**Findings** should be mere statements of the ultimate facts in controversy and the legal consequences from the facts admitted and proven; but they must be inconsistent with the judgment, or it will be allowed to stand, p. 514.

Cited in *Murphy v. Bennett*, 68 Cal. 530, to the point that "findings should be statements of the ultimate facts in controversy, and not of probative facts or mere conclusions of law," and holding that certain findings were of the ultimate facts, and not conclusions of law; *Smith v. Mohn*, 87 Cal. 497, holding that findings met and negatived "all the ultimate facts affirmatively alleged in the answer"; *Perry v. Quackenbush*, 105 Cal. 306, holding that "if from a consideration of the probative facts this court should determine that they did not justify the finding of the ultimate fact, it would determine that the evidence was insufficient to justify the decision. This, it has been repeatedly held, cannot be done in this mode"; *Southern Pacific Co. v. Whitaker*, 109 Cal. 274, to the point that "findings of probative facts, where the ultimate facts necessarily resulted from them, have been held sufficient," and holding that even if an omitted finding had been made, "it must have been in favor of defendants . . . . and the plaintiff was in no way prejudiced by the failure"; *McCarthy v. Brown*, 113 Cal. 17, holding that "to determine the sufficiency of a finding of fact, it is only necessary to ascertain what statement of that fact is required in the pleading"; also that the force of a finding, "as a fact, is not impaired by its having been placed under the heading of conclusions of law." Cited in *Chumasero v. Vial*, 3 Mont. 379, holding that an appeal from the judgment-roll, "the judgment will be allowed to stand unless there is an absolute inconsistency between the express findings and the judgment"; *Alder Gulch Co. v. Hayes*, 6 Mont. 32, holding that on an appeal from the judgment, the question whether the findings are supported by the evidence cannot be considered; and *In re Tsu Tse Mee*, 81 Fed. Rep. 564, approving the principal case, and holding that the findings of a commissioner in his order deporting a Chinese immigrant were sufficient.

#### 41 Cal. 515-519. **CAMPBELL v. JONES.**

**Verbal Promise of Judge**, out of court, to extend time for filing statement on motion for new trial, is insufficient; the order must be in writing, and either entered in the minutes of the court in open session, or signed by the judge and filed with the papers in the case, within the statutory time, p. 518.

Cited in *Cooney v. Furlong*, 66 Cal. 522, holding that right to move for new trial was lost by failure to file a statement; *Shumway v. Leakey*, 73 Cal. 262, holding that a sheriff was not entitled to fees without an order of court, and "what the judge told the defendant on the street is not an order"; *First Nat. Bank v. Irvine*, 2 Mont. 556, holding that where an appeal is from the judgment and refusal of new trial, a statement filed within the statutory time from date of the latter order is sufficient; *Clark v. Strouse*, 11 Nev. 79, holding that an order extending time for filing statement must be filed with the papers or entered on the minutes within the statutory time. Distinguished in

**Elliott v. Whitmore**, 10 Utah, 257, holding that under the statute if an order extending the time for filing statement is granted within the statutory time, it need not be filed until later.

**Form of Verdict**.—Objections cannot be raised for the first time on appeal, p. 519.

Affirmed in **Ryan v. Fitzgerald**, 87 Cal. 347.

**41 Cal. 519-521. CHILD v. HUGG.**

Sale by Broker as Pledgee of mining stock to cover margins, without sufficient notice to pledgor, is valid if the pledgor ratifies the sale, p. 521.

Cited in **Hill v. Finigan**, 62 Cal. 439, holding that ratification by pledgor of sale by pledgee to himself was sufficient to validate the sale; to same effect in later decision in same case in 77 Cal. 274; 11 Am. St. Rep. 283; **Sharpe v. National Bank**, 87 Ala. 650, holding that where the pledgee bought the pledge at private sale, and the pledgor after receiving an account gave his note to the pledgor to cover the deficiency, this was a ratification, unless done in ignorance of material facts, in which case the pledgor might disaffirm within a reasonable time; notes to 49 Am. Dec. 737, and 79 Am. Dec. 502, 503, on pledgee's right to sell; and note to 75 Am. Dec. 315, on stockbrokers.

**41 Cal. 521-524. PECK v. LOVETT.**

Continuance cannot be refused on the ground that the other party is willing to admit that an absent witness will testify in a certain way, if the admission does not extend to all the matters that the party calling the witness expects to prove by him, p. 524.

Cited in **White etc. Co. v. Simpson**, 10 S. Dak. 449, holding continuance improperly denied under facts stated; note 74 Am. Dec. 148.

**41 Cal. 525-532. SINTON v. ASHBURY.**

Legislature may compel a municipal corporation to pay in cash or by taxation the fees of commissioners for street widening, being a claim which in good conscience it ought to pay, even though there be no legal liability to pay it, p. 531.

Affirmed in **Creighton v. San Francisco**, 42 Cal. 452, holding that a special act of the legislature, authorizing a city to pay a contractor for street work was mandatory; **In re Market St.**, 49 Cal. 549, holding that commissioners for opening a street could not assess abutting owners for payment of the claim of a contractor on an abortive contract, for if the claim was one "affecting a public conscience," it "constituted a public burden, common to the state at large, or perhaps to the municipality"; **People v. Lynch**, 51 Cal. 35, 36, 21 Am. Rep. 693, saying that in the principal case "it seems to have been conceded by counsel that

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the legislature has power by special act to direct and control the disposition of the funds or property of a municipal corporation for a municipal purpose"; and holding, on page 34, with regard to a street assessment, that "an attempt by the state legislature to order an improvement within the limits of an incorporated city, and to levy an assessment to pay for it . . . . is unconstitutional, because it is mandatory in its nature, and deprives the board of trustees, or legislative department of the city government, by whatever name it be known, of all choice or discretion in reference to the improvement"; People v. Holladay, 93 Cal. 248, 27 Am. St. Rep. 192, holding that a city "has the authority to maintain an action for the purpose of preserving the rights of the general public to the use of squares, or land claimed as such, within its limits, and that in such action it is authorized to put in issue the alleged rights of the people to such easement, and that the state itself is bound by the result of such litigation, if the same is not collusive"; Conlin v. Board of Supervisors, 114 Cal. 408, holding that under the present constitution the legislature can "make no appropriation of public moneys for which there is no enforceable claim, or upon a claim which exists merely by reason of some moral or equitable obligation which, in the mind of a generous or even a just individual, dealing with his own moneys, might prompt him to recognize as worthy of some reward." Cited in Pearson v. State, 56 Ark. 154, 35 Am. St. Rep. 94, holding that a statute relieving a county treasurer from liability for loss of county and school funds, by burglary from his safe, was valid; Newman v. Emporia, 32 Kan. 464, holding that although illegal street work had been ratified by a city ordinance, an abutting owner was entitled to have the collection of an assessment therefor enjoined, for it was void; Board of Commrs. v. Snyder, 45 Kan. 638, 639, 23 Am. St. Rep. 744, 745, holding a statute valid that authorized a town to vote bonds for reimbursement of citizens for money advanced by them to build a court house; Wilcox v. Deer Lodge Co., 2 Mont. 578, holding that a statute authorizing the issue of county warrants, to reimburse citizens who had made a county road, was constitutional; Wooster v. Plymouth, 62 N. H. 214, holding that the legislature may provide that claims against a town for injuries from defects in highways shall be settled by referees without a jury trial; Luehrman v. Taxing District, 2 Lea, 442, holding that the legislature has the power to establish taxing districts and give them the rights of an incorporated city; and note in 80 Am. Dec. 733, on legislative power over municipal corporations.

Opening of Streets is clearly a municipal purpose, and whether the cost of such enterprises shall be borne by the contiguous property, or by all the property of the city, or a certain proportion by each, is a matter for legislative discretion, p. 532.

Cited in Byrne v. Drain, 127 Cal. 667, discussing effect of amendment

to section 6, article 11, of constitution on Los Angeles charter; Simpson v. Kansas City, 46 Kan. 448, holding that in assessing the cost of a street improvement, the whole street is one taxing district, and is not to be divided into blocks, each liable for the improvement in front thereof; Davidson v. New Orleans, 34 La. Ann. 178, holding that a drainage tax could not be enforced where the property was injured rather than benefited by the work.

**41 Cal. 532-536. BOHALL v. DILLER.**

**Vendor Must Tender Deed** before suit by him to rescind the contract of sale for failure of vendee to pay his last installment, where the agreement was that a conveyance should be executcd on payment of the purchase price, p. 535.

Affirmed in Kelly v. Mack, 45 Cal. 304, a suit on a vendor's lien. Distinguished in Newton v. Hull, 90 Cal. 492, 493, saying that the principal case "does not decide that [vendor] will be in default unless he tender a deed on the very day the purchase money becomes due"; and holding in a suit by a vendor to enforce her lien that she need not tender a deed "except upon tender of payment of the purchase money." Cited in Westerfeld v. New York etc. Co., 129 Cal. 84, noted under Morrison v. Lods, 39 Cal. 381; Merherin v. Saunders, 131 Cal. 691, but holding no tender of deed on execution sale necessary to bind purchaser who has received certificate of sale. Affirmed in Underwood v. Tew, 7 Wash. 301, an action by vendor on notes given by vendee for purchase price. Distinguished in Loud v. Pomona Co., 153 U. S. 579, holding that the covenants in an agreement for sale of land were independent, and "the clearly expressed intention was that the payment of the purchase price of the lands should precede the performance of the . . . covenant to convey."

Damages are not recoverable when complaint does not allege they have been sustained, p. 535.

Cited in Prince v. Lamb, 128 Cal. 125, noted under Pittsburgh etc. Co. v. Greenwood, 39 Cal. 71; Claffin Co. v. Simon, 18 Utah, 162, noted under ~~Raun~~ v. Reynolds, 11 Cal. 14.

**Vendor Cannot Rescind** the contract of sale, for the vendee's non-performance, unless he restore to the vendee whatever he has paid on the contract, p. 535; and the rescission must be in toto, p. 536.

Cited in Heilig v. Parlin, 134 Cal. 102, holding vendee entitled to recover purchase money when vendor has rescinded; Henderson v. Hicks, 58 Cal. 373, holding that a vendor, having returned the consideration to the vendee, had the right to rescind. Distinguished in Central Pacific Co. v. Mudd, 59 Cal. 589, saying it was obvious that plaintiff in the principal case "was not entitled to recover both the possession and the balance of the purchase price"; also that the principal case must be

understood as holding that "if a vendor relies upon his right to rescind, based upon a breach of the contract by the vendee, he must show that he has in fact rescinded or sought to rescind, by restoring what he has received"; and holding that a vendee having failed to perform his part of an agreement, which stipulated that in such event his possession should terminate, the vendor had the right to bring ejectment. Cited in *Hicks v. Lovell*, 64 Cal. 18-20, 49 Am. Rep. 681, 682, holding that a vendor was entitled to recover in ejectment against a vendee who had refused to perform his part of the contract; to same effect in *Gates v. McLean*, 70 Cal. 49, saying that the vendee can retain possession only by paying the purchase money, in which case "it is considered that he is willing to receive such title as the vendor is able to give, and is content with the personal responsibility of the vendor upon his covenants"; *Wilson v. Sturgis*, 71 Cal. 229, holding a vendor not entitled to rescind, because he had not offered to return the consideration; *Cleary v. Folger*, 84 Cal. 319, 18 Am. St. Rep. 189, holding that where both parties to a contract of sale were in default, the contract was at an end, and the vendee was entitled to recover a forfeit he had deposited with the vendor, less the vendor's damages; *Loaiza v. Superior Court*, 85 Cal. 32, 20 Am. St. Rep. 208, holding that rescission by a vendee was in toto, for "the offer was to restore everything of value on the one side, and the demand that everything be restored on the other"; *Hammond v. Wallace*, 85 Cal. 532, 20 Am. St. Rep. 244, holding a nonsuit properly granted in an action by a vendor to set aside a judicial sale made by him as assignee in insolvency for fraud of the vendee in preventing competition in bidding at the auction, because plaintiff had made no effort to rescind, or to return what the vendee had paid. Distinguished in *Stratton v. California Land Co.*, 86 Cal. 361, holding that the vendor, having treated the contract as abandoned for nonperformance by the vendee, could bring an action to quiet title without returning the purchase money. Cited in *Drew v. Pedlar*, 87 Cal. 451, 22 Am. St. Rep. 264, holding that the vendee could recover what he had paid on account, after the rescinding of the contract, notwithstanding that the contract stipulated that such payments should be forfeited as liquidated damages in case of breach; *Kelley v. Owens*, 120 Cal. 509, holding that where vendor brought a bill in equity to rescind a contract of sale, for fraudulent misrepresentations of vendee as to shares of stock taken in payment, and later placed the shares in the hands of the clerk of court, but did not properly assign them until they had been sold for assessments and become worthless, this was not a compliance with the rule that the vendor must return to the vendee anything of value received from him. Affirmed in *Minah Co. v. Briscoe*, 47 Fed. Rep. 281, and *Crossen v. Murphy*, 31 Oreg. 118.

**41 Cal. 536-544. SAN JOSE v. TRIMBLE.**

Adverse Possession, for five years from taking effect of the act of

1863, will bar recovery under Mexican or Spanish titles not then confirmed; but the possession must have been continuous for the statutory period, and if interrupted, even by force or fraud, . . . . the statute will begin to run only from the time of the re-entry, p. 543.

Cited in Grimm v. Curley, 43 Cal. 253, holding an alcalde grant barred by adverse possession under the act of 1863; Hayes v. Martin, 45 Cal. 563, holding that where decree of confirmation of a Mexican grant was rendered before the act of 1863, and defendant had entered adversely before that date, the running of the statute in his favor was not prevented by the fact that proceedings were pending for the approval of plaintiff's survey; Unger v. Mooney, 63 Cal. 595, to the point that adverse possession must be uninterrupted for the statutory period; Norris v. Moody, 84 Cal. 153, holding that if the decision in the principal case, that the statute began to run in favor of an adverse occupant before the issuance of a patent to the confirmees, was correct, the statute had run in the case at bar from the date of a final decree of confirmation, even under the act of 1863; but as the code had omitted the provisions of the act of 1863, the statute had certainly run under the code. Cited in McGrath v. Wallace, 85 Cal. 626, holding that an adverse possession had not been continuous, because it was interrupted by judgment and writ of possession in ejectment against a tenant of the adverse claimant; Anzar v. Miller, 90 Cal. 345, holding that the statute did not begin to run in the case of an imperfect Mexican grant, not presented to the land commission for confirmation, until after issue of a patent, because it could not run as long as the fee was in the United States; Ohm v. San Francisco, 92 Cal. 455, holding that a claim against the city, for possession of land therein under the "Scherrebeck title," was barred by sections 318 and 319 of the Code of Civil Procedure, and that "five years of adverse possession at any time since the passage of the act of 1863 . . . bars an action by the holder of an imperfect (unpatented) title of Spanish or Mexican origin"; Altshul v. O'Neill, 35 Or. 214, quoting Hayes v. Martin, 45 Cal. 559. Disapproved in Valentine v. Sloss, 103 Cal. 221, holding that a suit by confirmees of a patent on a Mexican grant, begun within five years after issuance of the patent, was not barred by the statute, and saying of the principal case: "The views first announced in that case were modified on rehearing, and were practically repudiated in Gardiner v. Miller, 47 Cal. 570, since which decision it has been uniformly held that the statute does not begin to run until the issuance of the patent." Affirmed as to continuity of adverse possession in Townsend v. Edwards, 25 Fla. 588. Approved by Field, J., as to effect of the act of 1863 on Mexican grants, in Montgomery v. Bevans, 1 Saw. 672; but on motion for new trial, on page 685 he holds section 6 of said act invalid so far as it applies to Mexican or Spanish titles perfected after its passage, saying that "as to titles thus perfected, the ordinary period of limitation must be allowed, from the date of their consummation, which exists with

reference to actions on complete title from other sources." Cited in *Union Mill Co. v. Dangberg*, 81 Fed. Rep. 91, holding that "an adverse use of water for the statutory period must be open, notorious, peaceable, continuous, and under claim or color of right; for if any act is done by other parties claiming the water that operates as an interruption; however slight, it prevents the acquisition of any adverse right"; and note to 99 Am. Dec. 282, on adverse possession.

#### 41 Cal. 545-552. WILSON v. CAPURO.

**Bankruptcy.**—A creditor who has proved his debt cannot maintain an action on the same demand in the federal or state courts, p. 551.

Cited in *New Lamp Chimney Co. v. Ansonia Co.*, 91 U. S. 667, 13 Bank. Reg. 396, holding that as the bankrupt law provides that no discharge from debts shall be granted to a corporation, the payee of a note made by a bankrupt corporation, who had proved the claim and received a dividend, could sue for the unpaid balance in a state court; dissenting opinion in *Eyster v. Gaff*, 2 Colo. 243, a majority of the court holding that bankruptcy of a mortgagor was no bar to a suit of ejectment brought by the mortgagee against a third party, without consent of the bankruptcy court, for the assignee had never taken possession of the mortgaged premises, and the plaintiff in ejectment had filed no claim in bankruptcy; *Spilman v. Johnson*, 27 Gratt. 38, holding that where a judgment creditor elected to prove his debt in the bankruptcy court, this was a waiver of his right to institute any other proceedings in law or equity inconsistent with his claim in bankruptcy.

#### 41 Cal. 552-556. EMERSON v. SANSCOME.

**Sheriff's Deed** transfers what interest the execution debtor had at the date of levy, and does not estop the debtor from asserting a right subsequently acquired, p. 555.

Distinguished in *Frink v. Roe*, 70 Cal. 305, saying that in the principal case the subsequent rights of the debtor were acquired after the execution sale, and holding that "the legal effect of a sheriff's deed . . . is at least equal to that of a quitclaim deed of the same property executed by the debtor on the day of sale. . . . Upon a sale under execution the interest or estate of the judgment debtor in and to the property at the date of the sale passes to the purchaser, although acquired after the levy of the execution." Cited in *Robinson v. Thornton*, 102 Cal. 682, holding that in ejectment by purchaser at sheriff's sale, against the vendee of the execution debtor, the latter may show "not only that he has acquired a different interest or right of possession, but also that the judgment debtor himself had no interest in the lands at the time of the sale"; *Shirk v. Thomas*, 121 Ind. 153, 16 Am. St. Rep. 386, holding that a judgment creditor who buys the land at execution sale gets only the interest that the debtor had at the time the

judgment was entered; Missouri Valley Co. v. Barwick, 50 Kan. 61, holding, with regard to a sheriff's sale, that "when the confirmation occurs and the deed is issued; they relate back to the date of the sale, and entitle the purchaser to the crops which were then unripe and growing upon the premises"; Northern Pacific Co. v. Smith, 69 Fed. Rep. 581, holding that "judgment in an action for the recovery of real property is not a bar to a subsequent action brought or defense interposed by either of the parties to it, when that action or defense is founded on an after-acquired title"; notes in 54 Am. Dec. 546, on judgment in ejectment; and note to 84 Am. Dec. 573, on after-acquired title.

**Entry on Homestead**, under act of Congress of May 20, 1862, gives an interest in the lands and the absolute right of possession from the paramount proprietor which possession, if actually continued for the period of five consecutive years . . . will entitle him to a patent on proof of residence or cultivation during that period, p. 556.

Distinguished in Reinhart v. Bradshaw, 19 Nev. 258, 3 Am. St. Rep. 888, holding that a tenant in common, in possession of government land for himself and cotenants, cannot acquire a homestead therein, for under the decision in Atherton v. Fowler, 96 U. S. 513, the right of pre-emption cannot be exercised on land occupied by another, and the possession of one cotenant is for the benefit of all; and saying that if the principal case is opposed to this rule, it was "decided before the decision in Atherton v. Fowler established the contrary doctrine."

#### 41 Cal. 557-561. CARPENTER v. SARGENT.

**Swamp Lands**.—The first payment, required by the act of 1863, must be made within thirty days after record in county surveyor's office of approval of survey or location by the surveyor general, p. 560.

Affirmed in Keema v. Doherty, 51 Cal. 6, 7. Cited in Rowell v. Perkins, 56 Cal. 223, holding that although an affidavit on an application to purchase state lands, under the act of 1808, was defective, the defect was cured by the act of 1870.

#### 41 Cal. 562-565. LEWISTON TURNPIKE COMPANY v. SHASTA AND WEAVERVILLE WAGON ROAD COMPANY.

**Special Damages** to a private person from a public nuisance must be particularly stated, p. 565.

Cited in Siskiyou etc. Co. v. Rostel, 121 Cal. 513, holding complaint insufficient for abatement of obstruction in public street by a private person; Parker v. Bond, 5 Mont. 11, holding that special damages from an injunction cannot be proved unless alleged; Fogg v. Nevada Ry., 20 Nev. 437, holding that demurrer to a suit by an individual to abate a public nuisance was properly sustained, because the complaint averred no special damages differing from the general damage to the public;

and in notes on special damages in 52 Am. Dec. 291 and 87 Am. Dec. 109.

**41 Cal. 566-571. LAWRENCE v. NEFF.**

**Assignment for Benefit of Creditors.**—A conveyance to several laborers, to secure payment of wages to them and their associates, is not such an assignment as is forbidden by the insolvency law, but is either an absolute sale with right to repurchase, or a mortgage, p. 570.

Cited in *Heath v. Wilson*, 139 Cal. 367, 368, noted under *Dana v. Stanford*, 10 Cal. 278; *Wood v. Franks*, 67 Cal. 34, holding that a chattel mortgage was not an "assignment" forbidden by the codes; and intimating that the parts of the opinion in the principal case, declaring that the instrument was not an assignment, "should be disregarded as mere dicta"; *Saunderson v. Broadwell*, 82 Cal. 134, holding that an absolute deed, given in consideration of a prior indebtedness, was not in fraud of creditors; *Sabichi v. Chase*, 108 Cal. 87, holding that a deed of trust to secure creditors was void under section 3457 of the Civil Code; *Lumbert v. Woodard*, 144 Ind. 341, 55 Am. St. Rep. 179, holding that a bill of sale of an electric plant, reserving a vendor's lien, was a chattel mortgage, not an assignment; *Marshall v. Livingston Bank*, 11 Mont. 361, holding that a bill of sale was an assignment under the statute, though called by the parties a chattel mortgage, for it was payment, not security; *Watterman v. Silberberg*, 67 Tex. 105, holding a conveyance to be a chattel mortgage, not an assignment; and to same effect in *Gage v. Chesebro*, 49 Wis. 491.

**41 Cal. 571-582. WALSH v. HILL.**

**Possession of Land** is not evidenced by a general inclosure including the land in controversy and other lands of other parties, p. 582.

Cited in *Davis v. Spring Valley*, 57 Cal. 548, holding that a tract of land fenced on three sides only, though a larger tract had formerly been fenced, was not in the "actual possession" of the party claiming it.

**41 Cal. 583-587. FUQUAY v. STICKNEY.**

**Mechanic's Lien.**—If the owner or claimant of an interest in land, knowing of the erection of a building thereon, fails to make the statutory objection, the liens of materialmen and laborers attach, p. 586.

Cited in *Birch v. Transit Co.*, 139 Cal. 500, construing Code of Civil Procedure, section 1192, and holding owner protected under facts stated; *West Coast Co. v. Newkirk*, 80 Cal. 279, holding that the owner of the fee was liable for lien of a materialman on a building erected by order of a lessee, because the owner did not give notice, under section 1192 of the Code of Civil Procedure, that he would not be responsible; *Hurlbert v. New Ulm Works*, 47 Minn. 85, not deciding the question; and note on this point in 61 Am. Dec. 700.

**Trust Deed** to secure a loan is not a mortgage but a deed conveying a fee, defeasible on the payment of the debt, p. 587.

Affirmed in **Savings & Loan Society v. Burnett**, 106 Cal. 528. Distinguished in **Brown v. Bryan**, 6 Idaho, 16, trust deed executed to secure given debt payable a specified time is a mortgage and cannot be foreclosed by notice and a sale under power of sale in such trust deed.

**41 Cal. 588. WILL v. SINKWITZ.**

**Appeal—Reversal.**—Trial court must follow directions of supreme court on remittitur, p. 593.

Cited in **Cowdrey v. Bank**, 139 Cal. 307, noted under **Argenti v. San Francisco**, 30 Cal. 467.

**41 Cal. 595-610. SALMON v. WILSON.**

**Demurrer for Ambiguity** of complaint is properly overruled where "enough appears in the complaint to render it easy of comprehension and free from reasonable doubt," p. 602.

Affirmed in **Applegarth v. Dean**, 68 Cal. 494; **Kramer v. Halsey**, 82 Cal. 213; **Ward v. Board of Commrs.**, 12 Mont. 31; **Campbell v. Taylor**, 3 Utah, 331; **Hawley etc. Co. v. Brownstone**, 123 Cal. 646, but holding order improperly overruling such demurrer reversible error; **Whitehead v. Sweet**, 126 Cal. 75 (quoted in **Jones v. Iverson**, 131 Cal. 104), and **Holladay Co. v. Kirker**, 20 Utah, 204, sustaining order overruling demurrer.

**Consideration of Deed.**—A deed by a father to his children, in consideration of love and affection, also naming a money consideration entirely disproportionate to the value of the land, held to be on its face a donation and not a sale, and a resort to parol evidence is unnecessary, p. 607.

Cited in **Ford v. Unity Society**, 120 Mo. 510, 41 Am. St. Rep. 718, holding that a deed from mother to daughter, for one dollar consideration, was really for love and affection; **Lake v. Bender**, 18 Nev. 385, holding evidence admissible to show that the real consideration for a deed was not the money expressed, but was other land to be exchanged; **Brown v. Whaley**, 58 Ohio St. 668, 65 Am. St. Rep. 797 (and note, 801,) noted under **Peck v. Vandenburg**, 30 Cal. 11, **Thorpe v. Sampson**, 84 Fed. Rep. 65, holding that a quitclaim deed from husband to wife was for love and affection.

**41 Cal. 611-615. MARSHALL v. CALDWELL.**

**Specific Performance.**—Vendee, upon finding that he has received less land than the contract called for, though entitled to rescind, may elect to have specific performance to the extent of the vendor's interest,

upon paying or tendering the proportionate part of the purchase money, p. 614, 615.

Cited in dissenting opinion in *McCowen v. Pew*, 147 Cal. 310 majority on hearing in bank holding where specific performance is sought of contract to convey land with timber at buyer's option for use of railroad, to be exercised within one year, and vendor prior to exercise of option, cut timber, purchaser entitle to take land and remaining timber with compensation for timber removed; *Hicks v. Lovell*, 64 Cal. 20, 49 Am. Rep. 682, to the point that a vendee who elects to keep the land must tender the purchase money; *Swain v. Burnette*, 76 Cal. 301, holding that although the complaint in an action for specific performance of a contract for exchange of lands was loosely drawn, it stated a cause of action, for "it proceeds upon the principle that where the defendant is not able to perform the whole of his contract, he may, at the option of the plaintiff, be compelled to perform it as far as he can, with compensation for the deficiencies"; *Burks v. Davies*, 85 Cal. 113, 30 Am. St. Rep. 215, to the point that "it is a general rule in cases of failure of title, even where the vendor is not at fault, that the purchaser may rescind the contract and recover any money paid by him as part of the purchase price"; and *Colburn v. Northern Pacific Co.*, 13 Mont. 486, holding that upon failure of vendor's title, vendee may sue to recover the purchase money, and is not bound to wait until ousted, and then sue on the covenants of the deed.

#### 41 Cal. 619-624. BRUNDAGE v. ADAMS.

**Mining Partnership.**—Persons subject to the provisions of the statute must be "copartners," p. 623.

Cited in *Harrigan v. Lynch*, 21 Mont. 42, noted under *Williams v. Gregory*, 9 Cal. 76, note 83 Am. Dec. 110.

#### 41 Cal. 624-626. MARQUEZ v. FRISBIE.

Pre-emption cannot be made of public lands after they have been withdrawn from pre-emption by act of Congress, p. 626.

Affirmed in *Low v. Hutchins*, 41 Cal. 638.

#### 41 Cal. 626-629. THOMPSON v. THORNTON.

Absence of counsel, caused by illness in his family, held to be ground for continuance, p. 629.

Cited in note on this point in 74 Am. Dec. 150. Distinguished in *State v. Vance*, 29 Wash. 451, upholding refusal of continuance on ground of illness of one of attorneys which prevented him from working as effectually as he otherwise could have done, where another attorney assisted at trial.

**41 Cal. 630-632. WILSON v. SHACKLEFORD.**

**Forcible Entry and Unlawful Detainer.**—Temporary absence of the actual occupant of premises is no bar to his bringing the action, under the section providing that there must be actual occupation by plaintiff within five days before defendant's entry, p. 632.

Affirmed in Leroux v. Murdock, 51 Cal. 543, and Giddings v. 78 Co., 83 Cal. 99. Cited in Eccles v. Union Pacific Co., 15 Utah, 20, without relevancy, to the point that after verdict in a case of forcible entry the court should on motion have trebled the damages.

**41 Cal. 634-640. LOW v. HUTCHINGS.**

**Right of Pre-emption** may be defeated by the government devoting the land to another purpose, "at any time before the price is actually paid or tendered," p. 638.

Cited in Thrift v. Delaney, 69 Cal. 194, to the point that "no estate vests in the pre-emptor until he has performed the conditions and has proved up and paid for the land"; holding that the same rule applies to a homestead claimant.

**41 Cal. 640-644. PEOPLE v. EDWARDS.**

Unqualified expression of opinion by a juror as to guilt or innocence of the accused is ground for challenge, p. 642.

Affirmed in People v. Brotherton, 43 Cal. 531. Approved in State v. Morgan, 23 Utah, 225, granting new trial where juror had beforehand prejudiced case but made false answers on voir dire. Cited in notes on this point in 36 Am. Dec. 524, and 53 Am. Dec. 101.

**Bad Character of Deceased** is admissible in a murder trial only on the question of self-defense, p. 644.

Affirmed in Garner v. State, 28 Fla. 137, 29 Am. St. Rep. 241; and State v. Middletham, 62 Iowa, 154.

**41 Cal. 645-657. PEOPLE v. AH SAM.**

Indictment with two counts does not charge two offenses, if the second count refers to the first in such manner as to show that it is the same, p. 648.

Cited in State v. Malin, 14 Nev. 291, holding that it is better to always use the words "said" and "aforesaid" in this connection.

Motion is an application for a rule or order, made *viva voce* to a court or judge. Making out and filing the application itself is not to make the motion. The attention of the court must be called to it. The court must be moved to grant the order, p. 650.

Affirmed in Spencer v. Branham, 109 Cal. 340. Cited in Williams v. Hawley, 144 Cal. 99, discussing sufficiency of record of grounds on mo-

tion for new trial. Distinguished in Wallace v. Lewis, 9 Mont. 403, saying that the principal case did not use the words "viva voce in their exact literal significance," and holding that "the motion itself is the application to the court." Disapproved in Freelove v. Gould, 3 Kan. App. 752, holding on stare decisis, that the filing of a motion within the statutory time was enough, and it need not be presented to the court until later.

Where an indictment charges unlawful possession of unfinished bills similar to those of a foreign banking corporation, the allegation of incorporation is unnecessary, but, if it were material, proof by reputation is sufficient, p. 654.

Cited in People v. Barric, 49 Cal. 344, holding that an averment that stolen property belonged to the "Quicksilver Mining Co. of New York" was sufficiently proved by evidence "that the company known by the name given in the indictment was a corporation de facto, doing business as such"; People v. McDonnell, 80 Cal. 288, 13 Am. St. Rep. 163, holding that an information charging counterfeiting of Bank of England notes need not aver that the bank was incorporated; People v. Oldham, 111 Cal. 651, holding that where stolen property was alleged to belong to a corporation organized under the laws of Colorado, proof of such organization was not necessary, but evidence of a de facto corporation was sufficient, if given with proper detail; State v. McKiernan, 17 Nev. 229, holding it unnecessary to charge that a bank was incorporated. State v. Savage, 36 Or. 215, holding proof of de facto existence sufficient in case of larceny from such corporation.

**Guilty Possession** of counterfeit bills is enough to constitute the crime, pp. 654-656.

Affirmed in People v. McDonnell, 80 Cal. 293, 13 Am. St. Rep. 167. Cited in United States v. Williams, 14 Fed. Rep. 554, holding that possession of a counterfeit bond, not signed and executed, was not an offense; and to same effect in United States v. Sprague, 11 Biss. 381; 48 Fed. Rep. 831.

#### 41 Cal. 661-663. GANNON v. DOUGHERTY.

Counterclaim must exist in favor of the defendants at the time of the commencement of the action, p. 663.

Affirmed in Wood v. Brush, 72 Cal. 227; and McGuire v. Edsall, 14 Mont. 360.

#### 41 Cal. 663-679; 10 Am. St. Rep. 279. MELEY v. COLLINS.

**Estoppel by Delay.**—Where a forged deed has been of record five years, delay of the owner of the land, having knowledge of the forgery, to attack it, does not estop her recovery of the land in ejectment from a vendee of the grantee in the forged deed, pp. 676-679.

Cited in Simpson v. Biffle, 63 Ark. 301, holding that where the grantor of land to a wife fraudulently inserted the husband's name as a grantee before recording the deed, without the wife's knowledge, she was not estopped, by her delay in attacking the forgery, from setting up the forgery as against a purchaser of the land at sheriff's sale on an execution against the husband. Distinguished in Brown v. Wilson, 21 Colo. 322, 52 Am. St. Rep. 238, holding that where title to mining property had been conclusively established by a judgment, one who might have attacked former transfers of the property for informalities was estopped by his delay, and the rule of the principal case did not apply. Cited in Chandler v. White, 84 Ill. 439, holding, as to forged trust deed, that the law does not require the owner of the title to attack the forgery within any particular period, but "he may bide his time, and trust to the strength of his title"; Bausman v. Fause, 45 Minn. 417, holding that although foreclosure proceedings were void for informality, not apparent upon the record, grantees of the mortgagor, who knew of the defect and failed to clear the record within a reasonable time, were estopped to question the validity of the foreclosure, as against buyers at the sale; Hugill v. Kinney, 9 Oreg. 251, 42 Am. Rep. 802, holding that where an advertisement offered a reward for information, and the reward was claimed by one entitled to it, but payment was refused by the advertiser on the ground that the advertisement was unauthorized by him, she was not estopped to set up the want of authority as a defense to an action to recover the reward, for his failure to publicly contradict the advertisement was not equivalent to "standing by and seeing the plaintiff act, knowing that he believed the advertisement genuine"; and note in 23 Am. St. Rep. 469, on registration of forged deeds.

#### 41 Cal. 683-686. THOMPSON v. O'NEIL.

Where there is no statement on appeal, findings necessary to support the judgment are presumed, and to procure a reversal, the express findings must be absolutely inconsistent with the judgment, p. 685.

Affirmed in Chumasero v. Vial, 3 Mont. 379; Alder Gulch Co. v. Hayes, 6 Mont. 32, 33; McMillan v. Carter, 6 Mont. 220, where the appeal was from the judgment and from refusal of new trial; and Sperling v. Calfee, 7 Mont. 527, as to an appeal from an order made on a referee's report in proceedings supplementary to execution. Distinguished in Gay v. Havernale, 27 Wash. 401, reversing decree against plaintiff on ground of laches which recited it is based on findings and evidence when issue of laches not raised by answer.

#### 41 Cal. 686-693. VANCE v. PENA.

**Reasonable Time.**—Where the grantor in a deed covenanted to convey certain lands, or other lands in lieu thereof upon reasonable notice, a delay of eight years in performance is unreasonable, p. 693.

Cited in *Hannan v. McNickle*, 82 Cal. 125, holding that where a memorandum of sale of land stipulated that the price of nine hundred dollars should be paid in monthly installments, not naming the amounts, "if the purchase money did not become due at once, or at the end of two months, it became due in a reasonable time, . . . . and we think that a period of nearly three years was more than a reasonable time for the payment of a sum like nine hundred dollars."

## **VOLUME XLII.**

**By ALBERT RAYMOND.**

**Revised to include citations to Volume 147, by CHARLES L. THOMPSON.**

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### **42 Cal. 11-18. GOODYEAR v. WILLISTON.**

**Mortgage on Growing Crop** remains a lien until crop severed and placed in condition capable of manual delivery and transportation, p. 17.

Cited to same effect in Waterman v. Green, 59 Cal. 142, construing Civil Code, section 2972; Horgan v. Zanetta, 107 Cal. 32, holding, further, attaching creditor not estopped by facts from asserting termination of lien; Ford v. Sutherlin, 2 Mont. 442; Gillilan v. Kendall, 18 Am. St. Rep. 771, defining "now growing and standing" grain as used in mortgage. White v. Brown, 1 Ind. Ter. 106.

### **42 Cal. 18-21. PEOPLE v. AH YING.**

**Insanity at Trial**—Question must be determined before main issues decided on doubt arising on court's own motion, and without necessity of plea, p. 20.

Cited to same effect in dissenting opinion, People v. Lee Fook, 85 Cal. 304, main opinion, distinguishing principal case, pp. 302, 303, sustaining refusal to submit question of insanity to jury, under pleadings; People v. McElvaine, 125 N. Y. 609, holding discretionary submission of question to commission under local statutes.

### **42 Cal. 27-34. BORNHEIMER v. BALDWIN.**

**Time for Appeal**—Statutory limitation is peremptory, p. 31.

Cited to same effect in Henry v. Merguire, 111 Cal. 2, holding time not extended by facts stated; Weinrich v. Porteus, 12 Nev. 104, ruling similarly as to appeals from successive orders; Solomon v. Fuller, 13 Nev. 278, dismissing appeal from judgment because not taken in time; Cedar Canyon etc. Min. Co. v. Yarwood, 27 Wash. 282, fact that no discovery of mineral had been made upon mining claim at time of its location cannot be questioned by cotenant in contest between cotenants; and dissenting opinion, Blythe etc. Co. v. Swenson, 15 Utah, 365, on same point.

**Tenant in Common** cannot while in possession assail common title or call its validity in question, p. 34.

Cited to same effect in *Olney v. Sawyer*, 54 Cal. 382, denying right to assert purchase of outstanding title as against suit of cotenant to be let into possession. Cited, also in note on general subject to *Gilliam v. Bird*, 49 Am. Dec. 389; *Rice v. St. Louis etc. Co.*, 47 Am. St. Rep. 78.

#### 42 Cal. 35-75. APPEAL OF HOUGHTON.

**Appeal Does not Lie** from judgment of county court on report of commissioners for modifying street grades, when declared by statute to be "final and conclusive," p. 51.

Cited to same effect in *San Francisco v. Certain Real Estate*, 42 Cal. 520, on point that such judgment under similar act cannot be collaterally attacked; *Spencer v. Vallejo*, 48 Cal. 72, as to which see *Bixler's Appeal, infra*), affirming jurisdiction of county court in proceedings to condemn water for use of cities; *Bixler's Appeal*, 59 Cal. 554, 555, 557, as to judgment of superior court on appeal from order of supervisors in swamp land proceeding; *Tyler v. Connolly*, 65 Cal. 30, as to judgment imposing fine for contempt though amount within statutory requirement; dissenting opinion in *Sharon v. Sharon*, 67 Cal. 214, main opinion sustaining appeal in action for divorce and to determine validity of disputed marriage; *In re Curtis*, 108 Cal. 663, as to proceeding against supervisor for misdemeanor in office (Penal Code, sec. 772); *State v. Oshkosh*, 84 Wis. 566, as to condemnation proceedings where no appeal allowed by statute; and holding statute constitutional although only remedy by certiorari provided. Cited, also, in note on general subject to *Conant v. Conant*, 70 Am. Dec. 724.

**Statutes Concerning Appeals** should be so construed as to allow right when possible, p. 52.

Cited to same effect in *Payne v. Davis*, 2 Mont. 382, granting right under local statutes; *Portland v. Gaston*, 38 Or. 537, denying supreme court's jurisdiction over appeal from circuit court in street condemnation proceedings under Laws of 1898, 101, 146, sections 112, 114, 117.

**Streets—Appeal.—Finality of judgment of county court discussed, p. 53.**

Cited in *Lambert v. Bates*, 137 Cal. 679, discussing nature of appeal to board.

**Procedure on Appeal** may be regulated by appellate court when jurisdiction conferred but no procedure established by statute, p. 58.

Cited to same effect in *People v. Jordan*, 65 Cal. 649, as to cases of misdemeanor prosecuted by indictment; *Sharon v. Sharon*, 67 Cal. 219, discussing right of appeal in action to determine validity of disputed marriage and for divorce; *State v. District Court*, 24 Mont. 563, and *Western etc. Co. v. St. Ann Co.*, 22 Wash. 163, discussing powers of supreme court under local statutes.

**Jurisdiction of Supreme Court.**—Power of legislature over, discussed, p. 82.

Cited in *Ex parte Towels*, 48 Tex. 446, discussing legislative power over appeals in election contests.

“Special Cases” are within appellate jurisdiction of supreme court, p. 68 (dissenting opinion).

Cited to same effect in *Stockton etc. Co. v. Galgiani*, 49 Cal. 140, as to proceeding to condemn land for railroad; *Lord v. Dunster*, 79 Cal. 483, 484, 486, as to election contest, and see *People v. Perry*, 79 Cal. 108, as to proceedings in nature of quo warranto to try title to office, both distinguishing and commenting on main opinion in principal case; dissenting opinion in *State v. Thayer*, 158 Mo. 55, on point that right cannot be created by intendment beyond clear expression of legislative intent.

**42 Cal. 75-86. PAGE v. VILHAC.**

**Mortgage.**—Deed with agreement for resale held to constitute, p. 78.

Cited in *Garwood v. Wheaton*, 128 Cal. 404, ruling similarly under facts stated; *Spalding v. Brown*, 36 Or. 167, noted under *Henley v. Hotaling*, 41 Cal. 22.

**42 Cal. 86-107. ATKINS v. GAMBLE.** 10 Am. Rep. 282.

**Action for Conversion** lies against bailee who has sold property in violation of authority, p. 98.

Cited to same effect in *Payne v. Elliott*, 54 Cal. 341, 35 Am. Rep. 82, sustaining right of action for conversion of “shares” of stock, independently of certificate therefor; and *Kuhn v. McAllister*, 1 Utah, 273, sustaining conversion for stock and holding complaint sufficient on default.

**Certificates of Stock** are not negotiable instruments, p. 99.

Cited to same effect in *Sherwood v. Meadow etc. Co.*, 50 Cal. 414, discussing rights of bona fide purchaser of lost endorsed certificate.

**Pledgee of Stock** is liable in nominal damages only for conversion when ready and willing to transfer to owner equivalent number of shares in same company, p. 101.

Cited to same effect in *Thompson v. Toland*, 48 Cal. 116, as to liability on redemption; concurring opinion in *Hayward v. Rogers*, 62 Cal. 372, following main case, however, on principle of stare decisis; *Krouse v. Woodward*, 110 Cal. 643, sustaining judgment for specific performance by pledgee of contract for return of stock by compelling him to transfer his own certificate for equal amount; *Craig v. Hesperia etc. Co.*, 113 Cal. 12, 54 Am. St. Rep. 318, on point that identity of shares is not affected by transfer of certificate, and transfer is subject to lien for unpaid assessments; *Marshall v. Marshall*, 11 Colo. App. 512, holding trustee liable to return such equivalent of shares intrusted to him; *Allen v. Dubois*, 117

Notes Cal. Rep.—134.

Mich. 117, 72 Am. St. Rep. 559, but holding pledgor entitled to identical shares when capable of identification; Morris v. East Side Ry. Co., 104 Fed. 417, applying rule of identity to bonds sold on pledgee's sale; note to Wilson v. Little, 51 Am. Dec. 314, on measure of damages for conversion by pledgee; Horton v. Morgan, 75 Am. Dec. 319, on general subject; Griggs v. Day, 32 Am. St. Rep. 724, on liabilities for unlawful use of collateral.

**General Citations.**—Koontz v. Oregon Ry. etc. Co. 20 Or. 18; Southern Pac. R. Co. v. Dufour, 95 Cal. 620, 623, ownership of percolating waters.

#### 42 Cal. 110-121. CALDERWOOD v. PEYSER.

**Appeal.**—“Order After Judgment” includes order made subsequent to judgment, striking from files statement on motion for new trial, p. 113.

Cited to same effect, as to such subsequent orders, in McDonald v. McConkey, 57 Cal. 326, order dismissing motion for new trial; and Marshall v. Golden Fleece etc. Co., 16 Nev. 169, order refusing to dismiss, and amending records; Clark v. Crane, 57 Cal. 633, order refusing to settle statement; Stonesifer v. Hilburn, 94 Cal. 42, order refusing to settle bill of exceptions; but see State v. Murphy, 19 Nev. 94, sustaining mandamus to compel such settlement; Odd Fellows' etc. Bank v. Deuprey, 66 Cal. 170, order denying motion to vacate former order refusing new trial; Empire Co. v. Bonanza Co., 67 Cal. 410, 411, and Comstock etc. Co. v. Allen, 21 Nev. 329, order taxing costs; and Mining Co. v. Weinstein, 7 Mont. 348, order adjudging costs; Sutton v. Symons, 97 Cal. 476, order striking out statement, and see S. C. 100 Cal. 577; and Symons v. Bunnell, 101 Cal. 223; White v. Superior Court, 110 Cal. 57, order directing sale by receiver of husband's property to satisfy judgment for alimony; Beach v. Spokane etc. Co., 21 Mont. 8, 25 Mont. 368, as to such orders extending time to file bill of exceptions, and striking bill from files; Clarke v. Gonn, 2 Mont. 439, order refusing to stay execution.

**Statement on Motion for New Trial** should not be stricken from files because not served, p. 121.

Cited to same effect in Vole v. Hollis, 60 Cal. 572, holding erroneous order denying such motion for want of prosecution, statement having been filed in due time; Beach v. Spokane etc. Co., 25 Mont. 374, noted under Quivey v. Gambert, 32 Cal. 304.

#### 42 Cal. 125-129. FAIRCHILD v. DOTEN.

**Judgment Upon Arbitration** is void if statute not complied with, p. 129.

Cited to same effect in Kreiss v. Hotaling, 96 Cal. 622, sustaining perpetual stay of judgment entered by clerk, because of such noncompliance, and discussing validity as common-law award.

**42 Cal. 129-134. BANK v. HOWLAND.**

Nonpresentation of Claim against decedent cannot be first urged in appellate court, p. 134.

Cited to same effect in *Drake v. Foster*, 52 Cal. 227, where defendant died during trial and administrator substituted, but no claim presented; on same point, *Preston v. Knapp*, 85 Cal. 561, where presentation admitted on trial; and see *Falkner v. Hendy*, 107 Cal. 53, discussing procedure on such substitution; *Chase v. Envoy*, 58 Cal. 353, and *Wise v. Hogan*, 77 Cal. 188 (and see 187), sustaining allegations of complaint as to presentation of claim; *Bemmerly v. Woodward*, 124 Cal. 574, noted under *Hentsch v. Porter*, 10 Cal. 555; *Rose v. Pierce Co.*, 25 Wash. 121, applying rule to presentation of claim against county; *Neis v. Farquharson*, 9 Wash. 517.

Presentation of Claim against decedent must be alleged and proved, p. 132.

Cited to same effect in *Wise v. Hogan*, 77 Cal. 187, sustaining allegations of complaint as to presentation; *Derby v. Jackman*, 89 Cal. 5, holding erroneous judgment on pleadings in suit on claim, where verification and presentation denied.

Joint Judgment against makers of note and administrator of deceased comaker is erroneous if not made as to latter payable de bonis testatoris, p. 131.

Cited to same effect in *Briggs v. Breen*, 123 Cal. 662, but permitting joinder of administrator of deceased promisor with latter's copromisors who were jointly liable; *Bostwick v. McEvoy*, 62 Cal. 502, sustaining, however, joinder of such parties as codefendants; *Braithwaite v. Power*, 1 N. Dak. 470, 471, sustaining judgment against all when administrator had been substituted for defendant dying pending suit, and judgment against him made payable in due course. Cited, also, in note on general subject to *Hawkins v. Ball's Admr.*, 68 Am. Dec. 762.

**42 Cal. 139-148. BREWSTER v. SIME.**

Owner of Mining Stock in name of another as "trustee" is bound by latter's acts as to all persons without actual knowledge of true ownership, p. 143.

Cited to same effect in *Thompson v. Toland*, 48 Cal. 113, as to sale and pledge by broker holding certificates so issued; and *Gass v. Hampton*, 16 Nev. 191, as to pledge by pledgee under like facts; *Newhall v. Central Pacific etc. Co.*, 51 Cal. 350, 21 Am. Rep. 717, applying principle to negotiation by vendee of bill of lading, as against vendor's lien; *Winter v. Belmont etc. Co.*, 53 Cal. 432, as to purchase in good faith of stolen stock certificate of W., issued in name of M., and by him indorsed in blank; *Woodsum v. Cole*, 69 Cal. 145, as to promissory note, holding, however, plaintiff not to be innocent purchaser under facts; *Moore*

v. Boyd, 74 Cal. 70 (from argument of counsel), considering such registry as to bar of stockholder's liability by statute of limitations; Graves v. Mining Co., 81 Cal. 325, on a point that certificates indorsed in blank pass by mere delivery (but see same page, where main case criticised in holding that court will take judicial notice of course of stock transactions); Savings Bank v. Central etc. Co., 122 Cal. 33, holding stockholders personally liable on their note, though signing as "trustees"; Rua v. Watson, 13 S. Dak. 456, holding bona fide purchaser protected in purchase from grantee described as "trustee" under facts stated. Denied in Geyser, etc. Co. v. Stark, 106 Fed. 563, holding corporation negligent in making transfer on request of such trustee, without obtaining consent of beneficiary; Winter v. Montgomery, etc. Co., 89 Ala. 549, discussing rights of transferee of stock of wife registered in name of husband as trustee. Distinguished in Gerard v. McCormick, 130 N. Y. 268, as "not in accordance with the current of authority," holding addition of "agent" by drawer sufficient to put payee on inquiry as to ownership of fund drawn on. Cited, also, in note on general subject to Johnson v. Laflin, 5 Dill. 88; Maples v. Medlin, 3 Am. Dec. 690, where criticised; Crocker v. Crocker, 88 Am. Dec. 297, on rights of bona fide purchaser.

Delivery of Possession of Personality does not per se constitute such indicia of ownership as to bind owner by transferee's acts p. 147.

Cited to same effect in Shaeffer v. Lacy, 121 Cal. 579, noted under Robinson v. Haas, 40 Cal. 474; Creighton v. Black, 2 Mont. 357, as to Montana militia vouchers where statute expressly prohibits assignments unless made in particular form.

**42 Cal. 148-149. SPANGEL v. DELLINGER. S. C. 34 Cal. 476; 38 Cal. 278, sub nom. SPANAGEL v. DELLINGER.**

Appearance of Counsel for defendants generally will be limited by prior express appearance as to some only, p. 149.

Cited to same effect in Hobbs v. Duff, 43 Cal. 492, as to appearance on motion for new trial; Kennedy v. Parks, 120 Cal. 23, as to general appearance on appeal, modified by stipulation in transcript.

**42 Cal. 152-158. GRAY v. COLLINS.**

"Forcible Entry" is one made with violence and strong hand on premises then held in peaceable possession, p. 157.

Cited to same effect in Ely v. Yore, 71 Cal. 133, 134, holding such entry shown by facts, although owner then absent. Cited, also, in note on general subject to Evill v. Conwell, 18 Am. Dec. 146.

"Actual Possession" defined and held shown under facts, p. 156.

Cited to same effect in Schnepel v. Mellen, 3 Mont. 135, construing "actual possession and occupancy" under Townsite Act; Brooks v. Warren, 5 Utah, 121, 122, holding possession insufficient to sustain action

for forcible entry. Cited also in *Townsend v. Edwards*, 25 Fla. 588, ~~aa~~ defining "adverse" possession.

42 Cal. 159-165. **HILL v. HASKIN.** S. C. 51 Cal. 175, 177.

42 Cal. 165-169. **PEOPLE v. HARRINGTON.** 10 Am. Rep. 296.

Criminal Trial.—Prisoner cannot be chained or shackled during trial unless necessary to prevent escape, p. 167.

Cited to same effect in *Faire v. State*, 58 Ala. 80, holding, however, action of court discretionary and not reviewable on appeal; and see *Poe v. State*, 10 Lea (Tenn.) 678, holding no abuse shown; *Lee v. State*, 51 Miss. 570, 572, justifying shackling when necessary to prevent escape; *State v. Kring*, 64 Mo. 592, holding assault by prisoner in courtroom three months previously not sufficient justification; *Territory v. Kelly*, 2 New Mex. 302, holding convenience of court officers no justification but no sufficient cause shown for reversal under facts; *State v. Smith*, 11 Oreg. 208, reversing conviction, on this ground; *State v. Craft*, 164 Mo. 651, but held inapplicable to handcuffing after adjournment of court to facilitate removal from courtroom; *State v. Williams*, 18 Wash. 51, 63 Am. St. Rep. 872 (and note), reversing decision for such manacling; *State v. Allen*, 45 W. Va. 68, but holding matter within discretion of court, which is presumed not abused, when record is silent as to necessity therefor. Cited also in note on general subject to *State v. Lewis*, 27 Am. Rep. 117.

Prisoner is Entitled to be personally present during every stage of prosecution for felony, p. 168.

Cited in note on general subject to *Fight v. State*, 28 Am. Dec. 629.

Prisoner on Trial is in custody of law and subject to orders and control of court, p. 168.

Distinguished in *Lee v. State*, 51 Miss. 667, holding sureties not released by appearance of prisoner at trial if he afterwards escapes during trial.

42 Cal. 169-174. **FARMER v. GROSE.**

Deed with Defeasance Back is mortgage if debt still subsists and continues, p. 172.

Cited to same effect in *Page v. Vilhac*, 42 Cal. 83, and *Winters v. Swift*, 2 Idaho, 66, *McNamara v. Culver*, 22 Kan. 669, holding transaction not a mortgage under facts; *Husheon v. Husheon*, 71 Cal. 411, ruling similarly and holding no express promise of mortgagor to pay debt necessary, whether debt is antecedent, concurrent or to be subsequently created; *Gassert v. Bogk*, 7 Mont. 598, 599, ruling aliter on facts and stating general rules on subject; and see *Lawrence v. DuBois*, 16 W. Va. 462, holding transaction to be a mortgage; *Garwood v.*

Wheaton, 128 Cal. 403, 404, noted under Page v. Vilhac, 42 Cal. 75. Cited, also, in Klein v. McNamara, 54 Miss. 100, on point that equity leans in favor of mortgage rather than sale.

Parol Evidence is admissible to show deed absolute on face to be mortgage.

Cited to same effect in Gassert v. Bogk, 7 Mont. 599.

Deed with Defeasance is not Mortgage simply because of agreement to reconvey on payment of consideration stated, with interest, p. 173.

Cited to same effect in Montgomery v. Spect, 55 Cal. 356, holding transaction mortgage, however, under all facts; Booth v. Hoskins, 75 Cal. 275, ruling similarly on facts where debt created contemporaneously.

General Citation.—Baldaff v. Griswold, 9 Okla. 448.

#### 42 Cal. 174-179. CHRISTY v. DANA.

Probate Claim on Mortgage need not be presented where no relief demanded against estate and mortgagor had no interest in land at time of death, p. 178.

Cited to same effect in Sichel v. Carrillo, 42 Cal. 505, holding presentation unnecessary where mortgage made by wife of deceased debtor.

Title Subsequently Acquired by patent inures in favor of holder of mortgage executed after certificate of purchase, p. 179.

Cited to same effect in Camp v. Grider, 62 Cal. 25, under similar facts; Orr v. Stewart, 67 Cal. 277, as to homestead patent; Stewart v. Powers, 98 Cal. 520, as to pre-emption patent; Weber v. Leadler, 26 Wash. 147, fact that entryman of public land under homestead act mortgages homestead claim before actual entry thereon does not invalidate mortgage. Cited in note on general subject to Clark v. Baker, 76 Am. Dec. 458; Kirkaldie v. Larrabee, 89 Am. Dec. 207; Wilcox v. John, 52 Am. St. Rep. 261.

#### 42 Cal. 180-196. JONES v. CLARK.

Interlocutory Judgment awarded in action for dissolution of partnership, with reference for accounting, p. 181.

Cited in Thompson v. White, 63 Cal. 509, as an instance of such judgment, sustaining procedure in action for specific performance of contract for conveyance of patent right and for accounting; Arnold v. Sinclair, 11 Mont. 567, 568, 28 Am. St. Rep. 494, holding decree of dissolution under facts to be a final judgment.

Superintendent of Mining Partnership cannot bind it except upon contracts usual and necessary in ordinary prosecution of the work, p. 191.

Cited to same effect in Stuart v. Adams, 89 Cal. 372, holding it liable for his purchase of necessary supplies and materials; Heald v. Hendy,

3<sup>rd</sup> Cal. 635, as to provisions furnished to miners' boarding house by superintendent's order. Cited, also, in note on general subject to Skillman v. Lachman, 83 Am. Dec. 108.

**Mining Partnership.**—Note executed by superintendent held executed for it and on its behalf, p. 191.

Cited in McCormick v. Stockton, etc. Co., 130 Cal. 105, holding note signed by president to be a corporate note.

**Finding of Fact** when ultimate and otherwise sufficient, is valid as such although stated as conclusion of law, p. 193.

Cited to same effect in Walker v. Buffandeau, 63 Cal. 316, and Savings, etc. Society v. Burnett, 106 Cal. 538, holding matter, however, to be such conclusion and not finding; Bath v. Valdez, 70 Cal. 355, as to finding on statute of limitations; McCarthy v. Brown, 113 Cal. 19, as to finding on ouster; Blish v. McCormick, 15 Utah, 197, holding matter to be conclusion of law, though stated among findings of fact; Snyder v. Emerson, 19 Utah, 322, holding question immaterial under the pleadings whether portion of finding was a conclusion of law.

**Mining Partners** are governed by laws of ordinary partnerships, except as to rules of *delectus personae*, pp. 193, 195.

Cited to same effect in Stuart v. Adams, 89 Cal. 369, 370, holding each liable for full amount of firm debts; Dellapiazza v. Foley, 112 Cal. 384, ruling similarly as to liability for labor performed on mine; Congdon v. Olds, 18 Mont. 491, holding instruction incorrect that partnership in suit was general partnership; Thomas v. Hurst, 73 Fed. Rep. 374, on point that such partnership is not dissolved by death of member; and see Hoard v. Clum, 31 Minn. 188, stating distinctions in this regard; Childers v. Neely, 47 W. Va. 74, noted under Skillman v. Lachman, 23 Cal. 199; Mining Co. v. First Nat. Bank, 95 Fed. 39, noted under Duryea v. Burt, 28 Cal. 569. Cited, also, in note on general subject to Skillman v. Lachman, 83 Am. Dec. 104, 106; p. 107, as to dissolution; p. 109, as to liability of incoming partners; p. 110, as to necessary parties in actions for dissolution.

**Estoppe will Operate against mining partnership by ratification and acquiescence in acts of their superintendent**, p. 193.

Cited to same effect in Gribble v. Columbus, etc. Co., 100 Cal. 72, holding corporation estopped as to acts of its president in making mortgage.

**Mining Partnership is not dissolved by death of one of its members**, p. 195.

Cited in notes to Breaux v. La Blanc, 69 Am. St. Rep. 416, and Brew v. Hastings, 79 Am. St. Rep. 716, on dissolution.

**Findings will be Refused when immaterial, or of probative facts only**, p. 196.

Cited to same effect in *Perry v. Quackenbush*, 105 Cal. 306, on point that findings of probative facts will not in general control, limit, or modify those of ultimate facts.

#### 42 Cal. 196-201. EX PARTE BULL.

Defective Commitment by justice will not justify discharge on habeas corpus, p. 199.

Cited to same effect in *Ex parte Keil*, 85 Cal. 310, as to failure to show name of person assaulted.

"Good Cause" for detention of prisoner when indictment not found is within discretion of court, p. 199.

Cited to same effect in *Ex parte Isbell*, 11 Nev. 297, holding no abuse of discretion in detention shown.

#### 42 Cal. 201-209. PEOPLE v. CHAMBERS.

Payment "in Cash" for formation of railroad corporation held under facts not to include payment by bank check, p. 205.

Cited in *Albright v. Texas, etc. Co.*, 8 N. Mex. 118, but holding subscribers not relieved from their liability as such or as stockholders by reason of such insufficiency of payment.

Distinguished in *People v. Stockton etc. Co.*, 45 Cal. 314, 315, 13 Am. Rep. 179, 180, holding payment by check sufficient under facts.

#### 42 Cal. 210-215. ESTATE OF SILVEY.

Community Property.—Half vests in surviving wife on husband's death, p. 212.

Cited to same effect in concurring opinion *Smith v. Olmstead*, 88 Cal. 589, 22 Am. St. Rep. 340, applying rule to pretermitted children.

Devise by Husband must be read as applying only to moiety with his testamentary power, p. 213.

Cited to same effect in *Estate of Wickersham*, 138 Cal. 363, noted under *Beard v. Knox*, 5 Cal. 256; *King v. Lagrange*, 50 Cal. 333, construing devise of community property and discussing election by wife; *In re Gilmore*, 81 Cal. 242, under similar devise; *In re Smith*, 108 Cal. 119, holding, however, wife put to election by form of devise of community property.

Will—Election.—Wife is not estopped by claim under will, from asserting rights as survivor of community, p. 213.

Cited to same effect in *In re Gwin*, 77 Cal. 315, and *Pratt v. Douglass*, 38 N. J. Eq. 537, holding no election required and no estoppel under facts; and *In re Gilmore*, 81 Cal. 243, under similar facts.

#### 42 Cal. 215-218. MYERS v. SAN FRANCISCO.

Exemplary Damages are allowable, under statute, for negligent killing of child, p. 217.

Distinguished in Little Rock etc. Co. v. Barker, 33 Ark. 360, 34 Am. Rep. 47, confining damages to expenses and loss of services during minority; Bennett v. City of Marion, 102 Iowa, 426, 63 Am. St. Rep. 455, and held to be justified only by local statute. Cited, also, but point not decided, on general subject in Kansas etc. Co. v. Cutter, 19 Kan. 89; Roach v. Imperial etc. Co., 7 Saw. 231; 7 Fed. Rep. 705; notes to Carey v. Berkshire etc. Co., 48 Am. Dec. 638, and see 641 as to general rule of damages; Louisville etc. Co. v. Goodykoontz, 12 Am. St. Rep. 376, 377, 379.

**Verdict will not be Disturbed unless so excessive as to justify presumption that jury was misled by passion, prejudice or ignorance, p. 218.**

Cited to same effect in Brown v. Evans, 8 Saw. 496, 17 Fed. Rep. 918, sustaining, on motion for new trial, verdict for eight thousand one hundred and fifty dollars and eighty-seven cents in case of aggravated assault and battery. Cited, also, in notes on general subject under first syllabus.

#### 42 Cal. 218-227. HALL v. POLACK.

**Order Improvidently Made may be set aside by court of its own motion, p. 224.**

Cited to same effect in Odd Fellows etc. Bank v. Deuprey, 66 Cal. 170, as to order on motion for new trial; Wiggin v. Superior Court, 68 Cal. 402, as to decree discharging administrator; Baker v. Fireman's etc. Co. 73 Cal. 185, as to order changing place of trial; Carpenter v. Superior Court, 75 Cal. 598, as to verdict and judgment on will contest, holding, however, practice erroneous under facts; People v. Curtis, 113 Cal. 71, as to order of dismissal in criminal case.

#### 42 Cal. 227-230. BOHANNAN v. HAMMOND.

**Carriers.—“Act of God” does not include ordinary results of falling of tide, p. 230.**

Cited in note to Gilson v. Delaware etc. Co., 36 Am. St. Rep. 822, on effect of normal physical laws on liability.

#### 42 Cal. 230-233. CUMMINGS v. STEWART.

**Judgment in Replevin is erroneous which gives defendant option of keeping property in payment of same less than value as found, p. 232.**

Cited to same effect in McCue v. Tunstead, 66 Cal. 487, holding judgment in claim and delivery erroneous because not in alternative: Guille v. Wong Fook, 13 Oreg. 585, ruling similarly where judgment held indefinite.

**42 Cal. 233-235. HIGGINS v. BARKER.**

Diversions of Water.—Judgment for injunction without damages held proper under facts, p. 235.

Cited in *Fabian v. Collins*, 3 Mont. 225, holding complaint for injunction sufficient.

Appropriator of Water may divert it by new ditch to amount of original appropriation, p. 235.

Cited to same effect in *Meagher v. Hardenbrook*, 11 Mont. 390, sustaining change by tenant in common under facts. Cited, also, in note to *Heath v. Williams*, 43 Am. Dec. 282, on rights of others to residue.

**42 Cal. 236-244. MORRIS v. ANGLE.**

Appeal.—Bill of exceptions or statement is necessary to bring up matters not appearing on face of judgment-roll, p. 240.

Cited to same effect in *Hawley v. Kocher*, 123 Cal. 79, holding order striking out part pleading not reviewable on appeal on judgment-roll alone; *Graham v. Linehan*, 1 Idaho, 781, as to order striking out part of supplemental complaint; and *Whitney v. Teichfuss*, 11 Colo. 556, as to order refusing to strike out amended answer.

**42 Cal. 245-252. REEDY v. SMITH.**

Contract is Executed although signed by one party only, if acted upon by the other, p. 250 (247.)

Cited to same effect in *Bloom v. Hazzard*, 104 Cal. 312, holding offer accepted under facts.

**42 Cal. 252-257. KEYS v. MARIN COUNTY.**

District Court or judge thereof may issue writ of certiorari, p. 254.

Cited to same effect in *Reynolds v. County Court*, 47 Cal. 605, under code.

Supervisors Exercise Judicial Functions in proceedings to establish road, p. 254.

Cited to same effect in *Belser v. Hoffschneider*, 104 Cal. 460, as to their action on appeal in street assessment proceedings.

Certiorari against Supervisors in highway proceedings is within discretion of court, p. 255.

Cited to same effect in *Hagar v. Supervisors*, 47 Cal. 228, denying writ, under facts, as to formation of reclamation district; *Spring Valley etc. v. Bryant*, 52 Cal. 140. (Cited in note to *Mayor v. Morgan*, 18 Am. Dec. 238), ruling similarly as to ordinance held to be legislative in character. Cited, also, in note on general subject to *Duggen v. McGruder*, 12 Am. Dec. 530, 536. (Cited in *Johnson v. Supervisors*, 61

Iowa, 92, and Welch v. County Court, 29 W. Va. 73); Wulzen v. Board, 40 Am. St. Rep. 39.

Certiorari is Barred by lapse of time equal to that granted for appeal, unless for good cause shown, p. 256.

Cited to same effect in Reynolds v. Superior Court, 64 Cal. 373 (cited in Smith v. Superior Court, 97 Cal. 352), holding application barred by lapse of more than one year, under facts: Kimple v. Superior Court, 66 Cal. 137, ruling similarly as to delay for more than sixty days; Lyons v. Green, 68 Ark. 209, but holding petitioner not barred under facts stated; State v. Milwaukee County, 58 Wis. 12, denying writ after lapse of two years. Cited, also, in note on general subject to Wulzen v. Board, 40 Am. St. Rep. 31.

#### 42 Cal. 275-279. ARAM v. SHALLENBERGER.

Appeal will be Dismissed when statutory requirements not followed, p. 278.

Cited to same effect in Pardee v. Murray, 4 Mont. 37, as to time of filing undertaking, remitting appeal, however, on motion for diminution to correct error in record as to such filing; Territory v. Hanna, 5 Mont. 247, as to failure to serve notice on proper person. Distinguished in Townsley v. Hornbuckle, 2 Mont. 581, where appeal held merely insufficiently taken, but holding right to dismissal waived under facts.

Appeal—Contempt.—Appeal does not lie from order adjudging one guilty of, p. 279.

Cited to same effect in Tyler v. Connolly, 65 Cal. 31, even when amount of fine within statutory requirement.

#### 42 Cal. 279-285. WHITE v. LYONS.

Code Pleading.—Plaintiff is entitled to such relief as facts alleged in complaint warrant, irrespective of prayer, or form of complaint, p. 282.

Cited to same effect in Whitehead v. Sweet, 126 Cal. 73, holding complaint sufficient to authorize review of corporate election, irrespective of its form or prayer; McPherson v. Weston, 64 Cal. 279, holding complaint sufficiently to state cause of action; and Marriott v. Clise, 12 Colo. 566, ruling similarly as to cross-complaint; and see Schiffer v. Adams, 13 Colo. 581; Watson v. Sutro, 86 Cal. 528, holding action for partition maintainable under facts; Hulsman v. Todd, 96 Cal. 231, ruling similarly, as to action to quiet title to water rights; Bayles v. Kansas etc. Co., 13 Colo. 197, as to action to reform contract for transportation of goods by railway: De Lacy v. Hurst, 83 Ga. 232, as to action in nature of creditor's bill; Carty v. Lattimer, 31 Minn. 241, as to action to reform contract and recover thereunder; Mullen v. McKim, 22 Colo. 475, allowing in action for specific performance, amendment praying for damages

merely; *Morse v. Swan*, 2 Mont. 309, as to action for trespass, discussing right to statutory treble damages.

**Interest.**—Statute changing rate as to judgments affects contracts made before passage but is prospective in operation only, p. 284.

Cited to same effect in *Randolph v. Bayue*, 44 Cal. 369, as to judgment for street assessment; *Dunne v. Mastick*, 50 Cal. 247, as to act allowing interest on legacies; *Estate of Olvera*, 70 Cal. 186, on point that judgment on probate claims bears interest from its date although original demands did not bear interest; *Seton v. Hoyt*, 34 Or. 274, 75 Am. St. Rep. 644, applying rule to interest on county warrants; *Graham v. Merchant*, 43 Or. 312, in action for money had and received where statutory rate of interest changed after money received and before judgment, old rate governs to date of change and thereafter at new rate; *State v. Guenther*, 87 Wis. 676, on point that state treasurer who has failed to pay over moneys to successor is chargeable with interest “at rate in force during period of default as varied by legislation.” Cited, also, in note on general subject to *Aguirre v. Packard*, 73 Am. Dec. 646.

#### 42 Cal. 285-287. SOULE v. BILLINGS.

**Dismissal of Action** cannot be granted on motion of stranger to record, p. 287.

Distinguished in *Kreiss v. Hotaling*, 99 Cal. 386, and rule held changed by section 581 of the Code of Civil Procedure as amended in 1889.

#### 42 Cal. 288-290. ESTATE OF GASQ.

**Probate.**—**Allowance of Fees** to attorney will be affirmed in absence of plain abuse of discretion, p. 290.

Cited in *Briggs v. Breen*, 123 Cal. 661, discussing personal liability of administrator for such fees, irrespective of allowance by probate court.

#### 42 Cal. 290-293. DE LA MONTAGNIE v. UNION INSURANCE COMPANY.

**Guardian's Sale** without order of court is void and does not bind ward, p. 293.

Cited in *Morse v. Hinckley*, 124 Cal. 158, holding invalid a guardian's contract for legal services to be rendered to ward. Distinguished in *Scarf v. Aldrich*, 97 Cal. 366, 33 Am. St. Rep. 194, holding ward bound on collateral attack by sale made on publication of irregular order to show cause.

#### 42 Cal. 298-303. PHELPS v. McGLOAN.

**Findings** will not be disturbed on appeal where evidence conflicting, p. 302.

Cited to same effect in Caulfield v. Bogle, 2 Dak. Ter. 467.

Declarations of Grantor, while in possession, are admissible to prove character of such possession, p. 302.

Distinguished in Frink v. Roe, 70 Cal. 318, holding declarations inadmissible to show that power of attorney to sell was coupled with interest, or that agent retained such interest after conveyance made under the power.

**42 Cal. 303-313. HANSON v. McCUE. S. C. 10 Am. Rep. 299.**

**Water Rights.**—Underground currents in defined channels are subject to same rules as similar surface streams, p. 308.

Cited to same effect and explained in Lux v. Haggin, 69 Cal. 394, discussing rights of riparian proprietors; Tampa etc. Co. v. Cline, 37 Fla. 602, 53 Am. St. Rep. 268, discussing rights to surface and underground waters generally; Willis v. Perry, 92 Iowa, 301, as to diversion from flowing wells and holding further as to measure of damages. Cited, also, in note on general subject to Wheatley v. Baugh, 64 Am. Dec. 727, 730; Gould v. Eaton, 52 Am. St. Rep. 205.

**Water Rights.**—Spring will be presumed fed from ordinary percolations unless presence of underground stream shown, p. 308.

Cited to same effect in Metcalf v. Nelson, 8 S. Dak. 89, holding further as to right of owner of such spring.

**Water Percolating or Filtrating** belongs absolutely to owner of soil, and free from usufructuary rights of others, p. 309.

Cited to same effect in Vineland Irr. Dist. v. Azuba Irr. Co., 126 Cal. 494, distinguishing between such waters and the subsurface flow of a stream; Katz v. Walkinshaw, 141 Cal. 128, 130, 131, 140, on point that underground water not flowing in defined stream is not a watercourse nor governed by law as to riparian rights; Boyce v. Cuppir, 37 Or. 260, and Case v. Hoffman, 100 Wis. 327, applying rule to percolations from springs and marshes having no definite course nor perceptible outlets; Crescent etc. Co. v. Silver King etc. Co., 17 Utah, 456, 70 Am. St. Rep. 817, and note (quoted in Willow Creek etc. Co. v. Michaelson, 21 Utah, 257), holding no prescriptive right to such percolating water established under facts stated; Copper King v. Wabash Mg. Co., 114 Fed. 992, but held inapplicable as to diversion of water from a natural watercourse; note to Wheelock v. Jacobs, 67 Am. St. Rep. 665, et passim, on general subject; Cardelli v. Comstock T. Co., 26 Nev. 297, where all waters flowing through tunnel are derived from drainage of mine and country between mine and mouth of tunnel and from pumpings from lower levels, waters are not subject to appropriation; Deadwood Cent. R. R. v. Barker, 14 S. Dak. 566, 574, where tunnel excavated on plaintiff's land extended into land of defendant, who permitted percolating water, to flow through same, which water was appropriated by plaintiff at mouth of

tunnel, disuse did not prevent defendant from diverting water on his own land; Herriman Irr. Co. v. Keel, 25 Utah, 114, drying up springs caused by escape of percolating waters into and out through a tunnel driven by one on his own land is damnum absque injuria; Painter v. Pasadena etc. Co., 91 Cal. 82, sustaining reservation of such right as profits prendre in deed of soil; Southern Pacific etc. Co. v. Dufour, 95 Cal. 617, 619, 620 (but see dissenting opinion 623, 624), sustaining diversion by such owner, and holding question of priority of appropriation immaterial; Gould v. Eaton, 111 Cal. 644, 52 Am. St. Rep. 204 (and see note, 205), holding rule not affected by character of material of soil, and sustaining such owner's right to divert; Cross v. Kitts, 69 Cal. 222, 58 Am. Rep. 562, holding right to such water acquirable by grant or prescription; People's Gas Co. v. Tyner, 131 Ind. 280, 31 Am. St. Rep. 435 (and see note, 438) applying rule to natural gas deposits and discussing generally surface owner's rights therein; Sullivan v. Northern Spy etc. Co., 11 Utah, 441, discussing conflicting rights of discoverer of such waters and subsequent locator on such land. Cited, also, in notes on general subject to Wheatley v. Baugh, 64 Am. Dec. 727, 730.

**Prescription.**—Presumption of grant of easement from user without interference need not be indulged in when no right shown to complain of user, p. 310.

Cited to same effect in Sullivan v. Zeiner, 98 Cal. 350, holding prescriptive right to support of building by coterminus property not established; Clarke v. Clarke, 133 Cal. 669, ruling similarly as to the right of way; Lakeside etc. Co. v. Crane, 80 Cal. 184 (cited in Sullivan v. Zeiner, 98 Cal. 351), discussing sufficiency of finding upon adverse possession of water right; and see on same point Hargrave v. Cook, 108 Cal. 79; Last Chance etc. Co. v. Heilbron, 86 Cal. 18, holding appropriator to have had no right of complaint against acts of riparian owner; Humphreys v. Blasingame, 104 Cal. 44, on point that in order to acquire right of way by prescription user need not amount to ouster or exclusion of former owner from the right.

#### 42 Cal. 316-326. STOPPELKAMP v. MANGEOT.

**Notice of Change of Terms of Lease** cannot be given when tenancy is for fixed period, p. 322.

Cited to same effect in Canning v. Fibush, 77 Cal. 197, where lease for three months, and holding further that no notice to quit was necessary at expiration of such term; Hurd v. Whitsett, 4 Colo. 87, on point that landlord cannot by notice change term of tenancy; and Reithman v. Brandenburg, 7 Colo. 481, where tenancy was for one month. Cited, also, in note on change of tenancy to Blumenberg v. Myres, 91 Am. Dec. 564, 565.

**Notice to Quit** is not necessary where lease terminates by expiration of term, p. 322.

Cited to same effect in *Lee Chuck v. Quan etc. Co.*, 91 Cal. 597, where tenant held over.

**Jurisdiction of County Court.**—Statute is constitutional extending jurisdiction to actions for unlawful detainer, p. 324.

Cited to same effect in *Rosenberg v. Frank*, 58 Cal. 403, affirming jurisdiction of district court in suit in equity to construe will.

**42 Cal. 326-335. IRWIN v. TOWNE.** S. C. 43 Cal. 23.

**Deed—Description.**—“Northerly,” et cetera, means “due north” only when necessary to prevent failure of deed for want of certainty in location of line, p. 334.

Cited to same effect in *Martin v. Lloyd*, 94 Cal. 202, holding “north” not to mean “due north” under circumstances; *Currier v. Nelson*, 96 Cal. 505, 31 Am. St. Rep. 241, ruling aliter, and holding “north” to mean “due north” unless controlled or qualified by other words; *Segar v. Babcock*, 18 R. I. 204, holding that line so described must yield to any other description which locates it with reasonable certainty.

**42 Cal. 335-339. TORMEY v. PIERCE.**

**Ejectment.**—Judgment for all coplaintiffs is erroneous, where no interest or right to possession shown as to one, p. 338.

Cited to same effect in *Waterman v. Andrews*, 14 R. I. 599, holding rule modified, however, by local statutes.

**42 Cal. 339-345. CORREA v. FREITAS.**

**Miners' Possessory Rights** include right to extend flume so as to prevent appropriation by another, p. 344.

Cited to same effect in *Last Chance etc. Co. v. Bunker Hill etc. Co.*, 49 Fed. Rep. 433, discussing right of change of use of water. Cited, also, in note on general subject to *McClintock v. Bryden*, 63 Am. Dec. 105; and in *Goldhill etc. Co. v. Ish*, 5 Oreg. 106, on point that right to mine on public lands is a franchise.

**42 Cal. 346-358. BRUCK v. TUCKER.**

**Ejectment.**—Answer need not set up title in defendant after plea of general denial, p. 348.

Cited to same effect in *Henry v. Vineland Irr. Dist.*, 140 Cal. 378, discussing right of plaintiff to dismiss complaint under pleadings construed; *Hyde v. Mangan*, 88 Cal. 325, on point that under general denial defendant may show that deed under which plaintiff claims is merely mortgage; *Wixon v. Devine*, 91 Cal. 481, as to evidence under general denial of prior appropriation of water in action for diversion; *Northern Pacific etc. Co. v. McCormick*, 55 Fed. Rep. 602, holding answer sufficient

which sets up both specific denials and new matter showing title, even if latter insufficiently pleaded.

**Equitable Defense** should be pleaded according to rules of equity pleading as applied to complaints praying similar relief, p. 352.

Cited to same effect in Miller v. Fulton, 47 Cal. 147, holding such defense in ejectment insufficiently pleaded; Kentfield v. Hayes, 57 Cal. 411, and Arguello v. Bours, 67 Cal. 450, 451, and Kahn v. Old Telegraph etc. Co., 2 Utah, 195, ruling similarly in similar action; Swasey v. Adair, 88 Cal. 182, ruling similarly as to such defense in action for recovery of personality; Davis v. Holbrook, 25 Colo. 496, as to defense equivalent to specific performance on action of ejectment; Hatcher v. Briggs, 6 Oreg. 41, as to equitable defense in ejectment, and holding cross-bill sufficient; but see Dale v. Hunneman, 12 Neb. 224, holding equitable defense inadmissible under general denial only when affirmative relief is sought.

**Equitable Defense is Allowable** in ejectment although no affirmative relief prayed for, p. 352.

Cited to same effect in Davis v. Davis, 9 Mont. 275, allowing such defense in action to annul conveyance by agent, and holding further as to bar of such defense by failure to plead it; and on last point Brady v. Husby, 21 Nev. 455.

**Specific Performance will be Denied** when set up as equitable defense where terms of contract are unfair, p. 353.

Cited to same effect in Ward v. Yorba, 123 Cal. 452; Windsor v. Miner, 124 Cal. 494; Prince v. Lamb, 128 Cal. 129; Newman v. Freitas, 129 Cal. 288, denying relief for insufficiency of consideration; Stiles v. Cain, 134 Cal. 172 (quoted in Fleishman v. Woods, 135 Cal. 262), holding complaint insufficient as against general demurrer; Nicholson v. Tarpey, 70 Cal. 609, holding, however, objection of inadequacy waived by vendor under facts; Kertchem v. George, 78 Cal. 599, refusing specific performance of contract of sale of land of estate of decedent when absolutely void. Distinguished in Burroughs v. De Couts, 70 Cal. 366, holding equitable defense in ejectment sufficient under facts.

**Construction of Will** is matter of law, p. 355.

Cited in Estate of Lynch, 142 Cal. 375, but holding devise ineffective where description of subject matter is indefinite.

#### 42 Cal. 358-362. WOODS v. WHITNEY.

**Community Property.**—Purchase by husband with community funds and title taken in wife's name constitutes it her separate property as being gift to her, p. 361.

Cited to same effect in Higgins v. Higgins, 46 Cal. 263, holding parol evidence admissible to show such intent in deed to her; Kane v. Desmond, 63 Cal. 465. sustaining gift of personality from husband to wife,

not otherwise void as to creditors; Jackson v. Torrence, 83 Cal. 532, holding, further, wife not estopped, under facts, from claiming property as her own; Flournoy v. Flournoy, 86 Cal. 294, 21 Am. St. Rep. 43, holding intention of parties to control, and husband to have no interest in land conveyed to wife as her separate property because of loan to her from his own funds to make part payment; Rico v. Brandenstein, 98 Cal. 469, 35 Am. St. Rep. 196, denying, however, right of wife to make gift to husband under act of 1857; Henry v. Pesoli, 109 Cal. 60, discussing effect of amendment to section 164 of the Civil Code on presumption from transfer to wife during coverture; Sackman v. Thomas, 24 Wash. 688, noted under Peck v. Brummagin, 31 Cal. 440. Cited, also, in note to Partridge v. Stocker, 84 Am. Dec. 674, on gifts from husband to wife.

Evidence of Intentions is not admissible where undisclosed and secret, p. 362.

Cited to same effect in Crane v. McCormick, 92 Cal. 182, as to conversations regarding intentions, had in absence of other parties.

Intention is to be Deduced from acts and conduct of party at time, p. 362.

Cited to same effect in Allen v. Southern etc. Co., 70 Fed. Rep. 375, holding positive testimony of party as to intention regarding residence overcome by such acts and conduct.

#### 42 Cal. 362-367. DE GAZE v. LYNCH.

Order Granting New Trial will be vacated if made before statement filed, or formal submission of motion, p. 366.

Cited to same effect in Estate of McKenna, 138 Cal. 440, sustaining denial of motion prematurely made; Carpenter v. Superior Court, 75 Cal. 598, discussing methods of reviewing decision of court, and holding motion inappropriate under facts.

#### 42 Cal. 367-372. TAYLOR v. CASTLE.

Mining Partnership has no delectus personae and is not dissolved by death of member or transfer of his interest, p. 270.

Cited to same effect in Kahn v. Central etc. Co., 102 U. S. 646 (cited in Bissell v. Foss, 114 U. S. 261), holding such partnership not dissolved by assignment of interests of some of members; Thomas v. Hurst, 73 Fed. Rep. 374, discussing commencement of running of statute of limitations against suit for dissolution of such partnership; Mining Co. v. First Nat. Bank, 95 Fed. 39, quoting Kahn v. Smelting Co., 102 U. S. 646; notes to Breaux v. Le Blanc, 69 Am. St. Rep. 415, 418, and Brew v. Hastings, 79 Am. St. Rep. 716, on general subject. Distinguished in Hawkins v. Spokane etc. Min. Co., 3 Idaho, 656, where a mining corporation, against majority's protest, works mine in which it has minority interest, and mingles gold extracted therefrom with portion from its own

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claim, they cannot recover gold so mingled. Cited, also, in note to Powell v. North, 56 Am. Dec. 517, on power of equity to appoint person to continue partnership for benefit of infant heirs of deceased partner; and to Skillman v. Lachman, 83 Am. Dec. 106, 107, on general subject.

**Mining Partners** are liable on contract made in firm name through its secretary, p. 371.

Cited in Stuart v. Adams, 89 Cal. 369, on point that each partner is liable to full extent of indebtedness, and not pro rata, and in note on general subject to Skillman v. Lachman, 83 Am. Dec. 107.

**Usage in Respect to Contracts** of mining partnership enters into and must be taken as part of contract of partnership, p. 371.

Cited to same effect in Union etc. Co. v. American etc. Co., 107 Cal. 333, 48 Am. St. Rep. 144, as to trade usages upon reinsurances by insurance companies. Cited, also, in note on general subject to Skillman v. Lachman, 83 Am. Dec. 108.

**Former Judgment is Bar** to second suit when cause of action is same, p. 372.

Cited to same effect in Mauldin v. Clark, 79 Cal. 53, holding, however, such judgment no bar where issues essentially and entirely different; Woolverton v. Baker, 98 Cal. 632, holding judgment conclusive as res judicata upon all matters which might have been litigated in first action.

**Former Judgment as Bar.**—Cause of action is same when evidence necessary for judgment in second action would have supported judgment in first, p. 372.

Cited to same effect in Phelan v. Quinn, 130 Cal. 378, holding former judgment a bar under the rule; Hammer v. Downing, 39 Or. 528, denial of motion to vacate judgment of supreme court for costs, as being prematurely entered, is not res adjudicata as to items in cost bill; Montgomery v. Harrington, 58 Cal. 274, applying principle to plea of another action pending; Baker v. State, 109 Ind. 60, holding judgment in supplemental proceedings a bar to proceedings for execution against debtor's body; Brooke v. Logan, 112 Ind. 186, 2 Am. St. Rep. 180, ruling aliter as to effect of judgment denying removal of statutory guardian on subsequent habeas corpus proceedings by father to obtain child's possession; and McKinney v. Curtiss, 60 Mich. 621, holding adjudication on probate claim to bar where party had no opportunity to have merits passed upon; Gayer v. Parker, 24 Neb. 644, 8 Am. St. Rep. 228, holding former judgment no bar because of difference in proof; and on same point Buddress v. Schafter, 12 Wash. 312; Stone v. United States, 64 Fed. Rep. 671, holding acquittal of one for feloniously removing timber from public lands, no bar to civil action against him for value of timber so cut. Criticised in Oregon etc. Co. v. Oregon etc. Co., 12 Saw. 118, 28 Fed. Rep. 511, holding test not to have been found satisfactory.

**Account Stated.**—Action on is no bar to subsequent action on original contract, p. 372.

Cited to same effect (sub nom. Littlefield v. Nichols) in Partridge v. Butler, 113 Cal. 328, holding, however, action based on original contract and not account stated.

**42 Cal. 372-375. LITTLEFIELD v. NICHOLS.** S. C. see Sherman v. McCarthy, 57 Cal. 512, as to further litigation based on same title.

**Ejectment.**—Title under elder lien must prevail against title from common source under junior lien, p. 374.

Cited to same effect in Brady v. Burke, 90 Cal. 6, as to successive street assessment liens, although judgment on latter rendered before that on former; Halyburton v. Greenlee, 72 N. C. 320, as to successive judgment liens where sale made under junior lien.

**42 Cal. 375-387. POLHEMUS v. CARPENTER.**

**Time of Filing Findings** is not defined or limited, under Practice Act, p. 383.

Cited to same effect in Broad v. Murray, 44 Cal. 229, sustaining filing after entry of judgment.

**Trial Does not Terminate** until filing of written findings when requested, p. 384.

Cited to same effect in Connolly v. Ashworth, 98 Cal. 206, holding judgment erroneous if entered on findings filed after expiration of term of office of trial judge.

**New Trial.**—Notice of motion must be filed within ten days after notice of filing decision, p. 385.

Cited in First Nat. Bank v. McCarthy, 13 S. Dak. 362, noted under Carpenter v. Thurston, 30 Cal. 123. Distinguished in Elder v. Frevert, 18 Nev. 282, under local statute holding time to run from announcement of judgment.

**Defective Findings** should be amended if objected to, p. 386.

Cited in Victor etc. Co. v. National Bank, 18 Utah, 93, 72 Am. St. Rep. 769, sustaining filing of additional finding under local practice.

**Findings of Court** must embrace all specific facts put in issue, p. 386.

Cited to same effect in Franklin v. Franklin, 140 Cal. 609, reversing divorce judgment for insufficiency of findings; Pratalongo v. Larco, 47 Cal. 382, sustaining, however, findings by referee on general facts alleged, when controversy involved many items of long standing account; Ladd v. Tully, 51 Cal. 278, holding insufficient a finding that all material allegations of complaint were true, and Smith v. Smith, 62 Cal. 468, ruling similarly as to finding in divorce suit held to be a conclusion of law;

and Potwin v. Blasher, 9 Wash. 466, ruling similarly were findings covered issues sufficient to support judgment, but not all.

**42 Cal. 387-390. McCOURTNEY v. FORTUNE.**

Appeal from Final Judgment does not allow review of prior order, itself appealable, p. 390.

Cited to same effect in Deyoe v. Superior Court, 140 Cal. 486, discussing effect of interlocutory divorce decree. Distinguished in State v. Reed, 3 Idaho, 559, order denying change of venue in criminal cases is reviewable only on appeal from final judgment; Regan v. McMahon, 43 Cal. 627, declining to review interlocutory decree in partition; Barham v. Hostetter, 67 Cal. 273, ruling similarly as to order dissolving preliminary injunction.

Time to Appeal from Judgment runs from its rendition, p. 390.

Distinguished under amendment of statute in Thomas v. Anderson, 55 Cal. 45, holding time to run from its entry.

Judgment is "Rendered" when findings are filed, p. 389.

Cited to same effect in In re Rose, 80 Cal. 169, discussing time of appeal from order settling administrator's account; Horn v. Miller, 20 Neb. 101, as to time for appeal from judgment.

**42 Cal. 390-397. TALBERT v. SINGLETON.**

Actual Possession of Land, with usual acts of ownership, is constructive notice of claim of title, p. 359.

Cited to same effect in Pacific etc. Co. v. Stroup, 63 Cal. 153, holding adverse possession established under facts; Hicks v. Lovell, 64 Cal. 20, 49 Am. Rep. 682, on point that vendee in such possession can set up contract to purchase as equitable defense to ejectment by grantee of vendor, affected with such notice; Peasley v. McFadden, 68 Cal. 615, holding such notice established by erection of building by claimant and its occupation by his tenants; Toltec Ranch Co. v. Babcock, 24 Utah, 193, where defendant's vendor entered on public lands after certificate of location filed by railroad, and defendant inclosed and cultivated same and held them in open and notorious manner for over twenty years after such certificate filed, he had title as against railroad's grantee, though his possession was not of seven years' duration since railroad's patent; School District v. Taylor, 19 Kan. 292, where building occupied as schoolhouse under unrecorded deed; but see Emeric v. Alvarado, 90 Cal. 473, holding such possession merely evidence of notice and criticising main case as dictum and opposed to current of authorities.

Notice of Claim of Title reattaches on revesting of title although conveyed to innocent purchaser, p. 396.

Cited to same effect in Huling v. Abbott, 86 Cal. 427, as to notice of unrecorded mortgage.

**42 Cal. 397-402. TALBERT v. HOPPER.**

Term of Court at which trial had held regular, p. 399.

Cited to same effect in Talbert v. Singleton, 42 Cal. 397, sustaining judgment at same term.

Judicial Notice extends to time of holding regular terms of court and power to adjourn, p. 400.

Cited in note on general subject to Lanfear v. Mestier, 89 Am. Dec. 688.

Ejectment—Variance.—When title is made basis of plaintiff's claim, he cannot recover without proving title, p. 402.

Cited to same effect in Helena v. Albertose, 8 Mont. 504, holding title (by dedication) not shown; Tarpey v. Desert etc. Co., 5 Utah, 213, holding proof of equitable title insufficient where legal title pleaded and made basis of claim.

**42 Cal. 402-408. SWEENEY v. REILLY.**

Injury will be Presumed from admission of improper testimony, p. 407.

Cited to same effect in Estate of Toomes, 54 Cal. 516, as to exclusion of proper testimony; Storch v. McCain, 85 Cal. 308, where record did not show appellant not injured thereby; People v. Ah Own, 85 Cal. 584, as to admission of improper opinion evidence.

**42 Cal. 408-412. KAPP v. GRIFFITH.**

Married Woman may be divested of separate property by adverse possession, p. 411.

Cited to same effect in Mauldin v. Cox, 67 Cal. 390, holding further adverse possession of homestead property not shown by facts.

**42 Cal. 412-415. BATCHELDER v. MOORE.**

Contempt.—Court has power to punish, but such power is arbitrary, p. 414.

Cited to same effect in State v. Markuson, 5 N. Dak. 160, holding, further, no right to jury trial in such matters.

Contempt Proceedings are invalid unless case is within provisions of law authorizing such proceedings, p. 414.

Cited to same effect in Lezinsky v. Superior Court, 72 Cal. 511, annulling order imposing fine for refusal to obey notary's subpoena; Overend v. Superior Court, 131 Cal. 285, noted under People v. Turner, 1 Cal. 155;

State v. Clancy, 24 Mont. 363, annulling orders on certiorari, for absence of affidavit and proper notice; State v. Conn, 37 Or. 598, ruling similarly as to affidavit on information and belief; dissenting opinion in *Ex parte Henshaw*, 73 Cal. 508, main opinion sustaining order for continuing to exercise functions of public office after having been adjudged usurper thereof; dissenting opinion in *In re Jessup*, 81 Cal. 482, discussing powers of legislature over courts, in relation to granting of rehearings on appeal; Schwarz v. Superior Court, 111 Cal. 112, on point that finding and judgment must be construed strictly in favor of accused, and annulling order based on alleged violation of injunction; and see *Ex parte O'Brien*, 127 Mo. 488, on point that no presumptions will be indulged in support of commitment; and Hawes v. State, 46 Neb. 151, on same point; State v. Frew, 24 W. Va. 437, 444, 49 Am. Rep. 258, 261, holding punishable, however, publication of newspaper articles reflecting on court.

**Order Punishing for Contempt committed outside of presence of court is void if based on insufficient affidavit, p. 415.**

Cited to same effect in *Phillips v. Welch*, 12 Nev. 164-178, holding affidavit sufficient and denying certiorari to quash order; *State v. Root*, 5 N. Dak. 496, 57 Am. St. Rep. 574, *Hawthorne v. State*, 45 Neb. 874, and *State v. Sweetland*, 3 S. Dak. 506, holding affidavit insufficient; *Thomas v. People*, 14 Colo. 258, *State v. Henthorn*, 46 Kan. 618; *State v. Horner*, 16 Mo. App. 194, discussing rights of accused and denying mandamus to compel adjudication of contempt; and *State v. Kaiser*, 20 Oreg. 60, reversing order when no affidavit filed. Distinguished in *Ex parte Robinson*, 71 Cal. 610, holding affidavit unnecessary when contempt committed in presence of court. Cited, also, in note to *Clark v. People*, 12 Am. Dec. 186, on review of judgments of contempt.

**Contempt.—Certiorari granted when order beyond jurisdiction of court, p. 415.**

Cited to same effect in *People v. O'Neil*, 47 Cal. 110, holding judgment appealable imposing three hundred dollars' fine (but see *Huerstal v. Muir*, 62 Cal. 481, denying right of appeal, and on same point, *Phillips v. Welch*, 11 Nev. 193, S. C. 12 Nev. 169); *Ex parte Hollis*, 59 Cal. 408, holding, also, habeas corpus to lie, and holding order improper under facts; *State v. Knight*, 3 S. Dak. 512, 44 Am. St. Rep. 811, holding writ of error appropriate to review order, and sustaining same under facts; *People v. District Court*, 6 Colo. 537; restraining such proceedings by prohibition, for want of jurisdiction; *State v. Judges*, 32 La. Ann. 1262, granting certiorari when respondent given no opportunity to make defense.

42 Cal. 416-418. **THOMASSON v. WOOD.**

**Omission of Revenue Stamp cannot be set up in state court as defense to action on a contract, p. 417.**

Cited in note on general subject to *Satterthwaite v. Doughty*, 59 Am. Dec. 558.

Appellate Court may remand cause when defense based on former decision now overruled, p. 418.

Cited to same effect in *Porter v. Sherman etc. Co.*, 40 Neb. 280, discussing powers of such court on reversal and holding matter to be in its discretion.

#### 42 Cal. 418-434. **PALACHE v. PACIFIC INSURANCE COMPANY.**

Statutes are to be Construed according to legislative intent as shown by general tenor and scope of entire legislative scheme embodied, p. 430.

Cited to same effect in *People v. Eichelroth*, 78 Cal. 143, construing "graduate in medicine" under act for appointment of county physician.

"Insolvency" of Insurance Company authorizing revocation of commissioner's certificate is that defined by statute itself, and not ordinary commercial insolvency, p. 432.

Cited to same effect in *State etc. Co. v. San Francisco*, 101 Cal. 144, construing sections 601 and 602 of the Political Code and holding, further, as to powers of court in case of insolvent insurance corporations.

#### 42 Cal. 435-438. **SHAW v. CROCKER.**

Street Contractor is not Liable for damages resulting to contiguous property from performance of work for city, if done with proper care and skill, p. 438.

Cited to same effect in *Reardon v. San Francisco*, 66 Cal. 498, 500, holding city liable, however, for such special consequential damages under constitutional provisions as to eminent domain; but see *Henderson v. Minneapolis*, 32 Minn. 322, holding city not liable under charter for damage caused by surface water on change of grade. Cited, also, in note on general subject to *Radcliff v. Mayor*, 53 Am. Dec. 367; *Perry v. Worcester*, 66 Am. Dec. 438; *Goddard v. Inhabitants*, 30 Am. St. Rep. 389.

#### 42 Cal. 439-444. **FOOTE v. RICHMOND.**

Reopening of Case for introduction of further testimony is within discretion of court. p. 442.

Cited to same effect in *Clavey v. Lord*, 87 Cal. 419, holding no abuse shown in permitting such evidence after setting aside verdict in equity case.

Appearance of Defendants is shown by filing of written consent of his attorney to judgment as prayed for, and he is bound by such judgment, p. 443.

Cited to same effect in *Childs v. Lanterman*, 103 Cal. 392, 42 Am. St.

Rep. 124, holding infant bound by judgment rendered after attorney's appearance when after majority he moves for new trial and appeals, although never served with summons; dissenting opinion in *Blyth v. Swenson*, 15 Utah, 363, as to showing required to vacate judgment when rendered on attorney's appearance, main opinion vacating such judgment.

**42 Cal. 444-446. RYCRAFT v. RYCRAFT.**

**Appeal from Judgment** will not authorize examination of sufficiency of evidence, p. 446.

Cited to same effect in *Allport v. Kelley*, 2 Mont. 345, where no appeal from order denying new trial; and on same point in *Brown v. Wiloughby*, 5 Colo. 8.

**42 Cal. 446-452. CREIGHTON v. SAN FRANCISCO.**

**Municipal Corporation** may be compelled by legislature to pay claims equitably due although not enforceable by action, p. 450.

Cited to same effect in *Erskine v. Steele Co.*, 87 Fed. 634 (quoted in S. C., 98 Fed. 219), as to statute validating municipal contracts formerly held invalid; *In re Market Street*, 49 Cal. 549, denying, however, legislative power to levy tax on property for payment for work previously done by contractor under abortive contract with city; *People v. Lynch*, 51 Cal. 36, 21 Am. Rep. 693, also denying legislative power to directly levy assessment within incorporated city whose charter has granted it such powers; *Perry Co. v. Conway Co.*, 52 Ark. 432, sustaining power to impose debt of one county on another, on new county division; *Pearson v. State*, 56 Ark. 154, 35 Am. St. Rep. 94, ruling similarly as to right of legislature to release county treasurer from liability for moneys stolen from him; *Board v. Snyder*, 45 Kan. 638, 23 Am. St. Rep. 744, as to act authorizing township bonds for repayment of moneys advanced towards construction of courthouse; and *Fuller v. Morrison*, 36 Minn. 311, as to act authorizing payment for publication of financial county statement theretofore gratuitously made. Distinguished in *Conlin v. Supervisors*, 99 Cal. 23, 37 Am. St. Rep. 21 (and see S. C. 114 Cal. 409), denying such legislative powers under new constitution, as being gift of public moneys; and *State v. Tappan*, 29 Wis. 674, 9 Am. Rep. 625, denying power to tax town to pay volunteer's bounty and costs of unsuccessful suits to recover same, not being for municipal purpose. Cited, also in note on general subject to *Hasbrouck v. Milwaukee*, 80 Am. Dec. 733, 734; *Mount Hope Cemetery v. Boston*, 35 Am. St. Rep. 534.

**42 Cal. 452-457. GUEDICI v. BOOTS.**

**Mistake.**—Judgment in partition may be set aside for, on equitable cross-complaint in ejectment suit, p. 456.

Cited to same effect in *Western v. Skiles*, 35 Fed. Rep. 675, as to set-

ting aside such judgment for fraud and mistake. Cited, also, in note to *Nicely v. Boyles*, 40 Am. Dec. 641, on effect of partition judgments.

**42 Cal. 457-462. McCREERY v. BROWN.**

Preliminary Injunction may be continued in force until hearing, in discretion of court, although equities of bill denied by answer, p. 461.

Cited to same effect in *Coolot v. Central Pacific etc. Co.*, 52 Cal. 67, sustaining granting of preliminary injunction notwithstanding denials in answer and counter-affidavits; *Efford v. Southern etc. Co.*, 52 Cal. 279, as to modification of such injunction; *Parrott v. Floyd*, 54 Cal. 535, as to its dissolution; *White v. Nunan*, 60 Cal. 407, as to its continuance; and on same point in *Hiller v. Collins*, 63 Cal. 238, where averments of answer made on information and belief; and *Huron etc. Co. v. Huron*, 3 S. Dak. 617, where rights of defendant were protected by bond, and holding, further, that such discretion should be exercised in favor of party most liable to be injured.

**42 Cal. 462-464. CHAPMAN v. HOLLISTER.**

Heir Cannot Maintain Ejectment while administration remains unclosed, p. 463.

Cited to same effect in *Plass v. Plass*, 121 Cal. 133, noted under *Meeks v. Hahn*, 20 Cal. 620; *Meeks v. Kirby*, 47 Cal. 170, as to action by grantee of heir, and holding further distribution ineffectual when made after suit commenced but before trial; *Janes v. Throckmorton*, 57 Cal. 387, denying, however, power of administrator to sue to establish trust and compel conveyance thereunder; *Crosby v. Dowd*, 61 Cal. 598, holding heir not barred by limitation when vacancy in administration, under facts (and see *Meeks v. Vassault*, 3 Saw. 212; 16 Fed. Cas. 1317); but see *Traweek v. Kelly*, 60 Miss. 656, holding heirs barred under facts, although all but one were under no legal disability; *Dunn v. Peterson*, 4 Wash. 173, applying rule to devisees under foreign will, and holding further as to presumption of administration had thereunder. Distinguished in *Lamme v. Dodson*, 4 Mont. 588, denying right of executor to possession as against stranger to probate proceedings and claiming property adversely to estate; *Gossage v. Crown Point etc. Co.*, 14 Nev. 156-158, sustaining heir's right to sue where no creditors to be affected and no equity existing in administrator's favor.

Title to Decedent's Realty passes to heirs on his death subject to right of possession by representative for payment of debts, p. 463.

Cited to same effect in *Murphy v. Crouse*, 135 Cal. 18, noted under *Beckett v. Selover*, 7 Cal. 215; *Bates v. Howard*, 105 Cal. 183, holding title not derived from decree of distribution and construing section 1384 of the Civil Code. Cited, also, in note on general subject to *Beckett v. Selover*, 68 Am. Dec. 257.

**42 Cal. 465-469. BARSTOW v. CITY RAILROAD COMPANY.**

**Quantum Meruit.**—Evidence is admissible of all facts relative to situation and relation of parties, as bearing on question of employment, p. 467.

Cited to same effect in Bassett v. Fairchild, 132 Cal. 646, quoting McCarthy v. Mount Tecate etc. Co., 111 Cal. 337, 338, holding erroneous the exclusion of certain testimony in suit by director against his corporation for compensation for services.

**42 Cal. 469-474. CRAWFORD v. BARK CAROLINE REED.**

**Maritime Contract.**—Jurisdiction of federal courts is exclusive in proceedings in rem to enforce lien against domestic vessel for materials and supplies furnished at home port, p. 472.

Cited to same effect in Hayford v. Cunningham, 72 Me. 134, as to repairs on domestic vessel, following federal decisions; Steamer Petrel v. Dumont, 28 Ohio St. 613, 614, 617, 22 Am. Rep. 401, 403, 405, holding lien for repairs given by state watercraft law unavailable in state court; The Willapa, 25 Oreg. 78, ruling similarly as to local law, as to supplies at home port. Distinguished in Atlantic Works v. The Glide, 157 Mass. 525, 34 Am. St. Rep. 306, sustaining jurisdiction of state court under local act, as to labor and materials used in repairs (but see dissenting opinion, pages 531, 532, 534, 34 Am. St. Rep. 309, 310); and see McDonald v. The Nimbus, 137 Mass. 363, discussing but not deciding point.

**42 Cal. 475-479. RUSSELL v. MIXER.**

**Satisfaction of Mortgage** will be set aside in equity when made by mistake of both parties, instead of assignment as agreed upon, p. 477.

Cited in note on general subject to Poore v. Price, 27 Am. Dec. 588; Banta v. Vreeland, 82 Am. Dec. 273; Young v. Shaner, 5 Am. St. Rep. 707.

**42 Cal. 479-484. SPENCER v. WINSELMAN.**

**Mining Claim** is freehold estate in fee and not subject to arbitration, p. 482.

Cited to same effect in Aspen etc. Co. v. Rucker, 28 Fed. Rep. 222, holding that partition thereof may be had although legal title still in government.

**42 Cal. 484-492. SMITH v. McDONALD.**

**General Guardian of Infants** may appear for them notwithstanding their nonservice, and submit them to jurisdiction of court, p. 486.

Cited to same effect in Emeric v. Alvarado, 64 Cal. 597, although no

summons issued; Richardson v. Loupe, 80 Cal. 490, holding further as to sufficiency of service on minors; Western etc. Co. v. Phillips, 94 Cal. 56, holding appointment of guardian ad litem immaterial; Redmond v. Peterson, 102 Cal. 599, 41 Am. St. Rep. 206, 207, applying rule to guardians of incompetents; Beliveau v. Amoskeag Mfg. Co. 68 N. H. 228, 73 Am. St. Rep. 580, on point that infants and adults are on same plane as to binding effect of judgment entered with consent of his attorney of record employed by next friend. Cited, also, in note to Porter v. Robinson, 13 Am. Dec. 159, and Joyce v. McAvoy, 89 Am. Dec. 186, on judgments against infants.

**Stare Decisis.**—Rule of property when well established, will be followed whether correct or not, p. 488.

Cited to same effect in Mayer v. Carothers, 14 Mont. 287, as to application of statute of limitations to mining claims; Pack v. Hansbarger, 17 W. Va. 339, as to rights of vendees as equitable owners. Cited, also, in note on general subject to Gee's Admir. v. Williamson, 27 Am. Dec. 632; note to Truxton v. Fait etc. Co., 73 Am. St. Rep. 99, on stare decisis.

#### 42 Cal. 493-509. SICHEL v. CARRILLO.

**Statute of Limitations** does not discharge debt, but only takes away remedy, p. 498.

Cited to same effect in Whitmore v. San Francisco Savings Union, 50 Cal. 150, applying rule to failure to present probate claim, and denying right of executor to compel creditor to surrender security under trust deed where claim not presented (but see as to this case Reid v. Sullivan, 20 Colo. 501, where main case cited); State v. Yellow Jacket etc. Co., 14 Nev. 232, discussing operation of statutes on claims for taxes; dissenting opinion in Mulvane v. Sedgley, 63 Kan. 126, main opinion holding action on surety mortgage barred when principal debt is barred; Raymond v. Bales, 28 Wash. 499, partial payment by mortgagor on mortgage debt does not extend limitations as against judgment creditors of mortgagor who has purchased mortgaged premises at execution sale; George v. Butler, 26 Wash. 463, absence of mortgagor from state will not suspend running of limitations as to mortgage where he has parted with all interest in premises to resident grantee; Myer v. Beal, 5 Oreg. 130, holding mortgage enforceable though remedy in notes barred, and on same point in Allen v. O'Donald, 12 Saw. 32, 28 Fed. Rep. 26. Cited, also in notes on general subject to Lord v. Shaler, 8 Am. Dec. 163; Ludlow v. Van Camp, 11 Am. Dec. 534.

Death of one joint debtor does not affect bar of statute as to survivor, p. 499.

Affirmed in Hibernia Sav. & Loan Society v. Boland, 145 Cal. 628, where bar of statute as to other defendants than administrator of deceased defendant appeared on face of complaint, it was not demurrable.

**Surety is not Discharged by failure to present claim against estate of deceased principal, p. 500.**

Cited in *Neale v. Head*, 133 Cal. 49, holding sureties not discharged by nonpresentation against estate of deceased cosurety; *Eickhoff v. Eikenberry*, 52 Neb. 335 (quoted in *Bell v. Walker*, 54 Neb. 226), applying rule to action on replevin bond. Distinguished in *Smith v. Freylar*, 4 Mont. 492, holding surety of note, though joint maker in form, discharged by granting of extension to principal.

**Contract of Mortgage is distinct from that creating debt secured, p. 503.**

Cited in *Sather etc. Co. v. Briggs Co.*, 138 Cal. 734, on point that mortgage is not discharged by any change in the form of the indebtedness.

**Probate Claim.—Nonpresentation against estate of debtor does not bar right to foreclose mortgage of lands of wife to secure the debt, p. 505.**

Cited to same effect in *Cal. Bank v. Brooks*, 126 Cal. 200, noted under *Lord v. Morris*, 18 Cal. 482; *Vandall v. Teague*, 142 Cal. 475, holding presentation of mortgage claim against husband's estate not to suspend running of statute of limitations as against title of surviving wife to the homestead mortgage; *Wood v. Goodfellow*, 43 Cal. 188, on point that mortgagor cannot, as against subsequent incumbrancers or transferees, prolong time of payment or otherwise increase burdens of mortgaged property; *Schadt v. Heppe*, 45 Cal. 437, 438, on point that mortgagor's administrator is not necessary defendant in foreclosure when property set apart as probate homestead and no personal claim made against estate; *Pitte v. Shipley*, 46 Cal. 159, holding presentation of claim necessary, however, when land part of general assets of estate, even though no claim for deficiency made; and on same point in *Harp v. Calahan*, 46 Cal. 230; and *Reid v. Sullivan*, 20 Colo. 501; *Bull v. Coe*, 77 Cal. 60, 61, 11 Am. Rep. 237, when mortgaged property was wife's homestead, and holding further as to release of wife considered as a surety. Cited, also, in *Toulouse v. Burkett*, 2 Idaho, 176, discussing meaning of "claim," and holding presentation unnecessary in case of action to declare vendor's lien on property sold to deceased.

**Claim on Mortgage should be presented against mortgagor's estate although securing debt of third person, p. 505.**

Explained and overruled in *Hibernia etc. Soc. v. Conlin*, 67 Cal. 181, holding such presentation unnecessary and bar of statute of limitations not affected by presentation and allowance; but see *Bush v. Adams*, 22 Fla. 190, where case followed.

**Conclusions of Law—Modification of.—Quere whether this proper practice, p. 507.**

Cited in *First National Bank v. Dusy*, 110 Cal. 76, denying power of court after entry of decree of foreclosure to amend its findings and judgment, so as to include other foreclosures.

**Counsel Fees upon Foreclosure** are not allowable unless stipulated in mortgage, p. 508.

Cited to same effect in Monroe v. Fohl, 72 Cal. 570, modifying judgment where fee allowed in excess of such stipulation; Boab v. Hall, 107 Cal. 182, ruling similarly on allowance where no fee stipulated in mortgage.

**42 Cal. 513-522. SAN FRANCISCO v. CERTAIN REAL ESTATE.**

Judgment by Consent cannot be reviewed on appeal, p. 518.

Cited to same effect in Erlanger v. Southern Pacific etc. Co., 109 Cal. 396, dismissing appeal from judgment entered on stipulation, with provision that no appeal should be taken therefrom.

**Street Improvements.**—Validating act is constitutional that cures defects and omissions in proceedings of supervisors or street superintendent, p. 519.

Distinguished in People v. Lynch, 51 Cal. 35, 36, 21 Am. Rep. 693, denying power of legislature to levy tax directly in incorporated city or validate such tax when imposed by city government when void for want of uniformity and equality. Cited in Lent v. Tillson, 72 Cal. 419, discussing validity of publication of notice.

**City is not Liable** under act 1862, p. 391, for work done other than on street "accepted" thereunder, p. 521.

Cited in Raisch v. San Francisco, 80 Cal. 8, holding city not liable on implied contract under the Statute of 1871-72, page 808, unless no assessment made or none enforced, through fault of others than contractor.

**42 Cal. 523-528. SCOLES v. UNIVERSAL LIFE INSURANCE COMPANY.**

**Life Insurance.**—"Local disease," within application for insurance, includes tuberculosis, p. 527.

Cited in note on general subject to Continental etc. Co. v. Yung, 3 Am. St. Rep. 635.

**42 Cal. 528-535. HOWE v. UNION INSURANCE COMPANY.**

**Attachment Lien is Dissolved** by filing petition in bankruptcy, but not execution lien where levy theretofore made, p. 533.

Cited to same effect in Elliott v. Warfield, 122 Cal. 634, quoting Vermont etc. Co. v. Superior Court, 99 Cal. 581; as to first proposition in Day v. Superior Court, 61 Cal. 494, holding further as to conflict between state and federal courts; and as to second, in Vermont, etc. Co. v. Superior Court, 99 Cal. 581, denying power of insolvency court to restrain sheriff in sale under such execution.

**General Citations.**—Hudson v. Adams, Fed. Cas. No. 6832; Shelly v. Elliston, Fed. Cas. No. 12750.

**42 Cal. 535-540. PEOPLE v. PADILLIA.**

**Affidavits on Motion for New Trial** cannot be considered unless incorporated into bill of exceptions or properly certified, p. 539.

Cited to same effect in People v. Mahoney, 77 Cal. 532, holding clerk's certificate insufficient; People v. Louie Foo, 112 Cal. 21, where not certified at all.

**Reasonable Doubt—Instructions.**—Jury cannot convict unless entirely satisfied of defendant's guilt of offense charged, p. 540.

Cited to same effect in People v. Kerrick, 52 Cal. 447; People v. Carrillo, 70 Cal. 645; and People v. Ferry, 84 Cal. 34 (but see State v. Ryan, 12 Mont. 299, holding erroneous instruction given, but holding main case overruled by later cases; and State v. Nelson, 11 Nev. 342, criticising main case); holding erroneous instruction similar to that given in main case; People v. Vereneseneckockcockhoff, 129 Cal. 504, as having overruled People v. Cronin, 34 Cal. 191, and holding erroneous instruction given; People v. Beck, 58 Cal. 213, sustaining instruction on reasonable doubt, although "considered unsatisfactory"; and People v. Hardisson, 61 Cal. 380, also sustaining instruction on same subject. Distinguished in State v. Anderson, 10 Oreg. 461, sustaining instructions given. Cited, also, in note to Rippey v. Miller, 62 Am. Dec. 182, on sufficiency of circumstantial evidence.

**Errors in Instructions** are reviewable in the absence of the testimony if incorrect under every conceivable state of the evidence, p. 539.

Cited in State v. Mason, 24 Mont. 344, reviewing such instructions on judgment-roll alone.

**42 Cal. 541-559. SAN FRANCISCO v. CANAVAN.**

**Dedication with Right of Revocation** is invalid, p. 553.

Distinguished in County v. Barney, 79 Cal. 379, 12 Am. St. Rep. 154, holding dedication by county of land for hospital shown, although power of revocation existed, and defining "irrevocable" as used in this connection; and see State v. Travis County, 85 Tex. 441, as to right of public where dedication made with no right of revocation. Cited, also, in note on general subject to State v. Trask, 27 Am. Dec. 570.

**Dedication may be Revoked** before acceptance, whether made by deed or otherwise, p. 553.

Cited to same effect in Mills v. Los Angeles, 90 Cal. 531, holding, however, that dedication by city of land for streets is complete without formal acceptance. Cited, also, in note on general subject to State v. Trask, 27 Am. Dec. 569.

**Intent to Dedicate** must be clearly indicated by owner's acts and declarations, p. 554.

Cited to same effect in *Ramthun v. Halfman*, 58 Tex. 553, holding such intent not shown by facts.

**Dedication** consists of clearly indicated intention by owner to dedicate, and acceptance by public of the dedication, p. 553.

Cited to same effect in *People v. Blake*, 60 Cal. 503 (and dissenting opinion, page 504), holding dedication for street shown by facts; *People v. Williams*, 64 Cal. 502, holding no dedication for wharf purposes shown, by reason of nonacceptance by city; and *Hayward v. Manzer*, 70 Cal. 480, ruling similarly as to street; *Spaulding v. Bradley*, 79 Cal. 454, and *Steinauer v. Tell City*, 146 Ind. 497, holding dedication for street incomplete on both grounds; and, for same reasons, *People v. Reed*, 81 Cal. 77, 79, 15 Am. St. Rep. 28, 30, where lots sold by reference to unrecorded map; and *Shellhouse v. State*, 110 Ind. 513, as to dedication for alley; *Smith v. San Luis Obispo*, 95 Cal. 470, holding acceptance of street shown by user without formal action by municipal authorities; *People v. Dreher*, 101 Cal. 273, holding, further, dedication question of fact, and finding not disturbed where evidence conflicting; and see *Demartini v. San Francisco*, 107 Cal. 409, sustaining finding of no dedication or acceptance, and holding intention to dedicate not shown by proof of user alone; *Niles v. City*, 125 Cal. 577, noted under *San Francisco v. Calderwood*, 31 Cal. 585; *Swift v. Mayor*, 101 Ga. 710, holding dedication not shown under facts stated; *Lightcap v. Town of North Judson*, 154 Ind. 46, holding offer revoked by conveyance to another before acceptance; *Bank v. Oakland*, 90 Fed. 697, 61 U. S. App. 231, holding dedication established. Cited, also, in note on general subject to *State v. Trask*, 27 Am. Dec. 562, 564, 565.

**Pueblo Lands** were held by pueblos and their successors only, in trust for certain municipal purposes, and subject to power of legislature to control their alienation. p. 555.

Cited to same effect in *Holladay v. San Francisco*, 124 Cal. 356, and *City of Monterey v. Jacks*, 139 Cal. 549, noted under *Hart v. Burnett*, 15 Cal. 530; *Board v. Martin*, 92 Cal. 217, discussing nature of city title to school lots; *Ames v. San Diego*, 101 Cal. 392, on point that pueblo lands held for public use cannot be lost by adverse possession, but aliter as to those held as house lots. Distinguished in *People v. Lynch*, 51 Cal. 35, discussing legislative power over municipal assessments. Cited, also, in note to *Mount Hope Cemetery v. Boston*, 35 Am. St. Rep. 538, on legislative power over municipal property held in trust.

**Municipal Corporations** are subject to legislative will as to extent of powers and manner of exercise, p. 557.

Cited to same effect in *Ex parte Wells*, 21 Fla. 319, sustaining act dissolving municipal corporation for default in payment of interest accounts; note in *Commonwealth v. Cullen*, 53 Am. Dec. 471, on amendments to municipal charters; *Hasbrouck v. Milwaukee*, 80 Am. Dec. 732, on general subject.

**42 Cal. 570-578. MCKINLAY v. TUTTLE.**

Defendants Sued by Fictitious Names are not bound by judgment unless complaint is amended by insertion of true names, p. 577.

Cited to same effect in Alameda Co. v. Crocker, 125 Cal. 104, but obviating reversal by amendment as of date prior to judgment; and to same effect, see Hoffman v. Keeton, 132 Cal. 196; Baldwin v. Bornheimer, 48 Cal. 436, directing amendment where party appeared who was not an original defendant; and see Tyrrell v. Baldwin, 67 Cal. 3, 4, under similar facts, holding, however, judgment not void on collateral attack; Campbell v. Adams, 50 Cal. 205, holding, however, judgment not attackable collaterally, although erroneous on direct attack; and on same point Baldwin v. Morgan, 50 Cal. 588; Farris v. Merritt, 63 Cal. 119, holding, however, such amendment not to change cause of action so as to fall within statute of limitations; Bachman v. Cathry, 113 Cal. 501, discussing right to change of venue where such fictitious names used.

Recitals in Judgment are not conclusive on direct attack, p. 577.

Cited to same effect in Houghton v. Tibbets, 126 Cal. 60, reversing default judgment on appeal for misnomer of defendant served; Wiggin v. Superior Court, 68 Cal. 401, holding aliter, however, as to collateral attack; County of Yolo v. Knight, 70 Cal. 436, as to recitals of proof of service and default; and Weeks v. Gold Min. Co. 73 Cal. 600; and Whitney v. Daggett, 108 Cal. 235, as to like recitals as to service by publication; Eichhoff v. Eichhoff, 107 Cal. 47, 48 Am. St. Rep. 112, on point that judgment will be reversed on appeal for irregularities which would not avail on collateral attack, and holding action to vacate judgment to be collateral attack. Distinguished in Dennis v. Winter, 63 Cal. 18, holding recitals in order confirming probate sale conclusive in collateral attack, as to facts not jurisdictional.

**Law of Case.—Record on Former Appeal** may be looked into to ascertain facts then before appellate court, p. 576.

Cited to same effect in concurring opinion, Sharon v. Sharon, 79 Cal. 691, holding, however, opinion of trial judge not within rule except as relating to questions of law; Eversdon v. Mayhew, 85 Cal. 7, Headley v. Challis, 15 Kan. 606, and Plymouth etc. Bank v. Gilman, 3 S. Dak. 178, 44 Am. St. Rep. 787, applying rules of law of case. Cited, also, in note on general subject to Gee's Admir. v. Williamson, 27 Am. Dec. 634.

**42 Cal. 578-590. STATE v. STEAMSHIP "CONSTITUTION." 10 Am. Rep. 303.**

States cannot Exclude sane, able-bodied persons who are neither paupers or criminals, p. 587.

Approved in dissenting opinion in Compagnie Francaise etc. v. Board etc., 186 U. S. 400, majority holding Louisiana state board of health may prohibit foreign steamer from landing passengers at New Orleans or any

place contiguous thereto because of existence of infectious disease in that city.

**42 Cal. 591-606. MORENHAUT v. BARRON.** S. C. see **MORENHAUT v. BELL**, 62 Cal. 338, construing same conveyances.

**Finding Outside Issues** will not sustain judgment based thereon, p. 605.

Cited to same effect in Schirmer v. Drexler, 134 Cal. 139, reversing judgment and holding no waiver of insufficiency of findings shown; Green v. Chandler, 54 Cal. 628, where fact found not alleged in complaint; Murdock v. Clarke, 59 Cal. 693, where finding for plaintiff was opposed to allegations of complaint; and Heinlen v. Heilbron, 71 Cal. 563, on allowance for damages for diversion of water on property not included in complaint; Harris v. Lloyd, 11 Mont. 405, 28 Am. St. Rep. 485, as to variance between complaint and findings in nature of partnership involved; Gaston v. Drake, 14 Nev. 183, 33 Am. Rep. 553, holding, however, that court need not base findings on such issues where relief denied because of public policy; and Harkins v. Cooley, 5 S. Dak. 231, holding, further, such judgment not supported by rule as to presumptions in its favor.

**42 Cal. 606-619. POPPE v. ATHEARN.**

**Regulations of General Land Office** have force and effect of laws, when not repugnant to acts of Congress, p. 609.

Cited to same effect in Rose v. Wood, etc. Co., 73 Cal. 388, sustaining regulation as to entry of lands by agents; Cosmos etc. Co. v. Gray Eagle etc. Co., 112 Fed. 12, sustaining regulations as to relinquished forest reserve lands under 30 United States Statutes at Large, 36; United States v. Barnhart, 13 Saw. 130, 33 Fed. Rep. 462, on point that such regulations are "executive acts" and within judicial notice of court.

**Failure to Find Upon Issues** cannot be reviewed on appeal unless findings excepted to in that particular, p. 617.

Cited to same effect in Warren v. Quill, 9 Nev. 264, affirming judgment for lack of such exception or objection.

**Pre-emption.—Declaratory statement** under act of 1853 is ineffectual if not filed within time limited by that act, p. 618.

Cited to same effect in Schieffery v. Tapia, 68 Cal. 188, where held filed too late under facts.

**42 Cal. 610-622. SEMPLE v. WARE.** S. C. see **HAGAR v. SPECT**, 48 Cal. 408, discussing same titles involved.

**Former Judgment as Bar.—Estoppel** from may be waived by failure to plead such bar in subsequent action and consent to decree thereon, p. 621.

Cited to same effect in *Board v. People*, 189 Ill. 448, noted under *Semple v. Wright*, 32 Cal. 659; *Bateman v. Grand Rapids etc. Co.*, 96 Mich. 444, holding such estoppel waived under facts, and last judgment to control.

#### 42 Cal. 622-625. **PEOPLE v. CLARKE.**

**Criminal Appeal** from order "affecting substantial rights" applies only to orders after final judgment, p. 625.

Cited to same effect in *People v. Ah Kim*, 44 Cal. 385, denying right to appeal from order arresting judgment; *People v. Tremayne*, 3 Utah, 334, ruling similarly as to orders forfeiting bail money and refusing to set aside such forfeiture; *People v. Hill*, 3 Utah, 359, as to order refusing to discharge defendant upon sustaining of demurrer to indictment.

#### 42 Cal. 626-628. **HARVEY v. RYAN.**

**Mining Regulations.**—Question whether in force at given time is one of fact for jury, p. 628.

Cited to same effect in *Myers v. Spooner*, 55 Cal. 281, applying rule to question of intention to abandon mining claim; *Poujade v. Ryan*, 21 Nev. 452, as to existence of local mining rules and customs; *North Noonday etc. Co. v. Orient etc. Co.*, 6 Saw. 307, holding, further, as to presumption of continued existence.

**Mining Custom** may be proved by parol, and supersedes disused written regulation, p. 628.

Cited to same effect in *Doe v. Waterloo etc. Co.*, 70 Fed. Rep. 456, construing section 2324 United States Revised Statutes. Cited, also, in note on general subject to *McClintock v. Bryden*, 63 Am. Dec. 93; and in *Roberts v. Wilson*, 1 Utah, 294, on point that on proof of written mining laws it must appear that copy comes from proper repository and is properly certified.

#### 42 Cal. 629-630. **BENNETT v. BENNETT.**

**Appeal.**—Recitals in undertaking cannot supply defects in clerk's certificate on motion to dismiss, p. 629.

Cited in *Railroad Co. v. Anderson*, 77 Cal. 299, on point that clerk's certificate of correctness of transcript (which improperly contained undertaking) is not sufficient as certificate of sufficiency of undertaking.

#### 42 Cal. 630-635. **BARBER v. SAN FRANCISCO.**

**Certiorari will not Lie** to correct error of supervisors in passing upon facts within their jurisdiction, p. 634.

Cited to same effect in *Central Pacific etc. Co. v. Placer County*, 46

Cal. 670, denying writ as to refusal of board of equalization to reduce assessment, and holding rule unchanged by section 3680 of the Political Code; and see Farmers' etc. Bank v. Board, 97 Cal. 327; Spring Valley W. W. v. Bryant, 52 Cal. 137, ruling similarly as to passage of resolution by supervisors and holding act legislative and not judicial; Belser v. Hoffschneider, 104 Cal. 459, on point that court cannot review action of supervisors in sustaining appeal on ground that relief granted was not based upon objections made; and see Quinchard v. Board, 113 Cal. 672, on point that board first exercises judicial functions on such appeal: Phillips v. Welch, 12 Nev. 169, denying writ as to commitment of petitioner for contempt where court had jurisdiction.

**Street Improvements.—Appeal to supervisors held sufficient, p. 634.**

Cited in Girvin v. Simon, 127 Cal. 494, ruling similarly as to appeal under act of 1885, and distinguishing "appeal" and "remonstrance."

#### 42 Cal. 636-643. DECKER v. HOWELL.

**Partner may Bind Firm by executory note in its name, p. 641.**

Cited to same effect in Schneider v. Sansom, 62 Tex. 202, 50 Am. Rep. 522, sustaining power to sell entire stock in good faith to pay debts, even if on Sunday.

**Partnership as to Mines** may be strict, and not mining partnership, if so expressly agreed upon by parties, p. 642.

Cited to same effect in Quinn v. Quinn, 81 Cal. 16, holding partnership to be a strict one, and granting power to partner to transfer entire property of firm; Congdon v. Olds, 18 Mont. 490, discussing difference between such classes. Cited, also, in note to Skillman v. Lachman, 83 Am. Dec. 103, 106, 108, on general subject. Distinguished in Hawkins v. Spokane etc. Min. Co., 3 Idaho, 655, where mining corporation holding minority interest works claim against protest of majority and mingles gold from partnership claim with its own gold, it cannot recover gold so mingled, quantity being unknown.

**General Citation.—Freeman v. Hemenway, 75 Mo. App. 617.**

#### 42 Cal. 643-645. WOOD v. RAMOND.

**Nonsuit may be Waived and judgment had on merits, p. 645.**

Cited to same effect in McKay v. Montana etc. Co., 13 Mont. 19, discussing review on appeal on judgment entered on verdict directed on motion.

**Granting of Nonsuit on defendant's motion precludes right to judgment on merits for him, p. 645.**

Distinguished in Warner v. Darrow, 91 Cal. 313, holding nonsuit not to operate as dismissal so as to deprive defendant of right to judgment on merits on his cross-complaint.

**42 Cal. 645-650. LOGAN v. HALE.**

**Findings.**—Omissions in should be supplied by court on exception taken to their sufficiency, p. 649.

Cited to same effect in Thompson v. Connecticut etc. Co., 139 Ind. 353, holding special findings amendable at any time before final judgment and during period for filing bill of exceptions containing evidence; Ordway v. Boston etc. Co., 69 N. H. 431, as holding that a judgment of nonsuit is not one upon the merits and is not a bar, but distinguished under local practice in this regard. Distinguished in Davenport v. Dose, 40 Or. 338, motion for nonsuit for insufficiency of evidence does not amount to an admission by defendant that his counterclaim is without merit.

## **VOLUME XLIII.**

**By S. W. CHARLES.**

**Revised to include citations to Volume 147, by CHARLES L. THOMPSON.**

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### **43 Cal. 11-22. POWELL v. MAGUIRE.**

**Partnership.**—Where two persons make a verbal agreement to form a partnership, but such partnership was never launched, and one of the parties proceed to conduct the business in his own name and for his own benefit, the only remedy of the injured party is an action at law for breach of contract, p. 19.

Rule upheld in Mann v. Bowen, 85 Ga. 618. Cited in Prince v. Lamb, 128 Cal. 127, holding no partnership actually created under facts stated. Approved in Hyer v. Richmond Traction Co. 168 U. S. 484, holding that it is well settled that the wrongful refusal by a party to a contract of copartnership to launch the partnership business is ground for an action of law by the injured partner.

### **43 Cal. 23-24. IRWIN v. TOWNE.**

**New Trial.**—If the supreme court reverses an order denying a motion for a new trial and remands the cause for further proceedings in accordance with the opinion filed, it places the case in point of the mere procedure to be followed in the same situation as though the court below had ordered a new trial, pp. 23, 24.

This is the settled rule unless there is something in the opinion of the court restricting the operation of the words "reversed" and "remanded"; Myers v. McDonald, 68 Cal. 165; Eades v. Trowbridge, 143 Cal. 30, discussing effect of appeal from order of trial court vacating verdict, *sua sponte*.

### **43 Cal. 25-27. BENNETT v. WALLACE.**

The writ of certiorari will not lie where there is an appeal, or where there *was* an appeal but the time for taking it has elapsed, p. 27.

Cited and followed in Faut v. Mason, 47 Cal. 8. Cited in Wittman v. Police Court, 145 Cal. 476, certiorari does not lie to annul order of San Francisco Police Judge for summoning of trial jury by sheriff in misdemeanor; Valentine v. Police Court, 141 Cal. 617, denying writ ac-

cordingly. Will not lie to review an order of the probate court, directing an administrator to sell certain real estate; *Stuttmeister v. Superior Court*, 71 Cal. 323, affirmed in *McCue v. Superior Court* 71 Cal. 545; and rule adopted in *Ramsey v. Pettengill*, 14 Oreg. 209. See also, 18 Am. Dec. 236, note.

Writ of certiorari only lies where, in the exercise of judicial functions, an excess of jurisdiction has occurred, and in which there is no appeal, p. 28.

Will not lie to review legislative action of the supervisors: *Spring Valley W. W. v. Bryant*, 52 Cal. 137.

#### 43 Cal. 29-37. PEOPLE v. SANFORD.

**Oral Instructions.**—The giving of an oral instruction to the jury in a criminal case without the consent of the defendant is error, pp. 35, 36.

This rule is adhered to in the cases following, citing the leading case: *People v. Kearney*, 43 Cal. 384, holding, however, that oral instruction may be given by mutual consent; *People v. Prospero*, 44 Cal. 184, where it was decided that consent cannot be inferred from a failure to object at the time the oral charge is given; *People v. Max*, 45 Cal. 255; *People v. Hersey*, 53 Cal. 575, where it was held that under the Penal Code as amended in 1874, if the charge be not given in writing, it must be taken down by the phonographic reporter; *Broadway v. Waddell*, 95 Ind. 173; *Sellers v. Greencastle*, 134 Ind. 647; *Territory v. Perea*, 1 N. Mex. 632; *Territory v. Lopez*, 3 N. Mex. 109; and *Hopt v. People*, 104 U. S. 635, deciding that it is error to give an instruction not reduced to writing otherwise than by a reference to a certain page of a law magazine. *Boggs v. United States*, 10 Okla. 448; *Swaggert v. Territory*, 6 Okla. 347.

The rule was somewhat modified by the decision of the court in *People v. Leary*, 105 Cal. 502, where it was held that if oral conversation and instruction to the jury causes no prejudicial injury to the defendant, it is not ground for a new trial; Beatty, C. J., dissenting and citing the leading case, but holding that the rule laid down there was modified by the codes.

A witness, though not an expert, who details a conversation had between himself and another, may also, in connection therewith, state his opinion, belief, or impression as to the state of mind of such person as these seemed or appeared at the time of the conversation, pp. 32, 33.

Followed in *People v. Wreden*, 59 Cal. 394. Cited in *People v. Casey*, 124 Mich. 282, quoting *Armstrong v. State*, 30 Fla. 201. Where the disease causing a testator's insanity was a progressive one, evidence was properly admitted as to his sanity at other times than at the execution of the will; *Estate of Dalrymple*, 67 Cal. 446. A witness who is not an expert may testify as to the apparent condition of the defendant as to sobriety; *People v. Monteith*, 73 Cal. 9. Upon the

question of what is the market value of land, the opinions of those who have knowledge of the circumstances and surroundings may be taken, although they are not experts: *San Diego Land etc. Co. v. Neale*, 78 Cal. 77; and *Santa Ana v. Harlin*, 99 Cal. 545. But it is not proper to admit testimony which was a mere expression of opinion: *Ellen v. Lewiston*, 88 Cal. 260. Evidence as to intoxication admissible: *People v. Sehorn*, 116 Cal. 511. Nonexpert witnesses can detail the facts known to them which show insanity, and thereupon express an opinion as to the sanity of the person whose mental condition is being investigated: *Armstrong v. State*, 30 Fla. 201. Rule upheld in Connecticut Mut. Life Ins. Co. v. Lathrop, 111 U. S. 622.

**Dying Declarations.**—The rule that no person is to be held incompetent to be a witness on account of religious belief is applicable to dying declarations, p. 34.

Rule applied in *People v. Chin Mook Sow*, 51 Cal. 599. Similar rule upheld in *State v. Ah Lee*, 8 Oreg. 219.

**Evidence.**—Where a proffer of testimony was denied by the court "for the present," and no exceptions taken, but the proffer was not subsequently renewed nor any effort made to obtain the ultimate decision of the court, the point must be deemed waived, p. 32.

Cited in *State v. Goddard*, 162 Mo. 230, when ruling was reserved on original offer. Where a defendant makes no effort to obtain a definite ruling upon an objection to a question asked of a witness, the ruling upon which has been reserved, the legal presumption is that a ruling was waived: *People v. Westlake*, 62 Cal. 309. Settled rule in Missouri; *State v. Taylor*, 134 Mo. 140.

**Jurors.**—If in a criminal case a juror is sworn who is only on the poll tax list and the defendant receives the juror without objection, he cannot after verdict object to his competency in this respect, p. 32.

Leading case followed in *People v. Mortier*, 58 Cal. 206. He who complains of the incompetency of a juror must not only show his ignorance thereof in time to urge it sooner, but he must at the proper time have examined the juror touching his qualifications, and if he fails to do so will be deemed to have waived them; *Pitt v. Bishop*, 53 Mo. App. 604.

**Indictment.**—An indictment is a sufficient charge of the death of one Brown—that "the accused did feloniously, willfully, maliciously and of malice aforethought, shoot, kill, and murder one Enoch Brown," and it was unnecessary to aver that the deceased died within a year and a day, p. 31.

An indictment should allege an assault, and the nature thereof, a mortal wounding of the deceased and that he died of such wounds within a year and a day: *State v. Blair*, 69 Mo. 322, holding the California rule inapplicable.

**43 Cal. 41-42. DANIELS v. LANDSDALE.**

**Pre-emption.**—The filing of a declaratory statement before the plat of the survey is filed by the surveyor general, is premature and of no effect, p. 42.

Referred to in Osgood v. Water and Mining Co., 56 Cal. 578, holding that in a question of priority or right between an appropriator of water on the public lands and a pre-emptor, the rights of the latter date from the issuance of his patent; and in Lux v. Hagggin, 69 Cal. 433, 438, holding the rule of the leading case inapplicable. Rule upheld in Lansdale v. Daniels, 100 U. S. 116.

**43 Cal. 43-53. VAN VALKENBURG v. BROWN.** 13 Am. Rep. 136.

Citizenship does not per se include right to vote, p. 51.

Cited in Dorsey v. Bingham, 177 Ill. 258, 69 Am. St. Rep. 234, discussing right of women to vote under local statutes.

The elective franchise is not one of the "immunities" or "privileges" secured by the fourteenth amendment to the federal constitution, p. 53.

The rule of the leading case cited and applied in Bloomer v. Todd, 3 Wash. Ter. 623. Cited in Gougar v. Timberlake, 148 Ind. 46, 47, 62 Am. St. Rep. 493, 494 (and note 496), denying right of women to vote under local statutes. See, also, 97 Am. Dec. 263, 264, extended note; and 29 Am. Rep. 586, note.

**General Citation.**—Cited to the point that women are citizens as well as men in State v. County Court, 90 Mo. 598.

**43 Cal. 55-56. PEOPLE v. McAUSLAN.**

**Appeal from Order Setting Aside Verdict.**—The presumption in the supreme court is, that the proceedings below are correct, except in so far as the record manifests the contrary, p. 56.

If the question is whether or not the evidence is sufficient to justify the verdict, the record must set forth all the evidence given at the trial: People v. Woods, 43 Cal. 177. Referred to in People v. Lum Yit, 83 Cal. 132.

**43 Cal. 56-65. HINCKLEY v. FOWLER.**

An application to buy tide lands, made in accordance with law, confers a right to purchase upon the applicant, and such applicant cannot be deprived of the benefit of his application by the malfeasance or misfeasance of a state officer, p. 63.

The validity of an application to purchase state lands is not affected by the error of the surveyor general in issuing a certificate of purchase prematurely; Pollard v. Putnam, 54 Cal. 634. Cited in Sherman v. Wrinkle, 121 Cal. 510, holding applicant not prejudiced by mistake of surveyor in including excess of land within survey lines.

**Land Contest.**—Ordinary rules, pleading and evidence must be observed, p. 64.

Cited in *Polk v. Sleeper*, 143 Cal. 74, holding complaint insufficient as against demurrer.

**43 Cal. 65-74. WILLIAMS v. SUTTON.**

**Tenancy in Common.**—A tenant in common is, as against every person but his cotenant, entitled to the possession of every part of the common land, and may recover the possession of all such land in an action of ejectment brought against a stranger, pp. 71, 72.

Where parties are tenants in common of a water right, each of them may maintain an action to enjoin a trespasser from diverting any portion of the water: *Lytle Creek W. Co. v. Perdew*, 65 Cal. 452. If one of several tenants in common recover judgment in ejectment against an adverse claimant of the premises, the judgment determines the right of possession to the whole premises: *Newman v. Bank of California*, 80 Cal. 372; 13 Am. St. Rep. 171, 172. But in *King v. Hyatt*, 51 Kan. 511, 37 Am. St. Rep. 308, while the rule was not expressly doubted, it was held that where the owner of an undivided interest, acting solely for himself, sues an adverse holder, and it appears that the plaintiff and the holders of the other undivided interest have no community of interest and do not recognize each other's title, that the plaintiff can only recover possession of his own share. Leading case approved in *Hopkins v. Noyes*, 4 Mont. 560; *Brown v. Warren*, 6 Nev. 241; and *Allen v. Higgins*, 9 Wash. 448; 43 Am. St. Rep. 848. A tenant in common, in actual possession with his cotenant, is not affected by the judgment in an action of ejectment against the latter, to which he was not a party: *Miller v. Blackett*, 47 Fed. Rep. 549. Cited, also, in 50 Am. St. Rep. 830, note.

**Statute of Limitations.**—If the statute has fully run and has become effectual to bar an adverse title, the disseisor becomes vested with a new title, and estate founded on and springing from the disseisin, p. 73.

It is a settled rule that the possession of property of the requisite character and time confers a title to the property: *Water Co. v. Richardson*, 72 Cal. 601, 608. But since the passage of the act of 1878, the taxes must be paid to set the statute in motion; *Woodward v. Faris*, 109 Cal. 18. Cited, also, in 94 Am. Dec. 742, note; and 49 Am. St. Rep. 714, note.

**43 Cal. 75-80. POTTER v. AMES.**

**Trespass** maintained against county for illegally taking possession of land for highways, p. 78.

Cited in *Robinson v. Southern Cal. Ry. Co.*, 129 Cal. 11, discussing remedies of owner against railroad for construction without condemnation.

**Eminent Domain.**—It is competent for the legislature to prescribe the several steps to be pursued in the assertion of a right to compensation for land appropriated for public use, but the prescribed procedure must not destroy or substantially impair the right itself, p. 79.

It is no objection to the mode of exercising the powers conferred upon the agents under the statute that the legislature has referred it to the consent of those whose property is burdened with the cost of the improvement: *Mulligan v. Smith*, 59 Cal. 229.

**Public Road.**—Where a statute for the alteration of a public road required the publication of a notice stating with particularity the course and terminus of the proposed alteration, a notice of an alteration to run northerly from one point to another "over the most practicable route for a road," is insufficient, pp. 79, 80.

The intermediate points through which the road passes must be specifically set forth, *Smithers v. Fitch*, 82 Cal. 156.

#### 43 Cal. 83-90. **LICK v. RAY.**

**Cloud upon Title.**—Any claim of title which, if asserted, would drive the other party to the production of his own title to establish a defense, constitutes a cloud which a court of equity may be called upon to remove, p. 88.

Cited in *Schofield v. Ute etc. Co.*, 92 Fed. 273, holding action maintainable to remove fraudulent obstruction to enforcement of a lien; *McLeod v. Lloyd*, 43 Or. 271, upholding sufficiency of allegation that defendant claims some interest or right of title to specified property, as shown by an abstract of title attached to complaint; *Schenk v. Wicks*, 23 Utah, 581, 582, where land contract provided for execution of deed on payment of purchase money note, and land sold under owner's subsequent trust deed to secure his own note, which matured before purchase money note, and after default in payment of latter note, it was paid under subsequent agreement, trust deed was cloud on title which relieved payment of purchase money note at maturity; rule approved in *Corey v. Schuster*, 44 Neb. 273; *Engelbach v. Simpson*, 12 Tex. Civ. App. 195; *Goldberg v. Taylor*, 2 Utah, 491; and *West Portland H. Assn. v. Lownsdale*, 9 Saw. 118; 17 Fed. Rep. 618. Referred to in *Northern Pac. R. Co. v. Cannon*, 46 Fed. Rep. 230; approved in *Ormsby v. Ottman*, 85 Fed. Rep. 499. See, also, 45 Am. St. Rep. 374, note.

If a title be void upon its face, if it be a mere nullity, so that an action based upon it would fall of its own weight, it does not constitute a cloud, and an action to remove it cannot be maintained in the absence of special circumstances entitling the party to relief, p. 88.

A conveyance by a widow before her dower is allotted her is not a cloud upon the title of the heirs: *Lytle v. Sandefus*, 93 Ala. 399. Cited and the rule applied in *Sloan v. Sloan*, 25 Fla. 67; *Maskey v. Lock-*

mann, 146 Cal. 780, where apparent validity of sheriff's sale against plaintiff depended on continuance of attachment levied prior to plaintiff's deed and complaint shows acceptance of bond and release of attachment sheriff's sale casts no cloud; see, also, 45 Am. St. Rep. 374, note.

#### 43 Cal. 110-119. ROSEMAN v. CANOVAN.

The rule of caveat emptor is not applicable where the vendor resorts to a trick or artifice for the purpose of diverting the purchaser from the line of inquiry otherwise open to him, pp. 117, 118.

Referred to in Court v. Snyder, 2 Ind. App. 443, 50 Am. St. Rep. 249, holding that where there is no willful misrepresentation, or artful device to disguise the character or conceal the defects of the article sold, the vendee is bound. Cited, also, in extended notes in 13 Am. Dec. 267; and 90 Am. Dec. 428, 430.

#### 43 Cal. 136. FOUCAULT v. PINET.

**Appeal.**—Judgment will be modified on, when error is determinable from the record, p. 137.

Cited in Fox v. Hale etc. Co., 122 Cal. 222, applying rule of modification when respondent released part of judgment which alone was the subject of the appeal.

#### 43 Cal. 137-158. PEOPLE v. FAIR.

On a trial for murder the prosecution will not be allowed to introduce evidence of the general character of the accused, unless the defendant initiate the inquiry, p. 149.

Upon the trial of a defendant for murder, evidence of his having immoral relations with a woman is inadmissible; People v. Wallace, 89 Cal. 162. Commission of other crimes in no way related to the one on trial cannot be proved: Mann v. State, 22 Fla. 608. Cited in Thompson v. State, 38 Tex. Cr. App. 341, as to her reputation for chastity when charge was murder. Where a defendant introduces evidence of his good character in a prosecution for larceny, the evidence should be limited to that particular trait of character having relevancy to the crime charged, i. e., honesty: State v. Bloom, 68 Ind. 56; 34 Am. Rep. 248. Evidence that defendant was reported to belong to a "gang of horse thieves" is inadmissible: State v. Thurtell, 29 Kan. 149. Approved in Carter v. State, 36 Neb. 488. Cited, also, in 50 Am. Rep. 99, note.

New Trial cannot be granted on any other grounds than those specified in section 440 of the Criminal Practice Act, p. 146.

Cited and followed in People v. Voll, 43 Cal. 167, holding that it is not ground for new trial that one of the triers appointed is on the panel of the jury in attendance in the case; People v. McCarty, 48 Cal. 559;

People v. Shainwold, 51 Cal. 470, deciding that the mere fact that a sheriff, in the absence of the judge, adjourned the court at 10 o'clock A. M., instead of waiting until 12 M., is not ground for a new trial: People v. O'Brien, 88 Cal. 488, 490, where it was held that misdescription of the names of some of the jurors summoned to try the cause is not ground for a new trial or for arresting judgment; and People v. Gardner, 98 Cal. 128.

The fact that a juror had formed and expressed an unqualified opinion of the guilt of the accused is not ground for a new trial, where the objection is taken for the first time after the trial, p. 147.

Rule followed in People v. Mortimer, 46 Cal. 120; and in People v. Samsells, 66 Cal. 100, where the rule was applied in a case, in which after the verdict it was found that two jurors were not on the last assessment-roll of the county. Approved in State v. Marks, 15 Nev. 36. Distinguished in State v. Morgan, 23 Utah, 228, 229, where juror had beforehand prejudiced case, but answered falsely in voir dire, new trial granted.

**Practice—Order of Argument.**—The court in a capital case may, in its discretion, direct by which side the argument to the jury is to be opened, but by whichever side it is opened, the other side will have the close, p. 156.

Followed in People v. Haun, 44 Cal. 100. Rule changed by Penal Code.—In criminal cases since the penal code took effect, the district attorney must open and may conclude the argument: People v. Mortimer, 46 Cal. 116. Cited in People v. Ah Hop, 1 Idaho, 702, but distinguished.

**Statutory Construction.**—A statute is not to be considered as repealed by implication either in whole or in part except in so far as its provisions are found absolutely inconsistent with the subsequent act, p. 154.

If there is an inconsistency between statutes, the former is repealed by implication only to the extent of the conflict: Capron v. Hitchcock, 98 Cal. 432.

#### 43 Cal. 159-161. WARD v. McNAUGHTON.

Parol testimony is not admissible to contradict, vary, or enlarge the effect of a written instrument, p. 160.

Cited in Frink v. Roe, 70 Cal. 316. If it appears on the face of the complaint, in an action to enforce an express trust in land, that the alleged trust rests in parol, the defense of the statute of frauds may be taken advantage of by demurrer: Barr v. O'Donnell, 76 Cal. 471; 9 Am. St. Rep. 244. Dissenting opinion, Ames v. S. P. Co., 141 Cal. 734, as to construction of railroad ticket.

**Foreclosure.—Junior Mortgagee,** when made a party, is entitled to foreclosure and judgment protecting his rights in case of surplus, p. 161.

Cited in *Hibernia etc. Soc. v. London etc. Co.*, 138 Cal. 260, applying rule to judgment lien holder.

**43 Cal. 162-163. PEOPLE v. DONOVAN.**

**Evidence.**—While it is objectionable to ask a witness if he had signed a written verdict of a certain tenor without first allowing him an opportunity to examine such verdict, it is not error to admit his answer if the witness does in fact examine the verdict before answering, p. 165.

The writing itself must first be shown the witness: *Gunter v. State*, 83 Ala. 106. Cited in *Ortiz v. State*, 30 Fla. 277, but distinguished, the court holding that where a defendant on trial for crime makes a statement under oath of his defense to the jury, a previous inconsistent statement, made under the same statute, is admissible against him as evidence of guilt, without his mind being directed to the time, place, or circumstances of such inconsistent statement. Rule approved in *Simmons v. State*, 32 Fla. 392.

**General Citations.**—Leading case referred to in *People v. Sutton*, 73 Cal. 246, but held by the court to have no bearing on the question at issue.

**43 Cal. 166-168. PEOPLE v. VOLL.**

**New Trial.**—Where a new trial is asked on the ground of newly discovered evidence, the affidavits must set forth such evidence as would be received on the trial, p. 168.

The evidence must be such as to render a different result probable on a retrial: *Braithwaite v. Aiken*, 2 N. Dak. 62.

**43 Cal. 176-178. PEOPLE v. WOODS.**

**Notes of Phonographic Reporter** of evidence are *prima facie* evidence only in the court below, and cannot be considered in the supreme court, p. 177.

Cited and followed in *People v. Armstrong*, 44 Cal. 327. Stenographer's transcript of testimony given by a party in a prior action, although certified to as correct, is not admissible in a subsequent action as evidence of what he said on the former trial: *Reid v. Reid*, 73 Cal. 206, 210. *State v. Shephard*, 23 Mont. 327, holding stenographer's certificate that statement contained all the evidence insufficient. To be admissible they must be adopted by the court, and included in a bill of exceptions: *State v. Larkin*, 11 Nev. 323.

**43 Cal. 178-180. HANSON v. McCUE.**

**Rules of Court** are binding on the court equally with suitors and are to be construed as statutes would be construed. p. 179.

But rules of the court must conform to and be governed by the statute: *In re Jessup*, 81 Cal. 483. Cited and followed in *Merchants' Nat. Bank of Jacksonville v. Grunthal*, 39 Fla. 394; *Coyote G. & S. M. Co. v. Ruble*, 9 Oreg. 123, holding that the court has no discretion when the time for filing a petition for a rehearing has expired; and *Mill Company v. Johnston*, 5 Utah, 149. See, also, 41 Am. St. Rep. 643, 644, note.

**Petition for Rehearing Lost.**—Where a petition for a rehearing is sent by the customary and most reliable means of transmission (express company) and fails to reach the clerk within the time allowed for filing such a petition, the petition is in contemplation of law in the hands of the clerk and if lost may be supplied, p. 180.

Followed in *Bernal v. Wade*, 46 Cal. 641. But in *Ward v. Healy*, 110 Cal. 589, the court held that the fact that a printed transcript was in the office of the express company and in transit to the clerk for filing, was not equivalent to filing within the rules of the court, refusing to extend the rule of the leading case to include such a statement of facts.

**Remittitur.**—When a remittitur is improperly issued, the court still retains jurisdiction of the case, and the remittitur may be recalled, p. 180.

Cited in *Trumpler v. Trumpler*, 123 Cal. 253, noted under *Rowland v. Kreyenhagen*, 24 Cal. 52. Case is erroneously cited in *City of Los Angeles v. Pomeroy*, 124 Cal. 635 (quoted in *Copper King v. Wabash etc. Co.*, 114 Fed. 993), as to percolating waters probably for *Hanson v. McCue*, 42 Cal. 303. Followed in *Bernal v. Wade*, 46 Cal. 641, "If a remittitur has been regularly issued and filed, and there has been no violation of law or of our own rules in ordering it, no mistake of facts and no fraud practiced by the prevailing party, our jurisdiction over the cause is at an end and our judgment is final"; *People v. McDermott*, 97 Cal. 249. Cited, also, in 21 Am. Dec. 121, note.

#### 43 Cal. 180-184. NEVADA & SACRAMENTO CANAL COMPANY v. KIDD.

**Appeal.**—An order striking out portions of a pleading cannot be reviewed on appeal from the judgment, unless it be supported by a statement on appeal, p. 184.

Cannot be presented upon an appeal from a judgment without a bill of exceptions: *Spence v. Scott*, 97 Cal. 181. Followed in *Reinhart v. Company D*, 23 Nev. 372. Cited in *Hawley v. Kocher*, 123 Cal. 79, noted under *Morris v. Angle*, 43 Cal. 240.

**Pleading.**—A complaint setting up in one and the same count ownership in and ouster from, a water right, and also a site for a dam, and the land on which a dam is built, and praying for restitution, is demurable for improperly uniting several causes of action, p. 184.

A cause of action based upon alleged fraud, malice, and oppression of the defendant, and a cause of action arising from a breach of a covenant of warranty of property conveyed, cannot be united: *Cosgrove v. Fisk*, 90 Cal. 76.

**43 Cal. 185-190. WOOD v. GOODFELLOW.**

**Mortgage—Statute of Limitations.**—When third persons have acquired interests in mortgaged property subsequent to the mortgage, they may invoke the aid of the statute of limitations as against the mortgage, even though the mortgagor, as between himself and the mortgagee, may have waived its protection, p. 189.

Cited in *Cal. Bank v. Brooks*, 126 Cal. 200, noted under *Lord v. Morris*, 18 Cal. 482; *Wells v. Enright*, 127 Cal. 674, sustaining right of original parties to waive or prolong the statute; *Filipini v. Trobock*, 134 Cal. 444, 445, 447, permitting distributee or mortgagor to plead statute under facts stated, when held to be a subsequent grantee; *Brandenstein v. Johnson*, 140 Cal. 31, 32, noted under *Lord v. Morris*, 18 Cal. 490; *Hanna v. Kasson*, 26 Wash. 574, where subsequent grantee of mortgaged lands has been compelled to redeem portion thereof from execution sale under personal judgment against mortgagor upon mortgage notes, limitations not extended as against foreclosure on mortgage debt; *Raymond v. Bales*, 26 Wash. 499, partial payment by mortgagor on his mortgage debt will not extend limitations as against judgment creditor of mortgagor who has bought mortgaged premises at execution sale; *George v. Butler*, 26 Wash. 462, 466, absence of mortgagor from state does not suspend limitations as to mortgage, when he has parted with interest in mortgaged premises to resident grantee. The absence of a mortgagor from the state stops the running of the statute as to him, but not as to subsequent lienholders: *Watt v. Wright*, 66 Cal. 205, 207. Rule cited in *Ward v. Waterman*, 85 Cal. 507, but it was held that a mere creditor, who has acquired no contract lien and parted with no value, would not come within the rule. Rule denied in *Kerndt v. Porterfield*, 56 Iowa, 415, holding that a note and mortgage barred by the statute of limitations may be revived by an admission of indebtedness by the mortgagor and the priority of the mortgage lien will thereby be preserved as against subsequent liens. Denied in *Waterson v. Kirkwood*, 17 Kan. 13; and in *Schmucker v. Sibert*, 18 Kan. 109, 110; 26 Am. Rep. 767, 768, 769. Rule generalized in *Gruner v. Westin*, 66 Tex. 217, holding that "one who has purchased property from another, in whose hands and on whose account it is charged with a lien, may assert the loss of that lien or its extinguishment, whenever it becomes necessary for the protection of his own rights." Approved in *Euhanks v. Leveridge*, 4 Saw. 279. Cited, also, in 82 Am. Dec. 758, note; 31 Am. Rep. 41, note; and 60 Am. St. Rep. 205, 206, 207.

**Mortgage—Subsequent Encumbrancers.**—As against subsequent en-

cumbrancers or a subsequent holder of the equity of redemption, the mortgagor has no power by stipulation to prolong the time of payment or in any manner increase the burdens of the mortgaged premises, p. 188.

Approved in Cook v. Prindle, 97 Iowa, 475, 59 Am. St. Rep. 431, holding that after the debt was barred, the mortgagor could not revive the mortgage lien, as against one to whom he had sold the land before the statute had run. Cited in Bassett v. Monte Cristo M. Co., 15 Nev. 300, as the correct rule. A renewal of a mortgage barred by the statute of limitations does not affect the rights of third parties to the property, accruing after the execution of the mortgage: Cason v. Chambers, 62 Tex. 307. Approved in De Voe v. Rundle, 33 Wash. 610, 611, where limitations has run against a mortgage it cannot be revived by any act of mortgagor as against a subsequent judgment lien.

Action on Mortgage must be brought within four years after its maturity, p. 190.

Cited in Newhall v. Sherman, 124 Cal. 511, noted under Union etc. Co. v. Murphy's etc. Co., 22 Cal. 621.

#### 43 Cal. 191-196. SLATTERY v. HALL.

Demurrer.—Under a general demurrer objection cannot be taken that the complaint is ambiguous, p. 196.

Defects of form of averment or uncertainty cannot be considered on general demurrer. Ward v. Clay, 82 Cal. 505. Uncertainty in a pleading must be taken advantage of by a special demurrer: Palmer v. Utah & N. Ry. Co., 2 Idaho, 293. Referred to in Isaacs v. Holland, 4 Wash. 60.

#### 43 Cal. 196-200. PEOPLE v. AVILA.

Indictment for Receiving Stolen Property.—An allegation of the name of the person who stole the goods, or that his name is unknown to the grand jury, is unnecessary and immaterial, p. 199.

It is sufficient to charge the offense as defined by the code, and it is not necessary to allege the value of the property: People v. Rice, 73 Cal. 221. Followed in People v. Ribolsi, 89 Cal. 496; and in People v. Clausen, 120 Cal. 383. Cited in Commonwealth v. Avery, 14 Bush. 631.

Idem.—A charge in an indictment which alleges that the defendant received certain stolen property for his own gain, knowing it was stolen, is sufficient, p. 199.

Followed in People v. Ribolsi, 89 Cal. 499.

#### 43 Cal. 200-205. ESTATE OF UTZ.

Will.—Where a testator used the expression, "to my children," and proceeded to name them and the portion devised to each, but omitted any

special mention of a devise to the children of a deceased daughter, the use of the word "children" did not indicate a purpose to exclude the children of the deceased daughter, and they were entitled to a full share of the estate, as if the deceased had died intestate, p. 203.

An illegitimate child unintentionally omitted from the will of its mother is entitled to share in the estate in like manner as if legitimate; Estate of Wardell, 57 Cal. 493. In order to disinherit a child whose name is omitted from a will, the words of the will must show that the testator had the child in mind, and must indicate directly or by implication equally as strong that he intended to omit such child from the will: In re Stevens, 83 Cal. 329; 17 Am. St. Rep. 257. The fact that the testator mentioned in the will the widows of his deceased sons, the mothers of the omitted grandchildren, is not sufficient to show that he had his grandchildren in mind and does not rebut the presumption that they were forgotten, or show that the omission was intentional: In re Salmon, 107 Cal. 617; 48 Am. St. Rep. 166.

**Idem.**—Rule in Shelly's Case when applied to wills, is confined to cases in which after a freehold interest is devised to one, the remainder is to go in terms to the heirs of the first taker, p. 204.

Rule abrogated by section 779 of the Civil Code; Barnett v. Barnett, 104 Cal. 299.

#### 43 Cal. 206-210. MAIN v. TAPPENER.

**Attachment.**—The service or posting of an attachment must precede the filing of a copy of it with the recorder, p. 209.

Approved in Sharp v. Baird, 43 Cal. 580; and in Watt v. Wright, 66 Cal. 208. But if an attachment is levied according to law, a sheriff's deed, executed in pursuance of an execution sale under a judgment rendered in the attachment suit, takes effect from the levy of the attachment. Porter v. Pico, 55 Cal. 172. Cited and the rule followed in First Nat. Bank v. Jasper County Bank, 71 Iowa, 488.

**Idem.**—To complete the service of an attachment of real property, both the service of the attachment on the occupant or posting on the premises, and the filing of it with the county recorder, are essential, p. 209.

Approved in Schwartz v. Cowell, 71 Cal. 306. Cited in Ames v. Parrott, 61 Neb. 851, on point that statute must be strictly followed and holding levy insufficient under local statute. Distinguished in Woldert v. Nedderhart etc. Co., 18 Tex. Civ. App. 604, noted under Wheaton v. Neville, 19 Cal. 42; First Nat. Bank v. Sonnelitner, 6 Idaho, 27, notice of levy of attachment must describe property sufficiently to be identifiable by purchaser; dissenting opinion of Beck, C. J., in Reynolds v. Ray, 12 Colo. 121, where he dissented from the holding of the court,

that a valid levy of a writ of attachment may be made on real estate and a valid lien acquired, by indorsing thereon a description of the property attached and filing a copy of such writ in the recorder's office. Leading case approved in *Graham v. Reno*, 5 Colo. App. 334.

**43 Cal. 210-217. BYERS v. NEAL.**

**Ejectment—Judgment.**—A judgment for plaintiff in ejectment where title was directly in issue, is conclusive and bars defendant's rights under the same title in a subsequent action, p. 214.

Approved in *Avery v. Superior Court*, 57 Cal. 249. Cited in *Graves v. Hebron*, 125 Cal. 405, applying rule to judgment rendered against a person before patent, but after issuance of pre-emption receipt in subsequent action to quiet title involving same question of boundaries. A judgment in ejectment, where both parties claimed under executory contracts from the holder of a Mexican grant, is a bar in a subsequent action between the same parties, notwithstanding the common grantor received his patent subsequent to the judgment: *Phelan v. Tyler*, 64 Cal. 83. But neither the parties nor their privies are precluded from showing in a subsequent action any new matters occurring after its rendition which give the defeated party a title or right of possession: *Thrift v. Delaney*, 69 Cal. 192. Rule applied in *Breon v. Robrecht*, 118 Cal. 472.

**Pre-emption.**—Where a pre-emptioneer had made proof and payment, a patent issued to him does not confer a new title, but is merely a formal assurance of the estate already acquired by such proof and payment, p. 215.

Cited in *Thrift v. Delaney*, 69 Cal. 192, holding that no estate vests, however, in the pre-empter until he has proved up and paid for the land. A pre-emptor becomes the equitable owner of land after payment, and ejectment may be maintained on the title and right of possession evidenced by the certificate of purchase: *Witchier v. Conklin*, 84 Cal. 503. Cited and followed in *Brown v. Warren*, 16 Nev. 235.

**43 Cal. 225-228. PEOPLE v. DE LA GUERRA.**

**Writ of Mandate** will issue to compel a judge to proceed with a cause which he refuses to do without sufficient reason, p. 228.

"Mandamus lies to compel an inferior court to proceed to the trial of a cause and to set it in motion, where it has unreasonably delayed the proceedings, or where its refusal is a denial of justice": *State v. Judge of Civil District Court*, 34 La. Ann. 77. Writ lies where an inferior court refuses to take jurisdiction when by law it ought to do so, or where, having attained jurisdiction, it refuses to proceed in its exercise: *State v. Eddy*, 10 Mont. 324.

**43 Cal. 229-238. MINOR v. KIDDER.**

**Election Contest.**—An election contest is not an ordinary adversary proceeding and public interests imperatively require that the ultimate determination should, if possible, reach the very right of the case, pp. 237, 238.

Cited in *Sweeny v. Adams*, 141 Cal. 561, discussing protection of public interest, therein involved; *Abbott v. Hartley*, 143 Cal. 485, holding petition sufficiently certain; *Preston v. Culbertson*, 58 Cal. 209, where the rule was applied; and *Lord v. Dunster*, 79 Cal. 488, holding it error for the court to deny a motion for a continuance made after the trial has ended but before its decision is announced, upon affidavits of an election board showing that they were greatly surprised at the result of the recount, and that they had since the adjournment of the court procured certificates of a sufficient number of voters of that precinct, who would testify that they had voted for respondent, to insure his election. But the doctrine of the leading case does not go to the extent of holding that the usual rules for the introduction and taking of evidence and other rules for the orderly conduct of judicial proceedings do not apply as much to election contests as to ordinary civil actions: *Lay v. Parsons*, 104 Cal. 663. Court has power of its own motion to adjourn the session in an election contest several days and does not thereby lose jurisdiction: *Falltrick v. Sullivan*, 119 Cal. 617. Cited in *Nash v. Craig*, 134 Mo. 358, where an amendment was allowed making the grounds of contest more specific; and in *Schneider v. Bray*, 22 Nev. 278.

**Idem.**—Any person who is an elector may contest the election of a county officer, p. 237.

So a private citizen may institute an inquiry into the conduct of office holders: *In the Matter of Marks*, 45 Cal. 216.

**43 Cal. 238-241. SERVANTI v. LUSK.**

**Execution.**—Personal property exempt from sale under execution is none the less exempt because the judgment debtor owns an undivided interest in it, p. 240.

Approved as a general rule in *Wise v. Fry*, 7 Neb. 136; 29 Am. Rep. 381. Referred to in *Noyes v. Belding*, 5 S. Dak. 616. The actual homestead of a head of a family is protected from forced sale, and there is nothing restricting the benefit of exemption to those having any particular kind of title—any interest of the claimant is exempt: *In re Swearinger and Lamar*, 5 Saw. 57. Cited, also, in extended note in 21 Am. Dec. 551; and in 1 Am. St. Rep. 593, note. Distinguished in *Porch v. Arkansas etc. Co.*, 65 Ark. 44, 67 Am. St. Rep. 897, denying right of partners to claim individual exemption in firm property during its existence, under local statutes.

All Facts Within Issues, not expressly found and not inconsistent with other findings, are presumed to have been found in accordance with judgment, p. 241.

Approved in *Gay v. Havermale*, 27 Wash. 401, decree against plaintiff on ground of laches which recites it is based on findings and evidence is erroneous where issue of laches not raised by the answer.

43 Cal. 242-250. **JOHNSON v. SIMONTON.**

**Swill Milk Ordinance.**—It is within the constitutional power of the legislature to authorize to supervisors to make all regulations necessary or expedient for the preservation of the public health, and under it the supervisors had the right to prohibit the feeding of cows on still slops and vending the milk of such cows, p. 249.

Cited in *Odd Fellows' Cem. Assn. v. San Francisco*, 140 Cal. 231, 234, noted under *Ex parte Andrews*, 18 Cal. 679; *Weeks v. McNulty*, 101 Tenn. 505, 70 Am. St. Rep. 699, holding innkeeper civilly liable for injuries resulting from failure to erect fire-escapes under ordinance; *Jackson v. Kansas etc. Co.*, 157 Mo. 637, ruling similarly as to breach of ordinance regulating rate of speed of railroad trains. Ordinance prohibiting the slaughtering of animals within the city limits is valid: *Ex parte Heilbron*, 65 Cal. 610. Ordinance is valid prohibiting the keeping of more than two cows within certain portions of the city limits: *In re Linehan*, 72 Cal. 116. An ordinance establishing fire limits is valid: *McCloskey v. Kreling*, 76 Cal. 512. Cited in *Yount v. Denning*, 52 Kan. 636, to the point that an ordinance authorized by statute, and duly passed, becomes binding on all persons within the corporate limits. Referred to in *Commonwealth v. Parks*, 155 Mass. 533, where an ordinance was held valid which prohibited blasting without the written consent of the board of aldermen; and in *Bott v. Pratt*, 33 Minn. 328; 53 Am. Rep. 51. Cited, also, in 34 Am. Dec. 633.

**Idem.**—The scientific correctness of the determination by the supervisors that the milk of cows fed on still slops is unwholesome is not open to inquiry in the supreme court, p. 249.

Where the questions of fact calling into exercise the police power were determined by the municipality, the correctness of their determination as to matters of fact is not open to inquiry, by way of defense, to a prosecution under the ordinance: *Ex parte Lacey*, 108 Cal. 329; 49 Am. St. Rep. 95.

43 Cal. 250-253. **GRIMM v. CURLEY.**

**Adverse Possession.**—Where a grantee by mistake and in good faith entered into a strip of land adjoining his lot, but not within its boundaries, and remains in continuous, open, notorious, and adverse possession for five years from the time of entry, the remedy of the former owner is barred, p. 253.

Cited in *Unger v. Mooney*, 63 Cal. 590, 49 Am. Rep. 102, to the point that to set the statute of limitations in motion there must be a hostile possession, open and notorious; *Bowers v. Ledgerwood*, 25 Wash. 18, holding adverse possession established under facts stated. Leading case followed in *Silvarer v. Hansen*, 77 Cal. 582, 584. If one tenant in common notifies the other that he claims the whole property as his own, and the latter acquiesces in the pretension and leaves the premises in the possession of the first, the statute of limitations begins to run notwithstanding each of the parties was under a mistake as to his rights: *McCormack v. Silsby*, 82 Cal. 76. Title may be acquired by adverse possession for five years, although the land in controversy was claimed under a mistaken belief as to boundaries: *Woodward v. Faris*, 109 Cal. 17. Cited in *Lockey v. Horsky*, 4 Mont. 462, and in 24 Am. St. Rep. 389, note.

#### 40 Cal. 253-263. CORWIN v. BENSLEY.

**Lis Pendens.**—If such a lis pendens is filed in an action to try the title to land as imparts notice to purchasers from a party to the action, such purchasers must apply for leave to protect their interests during the pendency of the suit, p. 259.

One who purchased land subject to the mortgages, and with notice of the pendency of the suit to foreclose them, becomes bound by the notice to appear in the action and defend his interests: *Amador C. & M. Co. v. Mitchell*, 59 Cal. 178.

Does a lis pendens filed by a plaintiff, in an action to try title to land in which defendants set up title and ask for affirmative relief, impart notice to purchasers from plaintiff pending the action? p. 259.

Answered in the affirmative in *Welton v. Cook*, 61 Cal. 487, declaring the leading case not an adjudication upon the point.

If a lis pendens is not filed or recorded, the title of a bona fide purchaser without actual notice would be unaffected by the judgment, p. 259.

Statutory mode must be followed, or there can be no lis pendens as to third parties: *Pennington v. Martin*, 146 Ind. 637.

**General Citation.**—*Barnham v. Smith*, 82 Mo. App. 46.

#### 43 Cal. 264-269. BUHNE v. CORBETT.

A plea or defense regarded as an entirety is not to be defeated or disregarded merely because it is inconsistent with some other plea or defense pleaded, p. 269.

The rule is well established in the cases citing it. Cited in *Banta v. Siller*, 121 Cal. 418, noted under *Billings v. Drew*, 52 Cal. 568; *Detroit etc. Co. v. Stevens*, 20 Utah, 247, noted under *Bell v. Brown*, 22 Cal. 672; *Hayes v. Silver etc. Co.*, 136 Cal. 241, on point that verified answer must be consistent. A party does not waive the effect of a denial contained

in one portion of his answer by setting up in the appropriate manner new or affirmative matter: *Billings v. Drew*, 52 Cal. 568. A judgment on the pleadings is not authorized if the answer deny the material allegations of the complaint, although in a special defense separately stated the allegations formerly denied are admitted: *Botto v. Vandament*, 67 Cal. 334. Cited in *McDonald v. Southern Cal. Ry. Co.*, 101 Cal. 213, to the point that there is no distinction between verified and unverified answers in this particular. The effect of a denial in one defense is not waived by the setting up of affirmative matter of extenuation in another defense, nor can the admissions made in the affirmative defense relieve the plaintiff from the necessity of proving the matters denied: *Miles v. Woodward*, 115 Cal. 316. Approved in *People v. Lothrop*, 3 Colo. 449; *Stebbins v. Lardner*, 2 S. Dak. 140; *Lawrence v. Peck*, 3 S. Dak. 648, holding that even if defenses were inconsistent, it would not justify the court in requiring the defendant to stand upon one alone and abandon the other; and *Lake Shore & M. S. Ry. Co. v. Warren*, 3 Wyo. 137.

The effect of a denial of possession in one defense is not waived by the setting up of affirmative matter admitting possession in another defense, and the admissions made in the affirmative defense cannot relieve the plaintiff from proving the matters denied, p. 269.

Approved in *Miles v. Woodward*, 115 Cal. 316. Denied in *McLaughlin v. Alexander*, 2 S. Dak. 236; and in *Seattle National Bank v. Carter*, 13 Wash. 289.

Cited in *Ray v. Moore*, 24 Ind. App. 490, where denials and plea of confession and avoidance were joined.

#### 43 Cal. 270-274. ALDEN v. COUNTY OF ALAMEDA.

When a money judgment is recovered against a county, the proper remedy is to present it to the supervisors for allowance as an audited claim, and if the board refuses to allow it, it may be compelled to do so by mandamus, p. 273.

Cited in *County v. Raymond etc. Co.*, 139 Cal. 132, but holding personal judgment against county for compensation in its condemnation suit not prejudicial to defendant therein; *Bigelow v. Los Angeles*, 141 Cal. 507, noted under *McCann v. Sierra Co.*, 7 Cal. 121; *Greeley v. Cascade Co.*, 22 Mont. 589, noted under *Dana v. San Francisco*, 19 Cal. 486. Where a city board of education has audited and allowed a claim against a school district, mandamus will lie to compel it to draw an order on the county superintendent: *Barber v. Mulford*, 117 Cal. 360. It is for the board to determine how far the county will defend against a claim which has been prosecuted to judgment, and if the board refuses or delays to make payment the claimant is entitled to a writ of mandamus: *Stoddard v. Benton*, 6 Colo. 517. Cited in *State v. Commissioners Lander Co.*, 22 Nev. 76, to the point that a judgment for a cer-

tain sum against a county is an auditing within the meaning of the statute. Rule approved in *Emery County v. Burresen*, 14 Utah, 333; 60 Am. St. Rep. 901; *Lockard v. Board of Commrs.*, Decatur Co., 10 Kan. App. 319. Cited, also, in 68 Am. Dec. 297, note.

**Rule Limited.**—Rule requiring presentation to the board applies only to unliquidated claims and accounts, not to bonds and coupons, nor to a judgment upon bonds and coupons, and such presentation is not necessary before an action on such a judgment: *Vincent v. Lincoln County*, 62 Fed. Rep. 707.

No action can be prosecuted against a county until the claim has been first presented to the supervisors for allowance and has been rejected, pp. 272, 273.

An averment that a claim has been duly presented and rejected is not sufficient—the plaintiff must aver all matter required by the statute: *Rhoda v. Alameda Co.*, 52 Cal. 351.

#### 43 Cal. 274-278. **LIVERMORE v. STINE.**

If a party claiming under a contract required by the statute of frauds to be in writing be permitted, without objection, to prove the contract by parol, such testimony cannot be stricken out at a subsequent stage of the trial because not in writing, p. 278.

Applied in a case where a deposition was improperly admitted as evidence: *People v. Salorse*, 62 Cal. 145, laying down the general rule that a party must object at the time the act is done or the ruling made by the court. Cited in *Schultz v. Noble*, 77 Cal. 81. *People v. Howard*, 135 Cal. 273, applying rule to objections to evidence when similar evidence was theretofore admitted without objection. Applied where parol proof of agency was admitted without objection: *McLaughlin v. Wheeler*, 1 S. Dak. 507.

**General Citations.**—Referred to, but not to any point in law: *Sagely v. Livermore*, 45 Cal. 614.

#### 43 Cal. 279-285. **UTTER v. CHAPMAN.**

Plaintiff is only entitled to recover the actual loss suffered from the breach of a contract to furnish freight to a steamboat, that is, the net profits that would have been made under the contract, p. 284.

Where there was a breach of contract to purchase all the lumber plaintiff should manufacture, et cetera, it was held that the measure of damages was the contract price of the lumber less the expense he would have incurred in manufacturing it: *Winans v. Sierra Lumber Co.*, 66 Cal. 67.

The measure of damages for breach of contract to furnish a steamboat with freight is the difference between the net profits that would have been made under the contract and the net profits which might

have been made with reasonable diligence, but the burden of proof is on the defendant to show that a profit had been or might have been realized, p. 284.

Cited in *Leblond v. McNear*, 104 Fed. 831, noted under *Utter v. Chapman*, 38 Cal. 659; *Cornwall v. Moore*, 132 Fed. 870, and 125 Fed. 651, both holding measure of damages for refusal to accept chartered vessel is net amount that would have been earned by the vessel under charter, less net amount earned, or which might with reasonable diligence have been earned during time required for charter voyage. *Cederberg v. Robinson*, 100 Cal. 95, rule was not discussed. In an action for breach of a contract of employment, the plaintiff is not bound, as a condition of recovery, to prove that he endeavored to find other employment and failed: *Rosenberger v. Pacific Coast Ry. Co.*, 111 Cal. 318.

#### 43 Cal. 285-295. SABICHI v. AGUILAR.

Under the act of 1863, the statute of limitations did not begin to run against lands included in a Mexican grant until after final confirmation by the courts of the United States or the issuance of a patent, p. 291.

Statute of limitations begins to run only from the issuance of the patent: *O'Connor v. Fogle*, 63 Cal. 11, where the rule was applied to a patent issued by the state. Cited, also, in 85 Am. Dec. 172, note; 76 Am. St. Rep. 483, note, on adverse possession of public property.

Where the final confirmation of a Mexican grant was to be made by the board of United States land commissioners, and not by the district court, the district court has no jurisdiction under the act of Congress of June 14, 1860, to adjudicate on the survey unless the survey had been returned into court and remained pending there at the time of the passage of the act, p. 292.

Applied in *Morris v. De Celis*, 51 Cal. 62.

#### 43 Cal. 299-306. JOHNSON v. CHELY.

**Unlawful Detainer.—Jurisdiction is vested in county court, p. 304.**

Cited in *Ivory v. Brown*, 137 Cal. 605, noted under *Caulfield v. Stevens*, 28 Cal. 120.

In an action of unlawful detainer against a tenant for holding over, if the tenant be able to show that he did not enter under the lease, but that, being already in possession, he was induced to accept a lease from the plaintiff, through deception and imposition practiced upon him, then this state of facts destroys the relation of landlord and tenant and he is not estopped to deny the title of the plaintiff, p. 305.

Referred to in *Peralta v. Ginochio*, 47 Cal. 460. Approved in *Steele v. Bond*, 28 Minn. 273; and in *Loring v. Harmon*, 84 Mo. 127, holding that if the "lessee was in possession at the time he entered into the lease, as tenant of another, he may resist a recovery on the ground

that he accepted the lease in mistake, or was induced by fraud or misrepresentation to accept it." Cited, also, in 13 Am. Dec. 71, note.

**Rule Limited.**—The rule that in an action of unlawful detainer the tenant is not estopped from disputing the title of the landlord, is limited to cases where the tenant was induced to accept the lease by reason of the fraud of the lessor which destroyed the relation of landlord and tenant; *Knowles v. Murphy*, 107 Cal. 114.

**43 Cal. 306-312. PHELAN v. GARDNER.**

A broker employed to make a sale of land is entitled to his commission on finding a purchaser ready and willing to complete the purchase on the terms agreed upon, p. 311.

Cited and approved in the following cases: *Gonzales v. Broad*, 57 Cal. 226, holding that the refusal of the purchaser to purchase because of an unsatisfactory title does not affect the broker's right to his commission; *Dolan v. Scanlan*, 57 Cal. 263, deciding broker is entitled to his commission if he find a purchaser, even though the owner negotiated a sale himself; *Wilson v. Sturgis*, 71 Cal. 229; *Maxon v. Jones*, 128 Cal. 81, holding broker entitled to commission for negotiating loan for administrator, although probate court thereafter refuses to confirm the project; *Parker v. Estabrooke*, 68 N. H. 350, ruling similarly, though contract of sale was rescinded and vendee paid damages stipulated therefor; *Phelps v. Prusch*, 83 Cal. 628, where it was held that the validity of title did not affect the broker's rights; *Smith v. Schiele*, 93 Cal. 149, a case of failure of title; *Gunn v. Bank of California*, 99 Cal. 352, deciding, however, that the mere finding of a person able to purchase and who makes a deposit with the broker, to be returned if title is defective, and who refuses to consummate the sale owing to a defective title, does not entitle the broker to his commission, particularly where the vendor never met or even knew the name of such purchaser; *Oullahan v. Baldwin*, 100 Cal. 661, dissenting opinion of Harrison, J.; *Martin v. Ede*, 103 Cal. 161, 162; *Finnerty v. Fritz*, 5 Colo. 179; *Goss v. Stevens*, 32 Minn. 474; *Hamlin v. Schulter*, 34 Minn. 536; *Gaty v. Foster*, 18 Mo. App. 645; *Hayden v. Grillo*, 26 Mo. App. 293; *Hayden v. Grillo*, 35 Mo. App. 654, holding that if the broker refuse to inform the owner of the name of the proposed purchaser, the owner may rightfully refuse to close the transaction without being liable for commissions; *Kyle v. Rippey*, 20 Oreg. 453; and *Watson v. Brooks*. 8 Saw. 320; 13 Fed. Rep. 543.

**Res Judicata.**—A judgment is only conclusive upon questions involved in the suit, and upon which it depends, or upon matters which might have been litigated and decided in the suit, p. 311.

Approved in *Parnell v. Hahn*, 61 Cal. 132. Not followed in *Greenup v. Crooks*, 50 Ind. 421. All matters involved in the issue, determined by the court upon the merits, are as fully concluded by the judgment

as other matters which may have been considered or discussed: *Sanderson v. Peabody*, 58 N. H. 118; and *Girardin v. Dean*, 49 Tex. 247. Cited, also, in 96 Am. Dec. 776, 780, note.

**Contract—Intoxication.**—Where the fact to be arrived at was the mental condition of the plaintiff at the time the contract was made, evidence of intoxication several hours after entering into the contract is admissible, p. 312.

Cited in 12 Am. Dec. 654, note.

#### 43 Cal. 312-314. **YENAWINE v. RICHTER.**

**Certiorari.**—Certiorari will not lie to review an order of a county court granting a new trial, however erroneous such order may be, p. 314.

If the lower court has jurisdiction, certiorari will not lie: *Hutchinson v. Inyo County*, 61 Cal. 121. Inquiry upon the writ cannot be extended any further than is necessary to determine whether the inferior tribunal has exceeded its jurisdiction or regularly pursued its authority: *Phillips v. Welch*, 12 Nev. 169. Cited, also, in 12 Am. Dec. 535, note.

County Courts are courts of superior jurisdiction, and have power to grant new trials, p. 314.

Cited in 94 Am. Dec. 765, note.

#### 43 Cal. 314-319. **JARVIS v. HOFFMAN.**

**Homestead.**—If, on the death of the husband, the widow performs the conditions and obtains the patent for the homestead, she acquires an absolute title in fee, from all trust in favor of children, p. 319.

Cited and applied in *Buxton v. Traver*, 67 Cal. 174, holding that the children of a deceased pre-emption claimant acquire no rights in a homestead filed by the widow on the same land after the pre-emptor's death.

**Idem.**—If the father and mother should both die before the conditions had been fully performed by the homestead claimant, the right and fee would immediately inure to the minor children and might be sold for their use at any time within two years, and the purchaser, on the payment of the remaining fees, would become entitled to a patent, pp. 317, 318.

Leading case followed in *A. T. & S. F. R. R. Co. v. Pracht*, 30 Kan. 77.

#### 43 Cal. 320-323. **COTTLER v. LEITCH.**

The giving of notice of intention to move for a new trial amounts to a waiver of the right to notice of filing of the findings, p. 322.

Approved in *Thorne v. Finn*, 69 Cal. 254; *Gray v. Winder*, 77 Cal. 527, where it was held that when a party acts as if he had formal notice of a decision, such acts constitute a waiver of such formal notice; *Forni v.*

Yoell, 99 Cal. 178; and Burlock v. Shupe, 5 Utah, 433, holding, however, that the asking of a stay of proceedings to prepare notice of intention to move for a new trial would not be a waiver of the statutory right to have written notice of the decision of the court before filing notice of intention.

An order extending the time to prepare and file motion for a new trial extends the time to prepare and file notice of motion for a new trial, p. 321.

Affirmed in Burton v. Todd, 68 Cal. 488.

A defendant in a motion for a new trial may file amendments to the statement without waiving his right to object that the statement was not filed in time, by a preface that he does so without prejudice to his right to object in this particular, p. 322.

Approved in Stevens v. Northwestern Stage Co., 1 Idaho, 606. Cited in Beach v. Spokane etc. Co., 25 Mont. 372, holding objection to settlement of statement sufficient.

43 Cal. 323-325. **POORMAN v. MILLS & CO.** S. C. 35 Cal. 118, 39 Cal. 345.

**Res Judicata.**—A decision by the supreme court upon the points of a case becomes the law of the case in all subsequent proceedings, p. 324.

Cited in 27 Am. Dec. 634, note.

43 Cal. 325-331. **WITTE v. VINCENOT.**

**Negotiable Instruments.**—Pass-book of a bank transferrable to order, is not a negotiable instrument, p. 330.

Rule approved in McCaskill v. Connecticut Savings Bank, 60 Conn. 312; 25 Am. St. Rep. 328.

43 Cal. 331-340; 16 Am. Rep. 143. **PEOPLE v. EDDY.**

**Taxation.**—A solvent debt, whether secured by mortgage or not, is property for the purposes of taxation within the meaning of the constitution, p. 336.

Cited in Judge v. Spencer, 15 Utah, 249, sustaining local statute as to taxation of mortgage debt; Arapahoe Co. v. Printing Co., 15 Colo. App. 190, membership in or contract with Associated Press by newspaper publisher is not property subject to taxation. Doubted in Savings & Loan Society v. Austin, 46 Cal. 492, in which Crockett, J., held a tax levied on both the mortgage debt and the property mortgaged to be double taxation; Rhodes, J., dissented from this view relying upon the leading case, 46 Cal. 500. Overruled in People v. Hibernia Bank, 51 Cal. 248, 250; 21 Am. Rep. 708, 709. The leading case cited in Attorney General v. Supervisors, 71 Mich. 22, to the point that taxation of credits is not unjust taxation. Leading case approved in State v. Carson Savings Bank, 17 Nev. 156, 157; Morrison v. Manchester, 58 N. H. 553; and in

**County of Perry v. Troutman**, 114 Pa. 364. Cited, also, in 74 Am. Dec. 93, extended note.

**Idem.**—All private property must be taxed, and is not competent for the legislature to exempt from taxation any particular class or species of property held in private ownership, p. 336.

Approved in **L. R. & F. S. Ry. v. Worthen**, 46 Ark. 327, 330, holding that a statute exempting railroad embankments, tunnels, ties, and trestles from taxation, is unconstitutional. Fruit trees are subject to taxation: **Cottle v. Spitzer**, 65 Cal. 464. A commutation of the taxes of a railroad company, in consideration of its carrying without charge troops and munitions of war, is unconstitutional: **Hogg v. Mackay**, 23 Oreg. 341; 37 Am. St. Rep. 684. An act providing that no taxes shall be levied upon a railroad company until its profits should amount to ten per cent on the capital, is unconstitutional: **C. & O. Ry. Co. v. Miller**, 19 W. Va. 427. Cited, also, in 37 Am. St. Rep. 688, note.

**Interpretation of Statute.**—The general rule in the interpretation of words in constitutions or in statutes is that they are used in their ordinary and popular sense, unless the contract shows that they have some technical or arbitrary meaning, pp. 336, 337.

Cited in **San Francisco v. Flood**, 64 Cal. 507, to the point that the word "property" is used in its popular sense in the constitution; and to the same effect in **Cottle v. Spitzer**, 65 Cal. 461. A word repeatedly used in a statute will bear the same meaning throughout, unless it is apparent another meaning was intended: **Miller v. Dunn**, 72 Cal. 466; 1 Am. St. Rep. 70.

#### 43 Cal. 341-344. GRAFF v. MIDDLETON.

**Quitclaim Deeds.**—A quitclaim deed passes whatever interest the seller has in the land at the time of its execution, and the prior recording of such deed will give it a preference over a deed of bargain and sale previously executed, but which was subsequently recorded, p. 344.

Affirmed in **Frey v. Clifford**, 44 Cal. 343. A quitclaim deed is sufficient to enable the grantee to maintain ejectment if his grantor could have done so: **Rego v. Van Pelt**, 65 Cal. 256. Rule of the leading case seems to be doubted in **Allison v. Thomas**, 72 Cal. 564, 1 Am. St. Rep. 90, where it was said to be contrary to the decisions elsewhere. But in **Nidever v. Ayers**, 83 Cal. 42, the leading case was approved and followed. Cited in **Spaulding v. Bradley**, 79 Cal. 456, to the point that a quitclaim deed conveys the absolute fee simple title if the grantor has it; and to the same effect in **Taylor v. Opperman**, 79 Cal. 470. The rule was discussed in **Hastings v. Brooker**, 98 Ind. 159, but the court did not decide the point. However, in **Davidson v. Coon**, 125 Ind. 503, and in **Smith v. McClain**, 146 Ind. 84, the rule of the leading case was approved and followed. Leading case was also approved in **Schott v.**

Dosh, 49 Neb. 193; 59 Am. St. Rep. 536; Wilhelm v. Wilken, 149 N. Y. 452; 52 Am. St. Rep. 746; and in Cutler v. James, 64 Wis. 178, 54 Am. Rep. 606. There is, however, a great diversity of opinion in other jurisdictions as to the rule of the leading case. In Gress v. Evans, 1 Dak. Ter. 384, the point was discussed, but not decided. But in Parker v. Randolph, 5 S. Dak. 558, a contrary doctrine was upheld, Corson, J., dissenting and approving the leading case. The question was raised but not decided in Hentig v. Redden, 35 Kan. 475. And in Johnson v. Williams, 37 Kan. 182, 1 Am. St. Rep. 246, the doctrine of the leading case was limited, the court holding a purchaser under a quitclaim deed not to be a bona fide purchaser as to outstanding equities and interests discoverable by the exercise of reasonable diligence. Rule of the leading case doubted in America Mort. Co. v. Hutchinson, 19 Oreg. 347. Cited in 25 Am. Dec. 184, 165, note.

**43 Cal. 344-352. PEOPLE v. WILLIAMS.**

Insanity produced by intoxication does not destroy responsibility for crime, if the accused, when sane, voluntarily made himself intoxicated, p. 352.

Approved in People v. Ferris, 55 Cal. 592; People v. Jones, 63 Cal. 189; and in State v. Thompson, 12 Nev. 151. Cited in People v. Fellows, 122 Cal. 239, and People v. Methewer, 132 Cal. 332, noted under People v. Lewis, 36 Cal. 531.

In deliberating, there need be no appreciable time between the intention to kill and the act of killing, p. 351.

Approved in Miller v. State, 54 Ala. 157; People v. Jamarillo, 57 Cal. 114, holding that there need be no appreciable space of time between the intention to kill and the act of killing; State v. Pritchard, 15 Nev. 80; and People v. Calton, 5 Utah, 459. Cited, also, in 18 Am. Dec. 783, note.

In a case of homicide, when the jury are to pass upon the question of premeditation for the purpose of fixing the degree of the crime, drunkenness may be taken into consideration solely for the purpose of passing on the fact of premeditation, p. 352.

Cited in People v. Blake, 65 Cal. 278, holding evidence of protracted intemperance admissible on the question of intent, in a prosecution for forgery. Applied in People v. Franklin, 70 Cal. 643, in a prosecution for assault with intent to murder. Approved in People v. Vincent, 95 Cal. 428; Aszman v. State, 123 Ind. 357; State v. Zorn, 22 Oreg. 601, where it was said that the fact of intoxication is to be submitted to the jury for the purpose of enabling them to determine the intent of the accused in committing the act; State v. Robinson, 20 W. Va. 733, 738; 43 Am. Rep. 804, 808; and Hopt v. People, 104 U. S. 634. Savary v. State, 62 Neb. 172. Cited also, in 87 Am. Dec. 102, note; and 40 Am. Rep. 506, 567, note.

Defendant's counsel is not entitled to make his argument on the case

made out by the prosecution when it closes, but must wait until the evidence is concluded, p. 349.

Approved in *People v. Goldenson*, 76 Cal. 348, 349, holding that counsel for defendant must confine himself to a statement of the facts, the effect thereof, and his conclusions therefrom, without any argument upon the evidence introduced by the prosecution.

An instruction should be refused, if there is no evidence on which it could be founded, p. 351.

Approved in *People v. Bourke*, 66 Cal. 456.

#### 43 Cal. 353-356. ROBINSON v. BUTTE COUNTY.

**Mandamus.**—When the legislature makes it the duty of the supervisors to provide by taxation a sufficient amount to meet the accruing interest on county bonds and also to create a redemption fund, the supervisors may be compelled to do so by mandamus if they refuse, p. 356.

Mandamus will lie to compel the levy and collection of a tax for the payment of a municipal debt: *People v. Getzendauer*, 137 Ill. 260.

#### 43 Cal. 356-358. AUTENREITH v. HESSENAUER.

**Writ of Assistance.**—A party who forecloses a mortgage, given by one partner, and obtains a sheriff's deed for an undivided interest in partnership property, without making the other partner a party to the action, is not entitled to a writ of assistance to be placed in possession, as against a receiver of the partnership appointed by the court, p. 358.

Cited in extended note, 51 Am. Dec. 156.

#### 43 Cal. 359-364. GREY v. TUBBS.

Equity will treat time as the essence of contract when from the agreement it clearly appears that the parties so intended; and if it appears that the parties have in fact contracted that if the purchaser makes default in the payments as agreed upon he shall not be entitled to a conveyance and shall lose the benefit of his purchase, and it also appears that the purchaser is without excuse for his delay, equity will not relieve him from the consequences of his default, p. 364.

Cited and followed in *Cleary v. Folger*, 84 Cal. 320, 321, 18 Am. St. Rep. 190, 191. *Glock v. Howard etc. Co.*, 123 Cal. 9, 69 Am. St. Rep. 24, discussing right of respective parties on vendee's default, and denying him right to recover installments theretofore made; *Williams v. Long*, 139 Cal. 189, holding time of the essence under facts stated; *Peterson v. Davis*, 63 Kan. 673, sustaining ejectment against vendee in possession after his default under such contract. No particular form of stipulation is necessary to make time the essence of contract, but any clause will have the effect which clearly and absolutely provides that the contract is to be void if the fulfillment is not within the prescribed time; *Martin v.*

Morgan, 87 Cal. 207, 208; 22 Am. St. Rep. 242. Rule applied in *Woodruff v. Semi-tropic L. & W. Co.*, 87 Cal. 280, to a case where vendor was in default owing to delay or neglect to convey. Referred to in *Drew v. Pedlar*, 87 Cal. 450; 22 Am. St. Rep. 262. A stipulation that time should be of the essence of contract is applicable only to the agreement on the part of the purchaser to pay the purchase money, and is intended for the benefit of the vendor alone, who may elect either to rescind or enforce the contract, and the purchaser cannot work a rescission by a default on his part: *Newton v. Hull*, 90 Cal. 494. Approved in *Bennett v. Hyde*, 92 Cal. 133, a similar case; and *Alexander v. Jackson*, 92 Cal. 528, holding that to entitle a person in default to relief, it must appear that he has promptly and in good faith offered to fulfill his contract, and neither infancy or ignorance of his rights is a sufficient excuse. Although it is unnecessary in order to make time the essence of contract that it should be declared to be so in the words of the statute (section 1492 of the Civil Code), yet the intent to make it the essence of contract must be clearly, unequivocally, and unmistakably shown by an express declaration: *Miller v. Cox*, 96 Cal. 344. Time is usually regarded as of the essence of contract where the character of the property renders it liable to fluctuations in value, and this is especially true of mining transactions: *Settle v. Winters*, 2 Idaho, 209. Approved in *Missouri River F. S. & G. R. R. Co. v. Brickley*, 21 Kan. 291. Cited, also, in 50 Am. Dec. 509, extended note; 50 Am. Dec. 677, extended note; 68 Am. Dec. 87, note; and 27 Am. St. Rep. 186, note.

**Contracta.**—Courts of equity have not the power to make contracts for the parties, nor alter those which have been deliberately made, p. 364.

Equity can only enforce the performance of a contract as made by the parties themselves; it has no power to make a contract for them: *Magee v. McManus*, 70 Cal. 558. Equity cannot make or alter a contract of the parties and then execute it: *Rison v. Newberry*, 90 Va. 521.

**43 Cal. 365-369. CENTRAL PACIFIC RAILROAD COMPANY v. PLACER COUNTY. S. C. 32 Cal. 582; 34 Cal. 352.**

**Certiorari.**—The writ will only lie where an inferior tribunal, board, or officer exercising judicial functions has exceeded its jurisdiction, and there is no appeal nor any plain, speedy, or adequate remedy, p. 367.

The leading case is cited with approval in the following decisions: Certiorari will not lie to review the proceedings of the board of supervisors in allowing an illegal claim: *Andrews v. Pratt*, 44 Cal. 318. It cannot be used as a writ for the correction of mistakes, either in law or in fact: *C. P. R. R. Co. v. Placer Co.*, 46 Cal. 670. Cited in *P. M. S. S. Co. v. Board of Supervisors*, 50 Cal. 283, to the point that the board of supervisors, sitting as a board of equalization, does not exceed its jurisdiction by refusing to accede to an application to reduce the assessed value of property. Legislative acts cannot be reviewed by certiorari:

Spring Valley W. W. v. Bryant, 52 Cal. 137. Action of board of supervisors in rejecting a bid for county printing is not judicial and cannot be reviewed by the writ; Townsend v. Copeland, 56 Cal. 615. If a court has jurisdiction, an erroneous order or decree of the court cannot be corrected by the writ of prohibition: Wiggin v. Superior Court, 68 Cal. 402. Writ will not lie to review an order for a street improvement: Quinchard v. Board of Trustees, 113 Cal. 668. If one in possession of the office of city alderman seeks only a review of the proceedings taken by the board of alderman disturbing him in the enjoyment of it, certiorari will lie: Aldermen v. Darrow, 13 Colo. 465; 16 Am. St. Rep. 217. Approved, also, in Moline, Wilburn & Stoddard Co. v. Curtis, 38 Neb. 532; and in Phillips v. Welch, 12 Nev. 169. See, also, extended notes, 12 Am. Dec. 536; and 23 Am. St. Rep. 108.

**Jurisdiction.**—Erroneous views entertained, or evidence erroneously admitted, do not make a case of want of jurisdiction, p. 368.

That errors of fact or law cannot be reviewed by this writ is approved by the following cases: C. P. R. R. Co. v. Placer Co., 46 Cal. 670; Farmer's etc. Bank v. Board, 97 Cal. 327; White v. Superior Court, 110 Cal. 64, 65.

**Construction of Statute.**—The words in section 446 of the Practice Act "has exceeded the jurisdiction of such tribunal, board," et cetera, presents substantially the same idea as the words "has regularly pursued the authority of such tribunal, board," et cetera, in section 462 of the act, p. 367.

This construction has been followed in Farmer's etc. Bank v. Board, 97 Cal. 326; Quinchard v. Board of Trustees, 113 Cal. 668; and Phillips v. Welch, 12 Nev. 175.

#### 43 Cal. 369-371. FEELEY v. SHIRLEY.

**Appeal.**—A ruling of the court striking out a portion of the complaint or answer cannot be reviewed on appeal unless made a part of the record by a statement or bill of exceptions, p. 370.

Approved in Spence v. Scott, 97 Cal. 182; and in Graham v. Linehan, 1 Idaho, 781. Cited in Hawley v. Kocher, 123 Cal. 79, noted under Morris v. Angle, 42 Cal. 240.

**Pleadings.**—If a complaint avers that the defendant wrongfully broke down plaintiff's flume, and the answer denies that the plaintiff, wrongfully or otherwise, broke down the flume, the answer admits the breaking down of the flume and only denies its wrongful character, p. 369.

Referred to and applied in a somewhat similar case: Thomas v. State, 51 Ark. 139. The averment by a defendant that he did not "make and furnish" is by implication an admission that he did furnish: Thomas v. State, 54 Ark. 587.

**43 Cal. 371-377. SMITH v. O'HARA.**

**Appropriation of Water.**—If the first appropriator of water takes only a part of the water of a stream, another may afterward appropriate the residue, p. 375.

Cited in Southside Imp. Co. v. Burson, 147 Cal. 407, where non-riparian owner appropriates limited quantity of water for irrigation subsequent appropriator may take whole of surplus though former afterwards needs surplus; Edgar v. Stevenson, 70 Cal. 290, where an injunction restraining a defendant from using surplus water during extraordinary high water was refused. The rule, however, is not applicable in a case where water discharged from a canal is appropriated without the owner's consent: Ball v. Kehl, 95 Cal. 614. Cited in a case where riparian rights were in issue, and holding that if the upper proprietor only uses a portion of the water, the proprietor below may have the benefit of that surplus: Mumpower v. City of Bristol, 90 Va. 155; 44 Am. St. Rep. 905. Cited, also, in extended note in 42 Am. Dec. 282.

There is no difference in principle between appropriation measured by time, and those measured in volume, p. 376.

Cited in Cache etc. Co. v. Water etc. Co., 25 Colo. 167, 71 Am. St. Rep. 136, sustaining appropriation for definite periods; Mattis v. Hosmer, 37 Or. 530, noted under Ortman v. Dixon, 13 Cal. 34. Where an appropriator has limited his use of water for irrigation to certain days of the week, the water not used is subject to appropriation by another: Santa Paula Water Works v. Peralta, 113 Cal. 44. If a plaintiff only appropriated the water during certain days of the week, or during a certain number of days in a month, then the defendants would be entitled to appropriate such surplus during the remaining days; Barnes v. Sabron, 10 Nev. 245.

**Sale of Ditch and Water Right** cannot be proved by parol but must be evidenced by a deed, p. 376.

Approved in Hayes v. Fine, 91 Cal. 398; Burnham v. Freeman, 11 Colo. 606; and Child v. Whitman, 7 Colo. App. 119.

One entering into the possession of a ditch and water right under a verbal sale does not succeed to the rights of the seller so as to claim the benefit of the seller's prior appropriation, but must date his appropriation from the time he enters into possession, p. 377.

Cited and applied in Fabian v. Collins, 3 Mont. 228. The rule was held inapplicable where a ditch was conveyed with a possessory interest in land as an incident of such possessory interest; Hindman v. Rizor, 21 Oreg. 119. A transfer of the possessory right to land by parol carries with it the water so appropriated: Low v. Schaffer, 24 Oreg. 242, citing the leading case to the point that the verbal sale and transfer of his water right by a prior appropriator operates ipso facto as an abandonment thereof. Leading case approved in Union Mill & Mining Co. v. Dangberg, 81 Fed. Rep. 104. Cited in Salina etc. Co. v. Salina etc. Co., 7 Utah, 460, discussing water rights as between successive appropriators.

**Denied.**—The rule of the leading case was denied in *McDodald v. Lannen*, 19 Mont. 86.

**General Citation.**—Cited in *Lux v. Haggan*, 69 Cal. 447, as an illustration of a case recognizing the right of appropriation of water.

**43 Cal. 377-380. MORSE v. GIBBONS.**

**Sheriff's Fees.**—Where a sheriff advertises property for sale under execution, the judgment debtor cannot deprive the sheriff of his fees allowed in the case of a sale, by paying the full amount of the judgment to the judgment creditor, p. 380.

Cited in dissenting opinion of Watson, J., in *Jackson v. Siglin*, 10 Oreg. 100. Approved in *Jurgens v. Hauser*, 19 Mont. 187, holding that a sheriff is entitled to his commission on the purchase price of land sold by him under foreclosure when the mortgagee buys in the premises.

**43 Cal. 380-383. ROBERTS v. EVANS.**

When goods are wrongfully taken and converted, the owner may waive the tort and sue in assumpsit for their value, p. 382.

**Indebitatus assumpsit** lien for pasturage where defendants' cattle were wrongfully on plaintiff's land: *De la Guerra v. Newhall*, 55 Cal. 23. Approved in *Lehmann v. Schmidt*, 87 Cal. 20, holding that if a bailee refuses, upon demand, to deliver the property to the bailor, without setting up any lien thereon, he waives his right to claim a lien after suit brought to recover the value of the property. Cited in *Monroe v. Cannon*, 24 Mont. 320, noted under *Fratt v. Clark*, 12 Cal. 89; *Crown Cycle Co. v. Brown*, 39 Or. 289, where sale of goods under contract giving specified time in which to pay is fraudulently procured by purchaser, seller may waive tort and sue for value of goods without waiting for vendee to convert them into cash; *Livingston v. Lovgren*, 27 Wash. 109, purchaser of logs on which there is lien, within thirty days in which claimant may file lien notice, must see that purchase money is appropriated to satisfaction of lien, or he is liable upon an implied contract to lien claimant, up to full value of logs.

**General Citation.**—*Buchanan v. McClain*, 110 Ga. 481.

**43 Cal. 383. PEOPLE v. KEARNEY.**

**Oral Charge** is improper in criminal case except when given by mutual consent, p. 384.

Cited in *State v. Fisher*, 23 Mont. 552, noted under *People v. Chares*, 26 Cal. 79.

**43 Cal. 385-389. PEOPLE v. BERNAL.**

**Service of Summons.**—In making service of summons, and in the

return of such service, the provisions of the statute must be and must be shown to have been substantially observed and followed by the officer; otherwise the proceedings cannot be supported upon a direct appeal taken, p. 389.

An affidavit which fails to show service upon the appellant, and is the only proof of service in the record, is insufficient to sustain a judgment upon a direct appeal therefrom: *Linott v. Rowland*, 119 Cal. 453. If the summons had been served by any party empowered to act, the affidavit thereon must show that he was one of the persons described in the statutes: *Black v. Clendenin*, 3 Mont. 47. Upon an appeal from a judgment by default, the record must affirmatively show jurisdiction of the defendant, either by his appearance or by a proper service of summons, and no presumption can be indulged in that there was some other and different kind of service made from that appearing in the record: *Lonkey v. Keyes S. M. Co.*, 21 Nev. 320.

#### 43 Cal. 393-395. PIERATT v. KENNEDY.

**Practice—Arbitration.**—A submission to arbitration is invalid unless:

1. The parties by their stipulation authorize the clerk to enter the note of submission in the register; and 2. That the note of submission is in fact entered by the clerk, p. 395.

Approved in *Kettleman v. Treadway*, 65 Cal. 505.

#### 43 Cal. 395-397. DAVANAY v. EGGENHOFF.

**Pleadings—Promissory Note.**—A complaint on a promissory note that fails to allege that the note remains "due and unpaid," does not state facts sufficient to constitute a cause of action, p. 397.

An allegation that the defendant has refused and still refuses to pay and that there is now due the sum, etc., is insufficient: *Scroufe v. Clay*, 71 Cal. 124.

**Rule Limited.**—In *Wise v. Hogan*, 77 Cal. 188, it was held that the rule was firmly settled that an averment of nonpayment is necessary to the sufficiency of a complaint for money due on contract, but is not applicable in an action against an administrator, where the complaint alleges nonpayment by the deceased, and presentation and rejection by the administrator; nonpayment by the administrator should be presumed from the alleged fact of his rejection of the claim. Leading case followed in *Barney v. Vigoreaux*, 92 Cal. 632, and *Hurley v. Ryan*, 119 Cal. 72. Rule of the leading case admitted to be correct in *Hershfield & Bro. v. Aiken*, 3 Mont. 449, but the court further held that such a defect would be cured by answering over and going to trial on the merits. Cited and followed in *Vogel v. Walker*, 3 Utah, 229. Cited, also, in 61 Am. Dec. 61, extended note.

**General Citations.**—Cited in *Tomlinson v. Ayres*, 117 Cal. 571, to the

point that an allegation that "there is now due," is not an allegation of "nonpayment."

**Pleadings.**—If an unverified complaint on a promissory note avers that it has not been paid, a general denial in the answer puts in issue the fact of payment, p. 397.

In an action to recover money due, the defendant, under the general denial, may prove payment, or that the plaintiff had transferred the demand to another person: Wetmore v. San Francisco, 44 Cal. 300. Cited and followed in Bank of Shasta v. Boyd, 99 Cal. 606. Distinguished in Alden v. Carpenter, 7 Colo. 91, on the ground that in Colorado there is no such a "thing" as a general denial. Again distinguished on the same and other grounds in Watson v. Lemen, 9 Colo. 203. Approved in Weissman v. Russell, 10 Oreg. 75.

**Idem.**—If, in an action on a promissory note, the pleadings are verified, a denial on information and belief that the note had not been paid, is insufficient, p. 397.

Cited in 70 Am. Dec. 625, extended note.

#### 43 Cal. 398-437. PEOPLE v. CENTRAL PACIFIC RAILROAD COMPANY.

**Constitutional Law.**—The state revenue laws are not unconstitutional for want of uniformity where the legislature has prescribed different modes for the enforcement of the payment of delinquent taxes in the several counties, pp. 433, 434.

Followed in San Francisco v. S. V. W. W., 54 Cal. 574, where a special act of the legislature providing for the collection of taxes assessed, levied, and delinquent in San Francisco, was declared constitutional, rule changed by new constitution, article IV, section 5: Ex parte Burke, 59 Cal. 8, but the change in the constitution was held not to apply to past legislation. It is within the power of the legislature to pass local or special laws regulating the compensation of county officers; State v. Fogus, 19 Nev. 253. Cited in McGill v. State, 34 Ohio St. 241, holding that an act of the legislature prescribing a different mode of summoning jurors in one county from that prescribed for the remaining counties, to be constitutional: State v. Shearer, 46 Ohio St. 282, deciding that the formation of a school district from territory within the limits of a township by special act of the legislature, is constitutional.

**Idem.**—Laws of a general nature must have a uniform operation, p. 433.

Cited in Edmonds v. Herbrandson, 2 N. Dak. 282.

**Idem—Creation of Revenue Districts.**—The constitution does not prohibit the creation of more than one revenue district in a county, nor the election of assessors and collectors in each district, p. 435.

The rule of the leading case explained, as being founded on a provision of the California constitution in *Hutchinson v. Ozark Land Co.*, 57 Ark. 558, 38 Am. St. Rep. 260, in which a contrary rule was maintained. Approved in *Rosenborough v. Boardman*, 67 Cal. 118. Referred to and the principle followed in *Gilson v. Board of Commissioners*, 128 Ind. 72.

**Taxation.**—The state has authority to tax the property of railroads lying within its limits, p. 431.

Where lands have been granted to a railroad company, and patents thereto have been regularly issued, the lands became subject to the legislative will in the imposition of taxes: *Wisconsin C. R. Co. v. Taylor Co.*, 52 Wis. 56.

**New Trial—Statement.**—A statement on motion for a new trial should specify the particulars in which the evidence is insufficient, or the particular errors of law upon which the party will rely, p. 423.

Followed in *Leonard v. Shaw*, 114 Cal. 71; and *Smith v. Smith*, 119 Cal. 186.

#### 43 Cal. 437-439. **CLELAND v. THORNTON.**

**Damages.**—If, through the negligence of a party who starts a fire, the fire spreads and destroys adjacent property, the one who builds the fire is liable for the damages, p. 439.

Approved in *The Louisville, New Albany, & Chicago R. Co. v. Nitsche*, 126 Ind. 232, holding a railroad company liable for damages for negligence in starting fires. Cited, also, in 30 Am. St. Rep. 504, 505, extended note.

**Measure of Damages.**—Evidence as to the cost of new buildings to replace those destroyed is admissible, as furnishing data for an approximate estimate of the value of the old buildings, p. 438.

It is a general rule that for permanent injuries to real or personal property, the plaintiff is entitled to recover the depreciation in value caused by the injury: *Williams v. Missouri Furnace Co.*, 13 Mo. App. 73. Where buildings are destroyed, the proper measure of damages is the value of the buildings: *White v. C. M. & St. P. Ry. Co.*, 1 S. Dak. 329.

#### 43 Cal. 439-444; 13 Am. Rep. 148. **PEOPLE v. BOWEN.**

**Pardon.**—An executive pardon removes from the offender the disabilities which follow conviction of a felony, p. 442.

Referred to as a case on the subject of "pardons," in *Singleton v. State*, 38 Fla. 304, 56 Am. St. Rep. 182, in which the above rule is approved. Cited, also, in 59 Am. Dec. 579, extended note.

An executive act restoring a felon to the rights of citizenship is not a pardon and does not remove the disability to testify, p. 443.

Cited in *State v. Grant*, 79 Mo. 127, 49 Am. Rep. 224, where it was held that incompetency is one of the incidents of a conviction of a

felony and the legislature cannot, without trenching on the pardoning power of the executive, do away with it; and *State v. Foley*, 15 Nev. 68, 37 Am. Rep. 460, holding that a pardon may be granted after the prisoner has suffered the full penalty.

Pardoning power is the same in its nature and effect as that exercised by the representatives of the English crown in this country during colonial times, p. 442.

Cited in 59 Am. Dec. 572, note.

An offender may be pardoned after suffering the full penalty for his crime, p. 441.

Cited in 59 Am. Dec. 575.

**General Citations.**—*Territory v. Richardson*, 9 Okla. 584; *In re Conditional Discharge of Convicts*, 73 Vt. 429.

#### 43 Cal. 444-446. PEOPLE v. LONG.

**Evidence—Motion to Strike Out.**—A motion to strike out evidence should not be allowed in either civil or criminal cases, where evidence is permitted to be given without objection in the first instance and then a motion to strike out made, on grounds readily available when the evidence was offered, p. 446.

Leading case approved in *People v. Rolfe*, 61 Cal. 542, where it was said that a party is not permitted to remain silent when evidence is offered, with the privilege of accepting it if favorable, and afterward moving to strike it out if unfavorable: *People v. Salorse*, 62 Cal. 145, holding that an objection to the admission of evidence cannot be made for the first time in the supreme court; *Wright v. Seymour*, 69 Cal. 128; *People v. Samario*, 84 Cal. 485; *People v. Nelson*, 85 Cal. 426.

**Doctrine Limited.**—The rule of the leading case does not apply where the answer of the witness sought to be stricken out is not responsive to the question addressed to him: *People v. Dixon*, 94 Cal. 258. Leading case cited and followed in *Wheelock v. Godfrey*, 100 Cal. 588; and *In re Wax*, 106 Cal. 347, holding that the withdrawal of an objection deprives the contestant of the right to object afterward by moving to strike out. See, also, 6 Am. St. Rep. 245, note.

**Confession.**—A voluntary confession made to an officer having the prisoner in custody, is admissible if not induced by improper means, p. 446.

Statements made by a person accused of crime, together with his demeanor at the time of arrest, are always open to inquiry when not made under duress, or induced by menace, or promises of immunity; *State v. Phelps*, 5 S. Dak. 490. The admission of confessions made in the defendant's presence implicating him in a homicide which were not denied by him, is not cause for reversal when the jury were instructed as to dangerous and unsatisfactory character of such evidence: *Green v. State*, 97 Tenn. 67. Cited, also, in 6 Am. St. Rep. 243, note.

**43 Cal. 447-451. PEOPLE v. WALSH.**

A challenge for implied bias must specify the particular grounds on which the challenge is founded, pp. 447, 448.

Cited and approved in *People v. Hopt*, 4 Utah, 250; *Shields v. State*, 149 Ind. 400; and *Southern Pac. Co. v. Raugh*, 49 Fed. Rep. 701.

Homicide held not justifiable under facts stated, p. 449.

Cited in *State v. Taylor*, 143 Mo. 164, holding similarly when committed to prevent a mere trespass.

**43 Cal. 452-454. COOMBS v. HIBBERD. S. C. 45 Cal. 174.**

**New Trial.**—If the court has passed on a motion for a new trial made in due form upon a settled statement, the order is conclusive on the court making it, and the court cannot afterward vacate the order and decide again on the motion, p. 454.

Cited and followed in *People v. Center*, 61 Cal. 194; *O. F. Sav. Bank v. Deuprey*, 66 Cal. 170, but the rule is otherwise when the order of the court was prematurely or inadvertently made; *Dorland v. Cunningham*, 66 Cal. 486, holding that the Code of Civil Procedure authorizes but one motion for a new trial, and the order thereunder is final so far as the superior court is concerned; *Lang v. Superior Court*, 71 Cal. 493, deciding that where a motion for a new trial was stricken off the calendar, that such action of the court was equivalent to a denial of the motion, and that the court could not afterward set its ruling aside and grant a rehearing; and *Carpenter v. Superior Court*, 75 Cal. 597, holding that the rule is not affected by the fact that terms of court are abolished. *Whitbeck v. Montana etc. Ry. Co.*, 21 Mont. 107, 108, applying rule to appealable order granting judgment on pleadings. In *Lake v. Bender*, 18 Nev. 374, the leading case was distinguished on the ground that there was not an intimation in the statutes of Nevada that the power of the trial court is not coextensive with that of the appellate court in the matter of granting new trials. But the leading case is approved in *Crosby v. North Bonanza M. Co.*, 23 Nev. 76. Also, cited and approved in *Burnham v. Spokane Mercantile Co.*, 18 Wash. 211, 212.

**Remedy.**—The proper and only redress is an appeal to the supreme court, p. 454.

Approved in *People v. Center*, 61 Cal. 194; *Goyhinech v. Goyhinech*, 80 Cal. 409, deciding that where a judgment or order is itself appealable, the appeal must be taken from such order or judgment, and not from a subsequent order refusing to set it aside; and *Crosby v. North Bonanza M. Co.*, 23 Nev. 76.

**43 Cal. 455-458. EX PARTE MURRAY.**

**Habeas Corpus.**—Upon habeas corpus, if the court whose judgment is assailed be one of competent jurisdiction to render a final judgment, the

appellate court will only inquire if the judgment as rendered be upon its face certain and definite in terms, so that it may be known what punishment the prisoner is to suffer, p. 457.

The rule of the leading case is approved by the cases citing it. The sentence of the court is sufficient which shows the offense of which the defendant had been convicted, and the penalty imposed: *Ex parte Raye*, 63 Cal. 492. Where the judgment in the record shows sentence for petit larceny, second offense, it is good: *Ex parte Young Ah Gow*, 73 Cal. 442. A judgment is sufficient as stating the general offense "murder," although the degree of the murder is not given: *People v. McNulty*, 93 Cal. 444. A judgment is sufficient which recites "that whereas, the said Geo. Stephen, having been duly convicted in this court of the crime of establishing and carrying on a saloon, and there selling and giving away malt liquors without a license," et cetera; *Ex parte Stephen*, 114 Cal. 283. All that is necessary is that the judgment shall sufficiently express that which is adjudged; it need contain no recital of the facts upon which it is based: *People v. Kelly*, 120 Cal. 273. A judgment by a court of competent jurisdiction, valid upon its face, is an unanswerable return to a writ of habeas corpus, issued for the release of a person imprisoned by virtue of such judgment: *Smith v. Hess*, 91 Ind. 429. If a magistrate be an officer de facto, his judgments will be as unquestionable in collateral proceedings by habeas corpus as if he were a magistrate de jure: *Parks, Petr. for Writ of Habeas Corpus*, 3 Mont. 432. A person held in custody under a regular commitment of a justice of the peace, will not be discharged on habeas corpus, unless it appears that the jurisdiction of the justice has been exceeded, or the commitment issued without authority of any judgment, order, a decree of any court: *Ex parte Winston*, 9 Nev. 75.

**Jurisdiction of Police Court—Collateral Attack.**—The police court of San Francisco is not of inferior jurisdiction in the sense that upon mere collateral inquiry nothing is to be intended in support of its judgment, when rendered in a particular case, included by general definition in that class of criminal cases over which jurisdiction has been conferred upon it by law, p. 458.

**Overruled.**—Mere dictum: *Ex parte Kearney*, 55 Cal. 214, 216, holding that police court of San Francisco is of inferior jurisdiction, and the evidence of its proceedings must affirmatively show jurisdiction of the person of the defendant and over the subject matter.

#### 43 Cal. 458-467. VASSAULT v. EDWARDS.

**Specific Performance.**—A contract will not be specifically enforced unless it is mutual, p. 464.

The general rule of the leading case approved in the cases citing it. A contract calling for the exercise of personal skill cannot be specifically enforced: *Sturgis v. Galindo*, 59 Cal. 31: 43 Am. Rep. 239; and *Lattin v.*

Hazard, 91 Cal. 91. The rule as to the inability of courts to compel specific performance of a contract for "personal services" is not applicable where the personal services have been fully or substantially performed: King v. Gildersleeve, 79 Cal. 510. An acknowledged executory contract of a married woman for the sale of her separate real estate is not enforceable against her, and cannot be specifically enforced by her against the vendee: Ranbury v. Arnold, 9 Cal. 608. But an original lack of mutuality in the right to specific performance will not preclude the enforcement of the contract, where this want has been removed at the time the action is brought; Sayward v. Houghton, 119 Cal. 548. Cited in Claypool v. Board of School Commissioners, 132 Ind. 271, in which the rule is discussed, especially as regards exceptions thereto. Optional contracts are almost uniformly enforced after the one who has had the privilege of accepting them has exercised his privilege in such a mode as to bind himself by the contract. From that moment it becomes mutual: 5 Am. St. Rep. 113, extended note. For other citations under this rule see cases collected under syllabi four and five.

An executory contract for the sale of real estate, signed by the vendor alone satisfies the requirements of the statute of frauds, p. 464.

Rule approved in the citations following: McDonald v. Huff, 77 Cal. 282; Scott v. Glenn, 87 Cal. 225; Cavanaugh v. Casselman, 88 Cal. 549, 551; Nason v. Lingle, 143 Cal. 367, but holding rule as to mutuality of remedy inapplicable under facts stated; McPherson v. Fargo, 10 S. Dak. 616, 66 Am. St. Rep. 727, holding vendee bound under such contract when he accepts and records it, even without his signature; Meux v. Hogue, 91 Cal. 447, holding that although it is unnecessary for the vendor of real property to subscribe the agreement for its sale, yet where the agreement is made through agents acting under verbal authority, subject to the approval of the owner, it is necessary that the vendor should know its contents and approve and ratify it before it becomes binding on the other party: Scott v. Glenn, 98 Cal. 171, deciding that the signature of vendor to the contract, taken in connection with a delivery thereof to the vendee, and a partial payment thereunder, binds both parties: Peevey v. Houghton, 72 Miss. 924; 48 Am. St. Rep. 594; and Ide v. Leisler, 10 Mont. 15; 24 Am. St. Rep. 22. See, also, 7 Am. Dec. 290, note; and 5 Am. St. Rep. 113, note.

In an action to enforce an agreement required by the statute of frauds to be in writing, an averment that the agreement was made is sufficient, without alleging that it was reduced to writing and signed, p. 463.

The citations show this to be a settled rule of pleading. Where, under the statute, an agreement is required to be in writing, such agreement, if in other respects properly pleaded, will be presumed to have been in writing for the purpose of testing the sufficiency of the pleadings: Reagan v. Justice's Court, 75 Cal. 255.

**Exception.**—An exception to the rule arises in cases where the con-

tract must necessarily be in writing to confer jurisdiction: *Reagan v. Justice's Court*, 75 Cal. 255. Leading case approved in *Emerson v. Bergin*, 76 Cal. 202; *Broder v. Conklin*, 77 Cal. 336, holding that a defendant relying upon the defense of the statute of frauds must plead it; and *Bradford Investment Co. v. Joost*, 117 Cal. 207, expressly affirming the rule. Cited, also, in 16 Am. Dec. 149, note; and 86 Am. Dec. 685, note.

**Specific Performance.**—If under an executory contract for the sale of land, the time for completion of the purchase is extended, an acceptance by the vendee of the vendor's offer within a reasonable time makes a binding contract of sale, which may be specifically enforced, p. 464.

Cited and a similar holding made in *Ide v. Leisler*, 10 Mont. 14; 24 Am. St. Rep. 21; *Spires v. Urbahn*, 124 Cal. 111, as reviewing *Cooper v. Pena*, 21 Cal. 404, granting specific performance in such cases though mutuality did not exist originally. Approved in *Johnston v. Trippe*, 33 Fed. Rep. 535.

An executory contract of sale, when its terms are accepted and acted upon by the vendee, becomes a binding contract of sale, p. 464.

Approved in *Gordon v. Darnell*, 5 Colo. 305; *Byers v. Denver C. R. Co.*, 13 Colo. 556; and *Weaver v. Burr*, 31 W. Va. 775, dissenting opinion of Snyder, J.

Where time is of the essence of the contract, the court has no power to extend it, p. 463.

Cited in *McDonald v. Huff*, 77 Cal. 283; *Larned v. Wentworth*, 114 Ga. 222, holding acceptance of offer ineffectual if after time limited therein.

#### 43 Cal. 467-477. **McLERAN v. BENTON.** S. C. 31 Cal. 29; 73 Cal. 329.

**Acknowledgment of Married Woman.**—If the certificate of acknowledgment of the deed of a married woman for her separate property does not state that she was examined by the notary without the hearing of her husband, and that she was made acquainted with the contents of the instrument, it is radically defective and void as to her, p. 272.

The general rule that the acknowledgment of a married woman is an essential part of the execution of a deed by her, and that to make the acknowledgment valid the provisions of the statute must be strictly complied with, is approved by the following cases: *Leonis v. Lazzarovitch*, 55 Cal. 58, holding that a court of equity cannot reform a certificate of acknowledgment; *Hand v. Hand*, 68 Cal. 140; *Bollinger v. Manning*, 79 Cal. 11; *Wamble v. Foote*, 2 Dak. Ter. 23, holding that the private examination of a married woman is personal, and is a matter in which she cannot be represented by another; and *A. S. & L. Assn. v. Burghardt*, 19 Mont. 326, 61 Am. St. Rep. 508, holding that where a mortgage of a homestead was void unless executed by the husband and wife, the acknowledgment was an essential part of the execution by the wife.

**Abandonment of Land.**—An attempted sale of land which fails be-

cause of a defect in the deed is not an abandonment. There cannot be an abandonment to a particular person or for a consideration, p. 478.

Abandonment is a matter of intention, and there is no such thing as an abandonment to a particular person or for a consideration; Middle Creek D. Co. v. Henry, 15 Mont. 577, an action to determine water rights. Cited, also, in 40 Am. Dec. 465, note; and 51 Am. Rep. 460, note.

**General Citations.**—Cited in the same case, after, 73 Cal. 337, to the point that on the death of the husband, the wife and children became tenants in common in the common property. Same case, 73 Cal. 339, where the court referred to the general supposition of the court in the case before, that an unacknowledged lease for a term of years by a married woman was valid; but on consideration the court held it created only a tenancy at will. Same case, 73 Cal. 344, the court apparently referring to the holding of the case before, that actual possession of land was necessary to entitle a party to the benefits of the Van Ness Ordinance.

#### 43 Cal. 478-481. EX PARTE DELANEY.

**Profane Swearing.**—A municipal legislative body if empowered by the legislature to prohibit or suppress practices against good morals or public decency, may by ordinance, punish the uttering of profane language, whether uttered frequently or only once by the same person, p. 480.

So an ordinance establishing fire limits in San Francisco is valid: McCloskey v. Kreling, 76 Cal. 512. Cited, also, in 34 Am. Dec. 642, note.

**General Citations.**—Referred to in 26 Am. Dec. 48, note, as sustaining the proposition that where a conviction is had under a void municipal ordinance, the one convicted may be discharged on habeas corpus.

#### 43 Cal. 482-484. THOMPSON v. LYNCH.

**New Trial.**—The right to give notice of intention to move for a new trial is lost, when the right to move for a new trial is lost, p. 483.

Cited and followed in People v. Center, 61 Cal. 194; and Cooney v. Furlong, 66 Cal. 522.

**Idem.**—An order striking a notice of motion for a new trial from the files ceases to be a subject of review after sixty days, and a party cannot move to vacate it and then appeal from the order denying his motion, p. 484.

The time allowed for an appeal cannot be extended by an order refusing to vacate or vacating an appealable order: Insurance Co. v. Weber, 2 N. Dak. 246. Approved in Vert v. Vert, 3 S. Dak. 623.

**General Citation.**—Casteel v. State, 9 Wyo. 275.

**43 Cal. 485-492. HOBBS v. DUFF.**

If the opposite party, without reserving his right to object for want of notice of motion for a new trial, settles the statement, or files amendments, he waives the right to notice, pp. 491, 492.

Cited in Harrigan v. Lynch, 21 Mont. 42, noted under Williams v. Gregory, 9 Cal. 76. Objection that a motion for a new trial is not given in time must be taken in the court below, or it will be deemed to have been waived, and the time extended by consent: Brichman v. Ross, 67 Cal. 602. Where a statement was settled and certified according to law, without any objection taken, or right to object thereafter reserved, any irregularity in the proceeding upon the motion was waived: Savings and Loan Society v. Moore, 68 Cal. 158. Approved in Schiefferly v. Tapia, 68 Cal. 185, where an objection that a notice of intention to move for a new trial was not filed in time was deemed waived; Simpson v. Budd, 91 Cal. 491, where the court say that, "it has been assumed if not directly decided, that the time for giving notice of motion for a new trial, as well as for every other step to be taken in relation thereto, may be waived or extended by consent."

**Attorneys—Substitution of.**—The proceedings in a cause on behalf of the parties thereto must be conducted by their respective attorneys until their authority is revoked, or other attorneys substituted, p. 491.

But in Shirley v. Burch, 16 Oreg. 8, it was held that a notice of appeal is sufficient, although signed by attorneys who were not the attorneys of the appellants below, and no substitution had been made in the manner provided by the Civil Code. Cited, also, in 76 Am. Dec. 256, note.

**Evidence.**—A defendant is not injured by the admission of parol evidence to establish title to real estate, when written testimony is also introduced to prove the same title, and the parol testimony does not add to or contradict it, p. 489.

Approved and followed in Crim v. Kessing, 89 Cal. 491; 23 Am. St. Rep. 499.

**43 Cal. 492-494. PEOPLE v. OLVERA.**

Taxes assessed on the property of an estate pending administration, are not claims required to be presented for allowance, p. 494.

Followed in Hancock v. Whitmore, 50 Cal. 523. Cited in Estate of Freud, 31 Cal. 671, sustaining right of executor to pay off existing liens and redeem from mortgage, though not presented as a claim.

**43 Cal. 497-502. LANDER v. CASTRO.**

**Attorney in Fact,** who executes a note binding principal, is not personally liable therefor, even if he had no authority to make the note, p. 501.

Approved in Melone v. Ruffino, 129 Cal. 523, 524, 79 Am. St. Rep. 134, 135, noted under Hall v. Crandall, 29 Cal. 568; dissenting opinion in Andrus v. Blazzard, 23 Utah 264, majority holding guardian who mortgages realty of ward to pay debts is personally liable, Blanchard v. Kaull, 44 Cal. 450, 452, where a promissory note given by trustees of a company was held not to bind the trustees personally; Bean v. Pioneer Mining Co., 66 Cal. 455; 56 Am. Rep. 108, holding that a note signed "Pioneer Mining Company, John E. Mason, Supt." did not bind the superintendent; Wallace v. Bentley, 77 Cal. 21; 11 Am. St. Rep. 233, deciding that an agent is not liable as principal on a contract for sale of land if the contract does not contain apt words binding him personally; Senter v. Monroe, 77 Cal. 351, to the same effect; and Hefron v. Pollard, 73 Tex. 102, 15 Am. St. Rep. 770, where it was held that the proper action was not upon the contract itself, but upon the implied warranty or for deceit. Cited, also, in 89 Am. Dec. 69, note; 11 Am. St. Rep. 234, note; and 22 Am. St. Rep. 511, note.

#### 43 Cal. 506-509. RAIMOND v. ELDRIDGE.

**Nonsuit.**—Grounds for the motion must be precisely stated and none other than those stated can be considered in passing upon the motion, or in reviewing the same in the appellate court, p. 508.

Rule approved in Shain v. Forbes, 82 Cal. 582; Daley v. Russ, 86 Cal. 117; and Bronzan v. Drobaz, 93 Cal. 650. Referred to but not commented upon in Mattoon v. Fremont E. & M. V. R. Co., 6 S. Dak. 198.

**Exception.**—Where the defects cannot be corrected by amendment, the error of not specifying the grounds of the motion is immaterial: Daley v. Russ, 86 Cal. 117.

**Statute of Limitations.**—A defendant, to avail of the statute, must show adverse possession of demanded premises for the statutory period, p. 508.

Cited in Townsend v. Edwards, 25 Fla. 588.

#### 43 Cal. 509-511. PATTEN v. HICKS.

**Statute of Frauds.**—A verbal contract not to be performed within one year from the making thereof, is void, p. 511.

Referred to in Feeney v. Howard, 79 Cal. 535, 12 Am. St. Rep. 170, holding that if a plaintiff relies upon a contract within the statute, a denial of the contract is sufficient to raise the question of its validity under the statute. Cited in 93 Am. Dec. 88, note.

**Idem.**—For labor and services performed under a contract void under the statute, recovery may be had on a quantum meruit, p. 511.

Rule approved in Lapham v. Osbourne, 20 Nev. 177; and Towsley v. Moore, 30 Ohio St. 191, 27 Am. Rep. 439, holding that where a contract

void under the statute has been fully performed by one party, the other having obtained its benefits, cannot refuse to pay its reasonable value.

**43 Cal. 511-514. MOORE v. BESSE.**

**Sale of Pre-emption Right** under execution passes no interest in the land which will enable the purchaser thereunder to procure the title through pre-emption laws, p. 514.

Followed in *Rupert v. Jones*, 119 Cal. 112. Approved in *Rio Grande etc. Ry. v. Telluride etc. Co.*, 23 Utah, 41, one settling on unsurveyed government land, who in good faith complies with statutory requirements, derives no right thereto by purchasing claim of prior settler.

**43 Cal. 515-526. HICKS v. MURRAY.**

**Mechanic's lien law** is not unconstitutional on the ground that it confiscates private property, p. 521.

Cited in *Jones v. Great Southern Fireproof Hotel Co.*, 86 Fed. Rep. 382, holding that an act giving sub-contractors a lien on the building and land for the amount of their claim for services or materials, without regard to the amount still due the principal contractor and limited only by the original contract price to be paid by the owner, is not unconstitutional; *Griffith v. Maxwell*, 20 Wash. 412, as to provision for attorney's fees in such law.

**Mechanic's Lien.**—If a person claiming a mechanic's lien signs the verification attached to the claim this is a sufficient signing of the claim, p. 521.

Cited in *Deatherage v. Woods*, 37 Kan. 62, holding that the signing of the verification by one member of the firm is sufficient; and in *Psin v. Isaacs*, 10 Wash. 175, deciding that the statute does not require the claims to be signed at all, if it appears in the statement who the claimants are; but the court apparently rely upon the opinion of Crockett, J., dissenting in part, p. 522, rather than upon the opinion of the court.

It is necessary that the claim for the benefit of such lien shall state the name of the owner or reputed owner of the premises, p. 521.

Approved in *Phelps v. M. C. G. M. Co.*, 49 Cal. 339.

**Pleadings.**—Facts essential to the support of a case must be alleged in the pleadings, and evidence upon omitted facts cannot be admitted, p. 522.

Findings of fact outside the issues raised by the pleadings and contrary to their admissions will be disregarded on appeal from their judgment: *Ortega v. Cordero*, 88 Cal. 226. Neither stipulations nor admissions can make a case broader than it is by allegation: *Tucker v. Parks*, 7 Colo. 68. Cited in *Ellis v. Rademacher*, 125 Cal. 558, on point that court cannot grant any relief not warranted by averments of complaint.

**General Citations.**—Dissenting opinion of Crockett, J., referred to in 76 Am. Dec. 508, note, to the point that notice of mechanic's lien need not set out the items of account, a general statement of the demand showing its nature and character being sufficient.

**43 Cal. 526-530. MARQUART v. BRADFORD.**

Abandonment and estoppel in pais distinguished, p. 528.

Cited in Wolff v. Canadian Pacific etc. Co., 123 Cal. 539, holding motion not abandoned under facts stated.

**General Citations.**—Cited in 40 Am. Dec. 464, to the point that standing by when a sale of property in which an interest is claimed is made, without objecting, is not sufficient evidence of an abandonment. It is questionable whether and such holding is to be found in the leading case. Referred to in 85 Am. Dec. 171, as a case on estoppel in pais.

**43 Cal. 530-533. PEOPLE v. BROTHERTON.**

An unqualified expression of opinion is ground for challenge for implied bias, p. 531.

But mere hypothetical opinions founded upon hearsay, and unaccompanied with malice or ill-will, would not come within the rule of the leading case: People v. Murphy, 45 Cal. 142. Approved in State v. Morgan, 23 Utah, 225, where juror had prejudiced case beforehand, but made false answers on voir dire, new trial granted.

**43 Cal. 534-541. PEOPLE v. MORSE.**

An assessor may assess and place a valuation on a block or part of a block in a city, as a whole, when one man owns it, without placing a separate valuation on the several lots into which it is divided, p. 541.

Approved in People v. Culverwell, 44 Cal. 622. Cited in Speich v. Tierney, 522, sustaining en masse assessment of contiguous lots; Co-operative etc. Assn. v. Green, 5 Idaho, 665, two contiguous town lots owned by same person may be jointly assessed, and one valuation fixed for said lots. Distinguished in People v. Clunie, 70 Cal. 507, deciding that city lots must be separately assessed, and a separate valuation placed on each. Overruled in Cadwalader v. Nash, 73 Cal. 50. Expressly affirmed in Cooper v. Miller, 113 Cal. 243, a case where five lots owned by one person were assessed and a valuation placed upon them as a whole. Leading case approved in Roth v. Gabbert, 123 Mo. 30, in which it is held that the mode of use is important in determining whether lots may be assessed as a whole; and in Land & River Imp. Co. v. Bardon, 45 Fed. Rep. 709.

**County Indebtedness.**—Legislature cannot require the creditors of a

county to accept new evidences of indebtedness, different in terms from the old, p. 540.

Cited in 68 Am. Dec. 300, note.

**General Citation.**—Pettibone v. Fitzgerald, 62 Neb. 872.

#### 43 Cal. 542-543. JOHNSON v. MUIR.

**Motion for New Trial on Affidavits.**—When an application for a new trial is made on affidavits, the affidavits used in the hearing of the motion must be identified by the indorsement of the judge or clerk, p. 542.

On an appeal from an order refusing a new trial affidavits embodied in the record, and marked filed by the clerk, will not be considered unless they are contained in and form part of a bill of exceptions or statement, or are otherwise identified by the judge; Fish v. Benson, 71 Cal. 431. Approved in Mining Co. v. Weinstein, 7 Mont. 351.

#### 43 Cal. 543-552. ESTATE OF SIMMONS.

**Administrator's Commissions** must be based on the value of the estate taken into possession and accounted for, p. 549.

But executors of the last will of a deceased person are not entitled to commissions on the value of a piece of land of which they had taken possession but which was afterwards determined not to belong to the estate: In re Ricaud, 70 Cal. 71. Referred to in In re Dewar's Estate, 10 Mont. 438.

In determining administrator's commissions, the inventory is only *prima facie* evidence of value, p. 549.

Approved in Estate of Carver, 123 Cal. 106, approving such allowance in absence of evidence as to unfairness of valuation; Estate of Fernandez, 119 Cal. 584, 585, holding that commissions cannot be allowed upon any greater amount than the sum for which the property was actually sold; and in Horton v. Barto, 17 Wash. 678.

Estate cannot be charged with attorney's fees for procuring letters of administration, p. 547.

Cited in Estate of Byrne, 122 Cal. 201, disallowing administrator's expenses prior to application for letters; In re McKinney, 112 Cal. 453, holding that it is within the discretion of the court to allow costs in an unsuccessful contest of a will before probate.

Administrator should be allowed expenses necessarily incurred, p. 551.

Cited in note to Fletcher v. American etc. Co., 78 Am. St. Rep. 203, on general subject.

#### 43 Cal. 552-556. PEOPLE v. VALENCIA.

**Murder.**—When the instructions of the court on a material point are contradictory, there should be a new trial, p. 556.

Approved in *People v. Anderson*, 44 Cal. 69; *People v. Wong Ah Ngow*, 54 Cal. 154, 35 Am. Rep. 71, holding that an erroneous instruction is not cured by a correct statement of the law in another part of the charge; *People v. Messersmith*, 57 Cal. 575, holding the following instructions erroneous: "That insanity must be proved beyond a reasonable doubt, and in that connection read to the jury a decision to the effect that it is sufficient to prove insanity by preponderance of evidence"; *Haight v. Vallet*, 89 Cal. 249, 23 Am. St. Rep. 468, where the rule was applied in a civil case; and *McClaine v. Territory*, 1 Wash. 353.

The question of deliberation and premeditation is peculiarly within the province of the jury to determine, p. 556.

Approved in *People v. Ah Lee*, 60 Cal. 86, and *People v. Chew Sing Wing*, 88 Cal. 271.

**Murder in First Degree.**—The wilful and felonious killing of another does not constitute murder in the first degree, but there must also be deliberation and premeditation, p. 555.

Approved in *People v. Guance*, 57 Cal. 154, holding an instruction, that "if the jury find from the evidence that the defendant killed the deceased, and that such killing was with malice aforethought, you will find the defendant guilty of murder in the first degree," to be erroneous; and *State v. Wong Fun*, 22 Nev. 341, holding that the words "malice aforethought" are not synonymous with "wilful, deliberate, and premeditated."

**Indictment.**—An indictment is good which charges a person as principal in one count and as accessory in another count, p. 555.

Approved in *State v. Hamlin*, 47 Conn. 119.

#### 43 Cal. 557-560. PEOPLE v. GIBBONS.

**Preliminary Examination of Prisoner.**—A justice of the peace has no authority to administer an oath to a prisoner, upon his preliminary examination, nor to hear or receive testimony from him in that proceeding, p. 559.

Rule changed by code.—Under the code a person accused of crime may become a witness for or against himself at a preliminary examination, and his testimony may be used in evidence against him on his subsequent trial: *People v. Kelly*, 47 Cal. 125. The rule laid down in *People v. Kelly*, supra, approved in *State v. Glass*, 50 Wis. 222; 36 Am. Rep. 847.

#### 43 Cal. 560-564. PEOPLE v. BURT.

**Repeal by Implication.**—Where a subsequent act is repugnant to a prior one, the last operates, without any repealing clause, as a repeal of the first, p. 564.

Notes Cal. Rep.—139

Approved in *People v. Sargent*, 44 Cal. 432, holding that an act authorizing the levy of a tax for school purposes not to exceed fifty cents on the hundred dollars, is in conflict with and repealed by a subsequent act providing that the levy shall not exceed thirty-five cents; In the Matter of *Yick Wo*, 68 Cal. 304, deciding that in order for a subsequent act to repeal the former, it should appear that it was extended to take the place of or repeal the former, or that the two acts are so inconsistent that force and effect cannot be given both; *Ex parte Henshaw*, 73 Cal. 506, dissenting opinion of Thornton, J., and *Busby v. Riley*, 6 S. Dak. 405. Referred to in *Barden v. Wells*, 14 Mont. 464, but distinguished on the ground that the statutes in question were not inconsistent. Cited, also, in 14 Am. Dec. 210, note.

If an act is properly enrolled and authenticated, and is deposited with the secretary of state, the courts will not look into the journals of the legislature to see whether or how the bill is passed, p. 564.

Cited in *County v. Colgan*, 132 Cal. 268, 269, noted under *Sherman v. Story*, 30 Cal. 266; *Narregang v. Brown Co.*, 14 S. Dak. 364, journals of two houses of legislature are not competent to impeach validity of statute enrolled and authenticated by proper officers. Rule approved in *Board of Commissioners v. Burford*, 93 Ind. 385; *Ex parte Wren*, 63 Miss. 533, 56 Am. Rep. 830, where it was held that the journals of the legislature are not admissible in evidence to show that a statute does not contain amendments which were adopted; *State v. Jones*, 6 Wash. 476; and *Field v. Clark*, 143 U. S. 675, holding that it is not competent to show from the journal of either house of Congress that an act duly authenticated, approved, and deposited did not pass in the precise form in which it was signed by the presiding officers of the two houses and signed by the president. But in *Chicot County v Davies*, 40 Ark. 210, a different rule was laid down, and it was held that not only the enrolled bill, but the legislative journals and records and files of the office of the secretary of state, may be looked to in ascertaining whether the act was duly passed. Cited, also, in 51 Am. Dec. 618, note; 85 Am. Dec. 357, note; and 47 Am. St. Rep. 818, extended note.

#### 43 Cal. 564-569. GORDON v. SWAN.

**Contract—Option.**—Where a person is given the privilege of prospecting a mine with the option of purchasing the same at a fixed price, he does not become liable for the purchase money or refusing to consummate the sale, p. 568.

Rule held inapplicable in *Wilcoxon v. Stitt*, 65 Cal. 597, 52 Am. Rep. 311, deciding that under a contract for the sale of land in which the vendor agrees to convey upon payment, and which provides that if the vendee shall fail to make such payment, he shall forfeit all right to the land, and the vendor shall be released from all obligations to convey, the vendor has the option to avoid or enforce the contract.

**43 Cal. 569-573. BORLAND v. LEWIS.**

**Forfeiture of Swamp Lands.**—A failure to pay interest annually, and to pay the principal in five years, works a forfeiture under the Act of 1855, and the state may resell, p. 573.

So if a franchise to construct a street railroad is granted by the legislature, with a condition that it shall be forfeited if the track is not laid within a specified time, a failure to lay the track within such specified time works a forfeiture: *O. R. R. Co. v. O. B. & F. V. R. R. Co.*, 45 Cal. 377; 13 Am. Rep. 188. It is the settled law of this state that when a forfeiture is declared by statute, the title to the thing immediately vests in the state, upon the happening of the event or the commission of the offense for which the forfeiture is declared and such forfeiture need not be established judicially: *Upham v. Hosking*, 62 Cal. 258. But in the absence of a statutory provision or municipal ordinance declaring a forfeiture for a failure to complete a sidetrack within a reasonable time, the right of the company to the use of the streets can be terminated only by a judgment of forfeiture in an action commenced directly for that purpose and cannot be considered in an action of ejectment: *Arcata v. Arcata & M. R. R. Co.*, 92 Cal. 646. Cited and approved in *State v. Emmert*, 19 Kan. 548, holding that a purchaser of school lands who fails to pay interest or principal when due loses all interest in the land. Distinguished in *California Reduction Co. v. Sanitary Reduction Works*, 126 Fed. 44, validity of grant of franchise by city not collaterally attackable by private party in equity on ground of irregularity in exercise of power by city, nor because of failure of grantee to perform conditions imposed.

**43 Cal. 573-576. DONAHUE v. GALLAVAN.**

**Nonsuit—Appeal.**—An error in granting a nonsuit is an error of law, and, if excepted to and specified as such, may be reviewed without any specifications of evidence, p. 576.

Rule approved in *Schroeder v. Schmidt*, 74 Cal. 460, holding that error in granting a nonsuit cannot be reviewed on the ground that the evidence is insufficient to sustain the decision; *Hammond v. Wallace*, 85 Cal. 527; 20 Am. St. Rep. 240; *Warner v. Darrow*, 91 Cal. 311, expressly affirming the leading case; *Toulouse v. Pare*, 103 Cal. 252; and *Emerson v. Eldorado Ditch Co.*, 18 Mont. 257. Referred to in *Brown v. Warren*, 16 Nev. 232. General principle approved in *Sanford v. Duluth & Dakota Elevator Co.*, 2 N. Dak. 10; and *Sioux Banking Co. v. Kendall*, 6 S. Dak. 545.

**Constructive Possession.**—One who has actual possession of a part of tract of land under a deed conveying the whole has constructive possession of the whole tract, p. 575.

Approved in *Watt v. Wright*, 66 Cal. 208, holding that where a party

enters under color of title upon an open tract of grazing land and pastures sheep upon it during the pasturing season—the tract being unoccupied during the rest of the year—he has sufficient possession under the statute of limitations. Cited, also, in 85 Am. Dec. 125, note.

#### 43 Cal. 577-580. SHARP v. BAIRD.

**Attachment.**—In order to create a lien, the requisite acts prescribed by the statute must be performed by the officer and must appear on such officer's return, p. 580.

Approved in Watt v. Wright, 66 Cal. 208, holding that where land is not occupied, a failure of the officer to post upon the land a copy of the description of the land in connection with a copy of the writ of attachment, and of the notice that the land had been attached, is fatal and no lien is created; Schwartz v. Cowell, 71 Cal. 306; Brusie v. Gates, 80 Cal. 467, holding a general return by a constable, that he attached certain described real estate, is not sufficient to show a valid levy; Rudolph v. Saunders, 111 Cal. 235, where the rule was applied to an attachment of personal property; and Graham v. Reno, 5 Colo. App. 334; Ames v. Parratt, 61 Neb. 852, noted under Main v. Tappiner, 43 Cal. 206. Referred to in First National Bank v. Jasper, 71 Iowa, 488. Rule questioned in Wilkins v. Tourtellott, 28 Kan. 835. The court expressly withdrew their dissent in Wilkins v. Tourtellott, 29 Kan. 515. Rule of the leading case denied in Wilkins v. Tourtellott, 42 Kan. 194, 195, 201. Cited, also, in 79 Am. Dec. 174, note.

**Idem.**—Sheriff's Deed takes effect by relation from the date of attachment, pp. 578, 579.

Followed in Porter v. Pico, 55 Cal. 174. Cited in Holter etc. Co. v. Ontario etc. Co., 24 Mont. 193, holding levy of attachment not vitiated by failure to file transcript of judgment thereafter.

#### 43 Cal. 581-586. LORD v. HOUGH.

**Husband and Wife.**—Husband cannot make a voluntary conveyance of any portion of the community property, with the intent to deprive the wife of her claims, in anticipation of divorce, any more than he could make a fraudulent disposition in anticipation of her widowhood, p. 585.

Wife cannot maintain an action while the marriage bond exists to set aside a transfer of the common property, made by the husband for the purpose of defrauding her: Greiner v. Greiner, 58 Cal. 120, distinguishing the leading case on the ground that the marriage bond had ceased. Morrison, J., dissented in 58 Cal. 123, relying upon the leading case. A wife deserted by her husband may sue to avoid transfers made by her husband of his separate property, with a design to defeat her right to maintenance: Murray v. Murray, 115 Cal. 273; 56 Am.

St. Rep. 101, referring to the leading case. A conveyance of real estate made by a husband during coverture for the purpose of defeating the wife's marital rights are fraudulent and void as against her: *Walker v. Walker*, 66 N. H. 392; 49 Am. St. Rep. 617. Cited, also, in 39 Am. Dec. 220, note.

A voluntary disposition of a portion of the community property, reasonable in reference to the whole amount, may be made by the husband, in the absence of a fraudulent intent, p. 585.

Deed of gift of a portion of the community property is not void per se: *Corker v. Corker*, 95 Cal. 309. Cited, also, in 73 Am. Dec. 537, note; 89 Am. Dec. 205, note; and 24 Am. Dec. 492, note.

Pendency of a suit for divorce does not of itself interrupt the husband's power of disposition of the community property, p. 585.

Approved in *Ray v. Ray*, 1 Idaho, 580. Cited in *Sun Ins. Co. v. White*, 123 Cal. 200, sustaining bona fide mortgage by husband pending divorce suit.

#### 43 Cal. 590-596. **LICK v. AUSTIN.**

**Double Taxation.**—The mortgagor cannot complain of double taxation if the land subject to the mortgage is taxed, and the debt secured by the mortgage is also taxed, p. 594.

**Denied.**—If a debt for money lent, which is secured by mortgage, is taxed and the mortgaged property is also taxed, it is a double taxation, and a violation of the constitution: *Sav. and Loan Society v. Austin*, 46 Cal. 483, 485 (by Crockett, J., Niles, J., concurring).

**Taxation.**—Solvent debt secured by mortgage is property for the purpose of taxation within the meaning of the constitution, p. 594.

Approved in *Sav. and Loan Society v. Austin*, 46 Cal. 492, and *Lamar v. Palmer*, 18 Fla. 150, holding that promissory notes and other credits were property, and as property liable to be taxed, and further deciding that a tax upon notes secured by mortgage upon land, the land mortgaged also being taxed, does not present a case of double taxation. Referred to in *Attorney General v. Supervisors*, 71 Mich. 22; and *State v. Carson Savings Bank*, 17 Nev. 156, holding that taxation of note secured by mortgage and of the land mortgaged is not double taxation. Cited, also, in 74 Am. Dec. 93, note.

**General Citation.**—*Globe Lumber Co. v. Lockett* 106 La. 420.

#### 43 Cal. 597-605. **DAVENPORT v. TURPIN.**

**Res Adjudicata.**—An action merely commenced, and then dismissed without trial, determines nothing and concludes no one, p. 602.

A dismissal of an election contest before citation is served upon the defendant, and before any appearance has been made in the action, does not operate as a retraxit, and is no bar to the institution of

another action: *Lord v. Dunster*, 79 Cal. 489. Dismissal of an action by leave of the court, without the consent of the opposite party, and which was expressly entered as "without prejudice to the commencement of another action," is not a bar to a subsequent suit: *Westbay v. Gray*, 116 Cal. 668.

**A Mortgage is Merged in the decree of foreclosure, and a party who enters under the decree cannot be regarded as a mortgagee in possession**, p. 603.

Followed in *Black v. Gerichten*, 58 Cal. 57, holding that a judgment docketed for a deficiency after a sale of the mortgaged premises, is not a lien on the premises sold, if purchased by any person other than the mortgage debtor.

**Foreclosure of Mortgage instituted against a mortgagor alone, cannot affect the title of a vendee of the mortgagor vesting between the delivery of mortgage and commencement of foreclosure suit**, p. 601.

The foreclosure of a prior mortgage lien upon real property, without making a subsequent judgment lien creditor a party, in nowise affects the rights of the latter: *De Lashmutt v. Sellwood*, 10 Oreg. 326.

**Estopel.—Where one person holds the legal title to land claimed by another, but, believing that the other had the superior title, surrendered his possession thereto, such withdrawal, in the absence of fraud or deception, will not estop him from setting up his title later**, p. 602.

Referred to in *State to the use of State v. Berning*, 74 Mo. 96, holding that an administrator is not estopped from reclaiming notes illegally pledged by him for his own purposes to a person having notice of their true ownership. Cited, also, in 38 Am. Rep. 316, note.

**Abandonment.—A party holding the legal title to land as vendee of a mortgage cannot divest himself of that title by abandonment or parol disclaimer**, p. 602.

Cited in 40 Am. Dec. 466, note.

**Deed as Mortgage.—Under the general issue in ejectment, a deed absolute in form cannot be attacked on the ground that it was intended as a mortgage**, p. 604.

Cited in 35 Am. Dec. 128, note.

#### 43 Cal. 615-617. HILL v. KIDD.

**Election Wager is illegal and void, upon grounds of public policy, and an action for affirmative relief cannot be maintained**, p. 616.

Cited in *Gridley v. Dhorn*, 57 Cal. 79, 42 Am. Rep. 111, to the point that where an illegal wager is made, the parties to it may recover their stakes before the wager is decided, but that after the money has been lost and won, neither party can be heard in a court of justice; and *Wise v. Rose*, 110 Cal. 162, where a party repudiating a wager on a

horse race before the race was run, was held entitled to recover his stake. Approved in *Cooper v. Rowley*, 29 Ohio St. 548. Cited, also, in 12 Am. Dec. 340, note; 18 Am. Dec. 500, note; and 37 Am. St. Rep. 702, note.

**43 Cal. 617-625. SCHMITT v. GIOVANARI.**

**Mexican Grant.**—A decree confirming a Mexican grant vests the legal title in the confirmees and their assigns, and not in the assigns of their grantor, p. 623.

Followed in *Hartley v. Brown*, 46 Cal. 204, holding that if the confirmation of a Mexican grant is made to the children of the grantee, they have the legal title, and they and their assigns will prevail in ejectment against one claiming title under a sale made by the administrator of the grantee, when no equitable defense is set up, and *Hartley v. Brown*, 51 Cal. 467, to the same effect. Cited in *Bihler v. Platt*, 52 Cal. 552, where the principle was adhered to.

Decree of confirmation which declared the confirmation should be without prejudice to the legal representatives of the original grantee, and should inure to the benefit of any person who owned the land by any title derived from the original grantee, gives a perfect title to a purchaser from the confireree, who bought from him before he presented his petition for confirmation, p. 625.

Referred to in *Bixby v. Bent*, 59 Cal. 531. Cited in *McDonald v. McCoy*, 121 Cal. 67, noted under *Moore v. Wilkinson*, 13 Cal. 478.

**43 Cal. 625-628. REGAN v. McMAHON.**

**Motion for New Trial** may be resorted to for the purpose of correcting errors in a preliminary decree of partition, p. 627.

Followed in *Tormey v. Allen*, 45 Cal. 121. Cited in *Deyoe v. Superior Court*, 140 Cal. 486, discussing nature of interlocutory divorce decree.

**Supposed Errors in Preliminary Decree in Partition** cannot be reviewed through an appeal taken from the final decree, p. 627.

Approved in *State v. Reed*, 3 Idaho, 559, writ of error does not lie to review order overruling motion for change of venue.

**43 Cal. 628-635. KING v. WISE.**

If one party agrees to unite with two others in the purchase of lands, each to furnish one-third the purchase money, the first party to conduct the negotiations, he assumes a position of trust toward his associates, and is bound to exercise the utmost good faith towards them, p. 633.

Cited and the principle approved in *Newell v. Cochran*, 41 Minn. 378; *Keogh v. Noble*, 136 Cal. 155, holding associate entitled to accounting accordingly; *Calmon v. Sarraillé*, 142 Cal. 641, 642, sustaining right of

principal to annul deed obtained by agent in fraud of the fiduciary relation.

**Recoupment of Damages.**—Joint and separate debts cannot be set off against each other, p. 635.

So a cause of action arising on the liability, promise, or undertaking of a partnership is a joint one only, and, in an action thereon against the members of the firm, one of the defendants cannot maintain a counterclaim arising on a cause of action existing in his own favor: *Coleman v. Flavel*, 12 Saw. 465; 31 Fed. Rep. 392.

#### 43 Cal. 636-638. THOMPSON v. CONNOLLY.

**Appeal.**—Statement on new trial motion cannot be used as a statement on appeal from judgment unless so stipulated, p. 637.

Cited in *Wall v. Mines*, 128 Cal. 139, but held inapplicable under present code (Code Civ. Proc., sec. 950).

**Stipulation.**—Parties may stipulate that the court pass on a motion for a new trial before the statement is engrossed, and the order of the court relying upon such stipulation will not be reviewed, p. 638.

Approved in *Erlanger v. Southern Pac. R. R. Co.*, 109 Cal. 395, holding that it is well settled that judgments and orders by consent will not be reviewed; and in *Crosby v. North Bonanza M. Co.*, 23 Nev. 76.

#### 43 Cal. 640-643. ESTATE OF BOLAND.

**Homestead** under Probate Act, is to be set apart in pursuance of the statute in force at the time the order of the court is made, p. 642.

Approved in *Sulzberger v. Sulzberger*, 50 Cal. 388; and *Sheehy v. Miles*, 93 Cal. 294.

**Homestead**, under Probate Act, cannot be acquired by a widow in the estate of her deceased husband, until an order of the probate court has been made setting it apart for her, p. 642.

Cited in *Fealey v. Fealey*, 104 Cal. 360, 43 Am. St. Rep. 115, holding that an order setting apart a homestead to the widow of a decedent, no homestead having been declared during the lifetime of deceased, operates to vest in the widow a title to the land set apart out of the community property.

**Idem.**—A widow who marries before an order of the probate court setting apart a homestead, loses by her marriage her right to such homestead, p. 643.

Followed in *In re Still*, 117 Cal. 514.

#### 43 Cal. 643-655. REEVE v. KENNEDY.

**Title by Sheriff's Sale—Evidence to Contradict Record.**—In action to

impeach the title to property acquired by an innocent purchaser at judicial sale, the plaintiff cannot contradict the record by proof that there was in fact no service of summons, or that the judgment was obtained by fraud, pp. 651, 652.

Approved in *McCauley v. Fulton*, 44 Cal. 361, deciding that upon collateral attack recitals in the judgment of service upon the defendants are conclusive of the question of jurisdiction of the person when rendered by a court of competent jurisdiction. Affirmed in *Jones v. Gillis*, 45 Cal. 543, and *Stokes v. Geddes*, 46 Cal. 19. Distinguished in *Martin v. Parsons*, 49 Cal. 98, and holding that while a court of equity will not vacate a judgment obtained by the wrongful act of a party without service of summons, still it will interfere to prevent the party thus obtaining it from using it as an instrument of injustice. Cited in dissenting opinion of Crockett, J., *Mayo v. Haynie*, 50 Cal. 75. Proof of the execution of a deed, and of the judgment and execution are sufficient for recovery in ejectment against the debtor: *Kelley v. Desmond*, 63 Cal. 519. Referred to in *Rollins v. Wright*, 93 Cal. 400. Domestic judgment of a superior court must be presumed to have been rendered with jurisdiction over the person of the defendant, when offered in evidence in another action, although there is no proof of service of summons, and although the judgment itself is silent concerning jurisdiction over the defendant. In re *Eichhoff*, 101 Cal. 603, referring to the leading case as a holding on a cognate subject. Leading case cited and principle applied in *Bagley v. Sligo Furnace Co.*, 120 Mo. 251; *Leonard v. Sparks*, 63 Mo. App. 612; *Roush v. Fort*, 2 Mont. 485, holding that the sale of real property under execution, which has been issued in excess of the judgment through the fraud of the creditor, and which the debtor has not sought to correct by an amendment, does not affect the rights of bona fide purchasers; and *Marrow v. Brinkley*, 85 Va. 61.

**Sheriff's Sale.**—In a complaint to set aside an execution sale on account of matters extrinsic to the judgment, if there is no averment that the purchaser had notice of such extrinsic facts, he will be deemed a purchaser without notice, p. 640.

Cited and approved in *Heard v. Stack*, 81 Mo. 616.

**Taxes—Public Record.**—Assessment of taxes and the lien which it creates are matters of public record, of which all purchasers are bound to take notice, p. 654.

Cited and approved in *Empire etc. Co. v. Engley*, 18 Colo. 393; and *Adams v. Osgood*, 42 Neb. 457. Distinguished in *Page v. W. W. Chase*, 145 Cal. 582, purchaser who took title from defendant in foreclosure of street assessment lien pending action, without actual notice of its pending, is not bound by judgment therein.



## **VOLUME XLIV.**

**By CHARLES T. BOONE.**

**Revised to include citations to Volume 147, by CHARLES L. THOMPSON.**

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### **44 Cal. 3-17. MOSS v. ATKINSON.**

**Notice.**—Possession of land under contract of sale is notice sufficient to put purchasers on inquiry, p. 17.

Affirmed in Pacific Mut. L. Ins. Co. v. Stroup, 63 Cal. 152; Scheerer v. Cuddy, 85 Cal. 272. Approved in Tate v. Pensacola etc. Co., 37 Fla. 452, 53 Am. St. Rep. 258, holding that notice in such cases is a legal deduction from the fact of possession; Scott v. Lewis, 40 Or. 41, purchase money mortgagee who voluntarily releases mortgage and takes reconveyance of mortgaged premises, knowing or having means of knowing that mortgagor has executed title bond, takes property subject to equity so created.

**Statute of Frauds.**—Letter signed by owner of land addressed to A, stating that he has agreed to sell the land to B, giving the general terms of agreement, description of land, and price, is a sufficient memorandum of the sale within the statute of frauds, and may be enforced by B, in equity, p. 16.

Principle of decision approved in McDonald v. Huff, 77 Cal. 282, where the contract to convey was delivered to a third person in escrow, without the signature of the vendee or any contract in writing from him, and the vendor was held bound. Cited in Estate of Robinson, 142 Cal. 156, ruling similarly as to memorandum of executor's sale.

### **44 Cal. 18-29. COX v. WESTERN PACIFIC RAILROAD COMPANY.**

S. C. again on second appeal, 47 Cal. 87; explained, Cox v. McLaughlin, 52 Cal. 595; Same v. Same, 76 Cal. 62; 9 Am. St. Rep. 184.

Contract to grade section of railroad for a fixed sum is entire, notwithstanding provision for payment of installments as the work progresses, p. 28.

Referred to in Cox v. McLaughlin, 52 Cal. 595, involving same contract, and holding that failure to pay an installment did not amount to prevention; so in Same v. Same, 54 Cal. 605; 63 Cal. 205; and 76 Cal. 62,

9 Am. St. Rep. 164, allowing an amendment of the complaint averring a claim for the value of the services actually done as upon a quantum meruit; Cited in Atlantic etc. Co. v. Delaware etc. Co., 98 Va. 508, holding contract for certain railroad construction an entire one.

**Mechanic's Lien.**—If contract is entire, no liens can be filed from time to time, as the work progresses, p. 28.

Principle approved in Farmers' Loan and Trust Co. v. Railway Co., 127 Ind. 259; Merchant v. Water Power Co., 54 Iowa, 455. Affirmed in Dingley v. Greene, 54 Cal. 335; and distinguished in Whittier v. Blakely, 13 Oreg. 562; Wortman v. Kleinschmidt, 12 Mont. 349, dissenting opinion of De Witt, J.

Lien for work or materials cannot be acquired on a portion of a railroad, but must be filed on the entire road, p. 28.

Cited in Bingham v. Knox, 127 Cal. 43, holding claim sufficient as against entire road; Adams v. Grand Island etc. Co., 10 S. Dak. 248, holding lien not enforceable when against portion only; Fields v. Daisy Gold Min. Co., 25 Utah, 86, where materials are furnished for separate and distinct purposes under separate contracts requiring cash payments under circumstances tending to rebut presumption of continuous dealing, lien for materials dates from date when materials were commenced to be furnished on respective contracts; Williams v. Mountaineer Gold Min. Co., 102 Cal. 140; Knapp v. Railway Co., 6 Mo. App. 208; and Eclipse Mfg. Co. v. Nichols, 1 Utah, 259, holding that a mechanic's lien cannot be claimed upon part of a structure, or portion of materials furnished. Explained and distinguished in Pacific etc. Co. v. Bear Valley etc. Co., 120 Cal. 96, 98, 65 Am. St. Rep. 160, 162, allowance of lien claim on section of canal.

#### 44 Cal. 29-32. COHEN v. SHARP.

**Cloud on Title.**—Equity will not interfere to cancel a deed as cloud on title, when the deed is void on its face or the result of proceedings void upon their face, and requiring no extrinsic evidence to disclose their illegality, p. 30.

Approved in Archbishop of S. F. v. Shipman, 69 Cal. 591, 592, refusal to enjoin a sale under a judgment for the foreclosure of a lien; Roth v. Insley, 86 Cal. 140, in which case the sale of a homestead under execution was enjoined, as it would be necessary, in ejectment by the purchaser under the sale, for the owner to introduce extrinsic evidence to show that the execution sale, valid on its face and under a valid judgment against him, did not pass title to the property; Gilman v. Van Brunt, 29 Minn. 272; Rosenbaum v. Foss, 4 S. Dak. 195, both in approval of the doctrine stated; and Miles v. Strong, 62 Conn. 105, holding that jurisdiction to try titles to land in a court of law cannot be transferred to a court of equity upon pretense of removing cloud from title.

**44 Cal. 32-35. EX PARTE HARTMAN.**

Where party is in custody under an order regular on its face, and which the court had power to make, he cannot be discharged upon habeas corpus because of error in granting the order, p. 35.

Approved in *Ex parte Cohn*, 55 Cal. 197; *Ex parte Barnett*, 51 Ark. 218; *Ex parte Renshaw*, 6 Mo. App. 475; and *Ex parte Degener*, 30 Tex. Cr. App. 576, all of the effect that the writ of habeas corpus cannot be made to serve the office of an appeal or writ of error; *In re Mahany*, 29 Colo. 446, habeas corpus does not lie where defendant charged with murder convicted of manslaughter, and court, over objection of defendant, set verdict aside and ordered new trial, and defendant pleaded jeopardy; 26 Am. Dec. 40, note; *Territory v. Conrad*, 1 Dak. Ter. 355. in approval of principle of decision.

**44 Cal. 36-43. POLACK v. MANSFIELD.** 13 Am. Rep. 151.

**Ejectment.**—Mere servant or employee, not claiming any interest in the premises nor right to their possession, and only in that manner occupies the premises, cannot be sued in ejectment for them, p. 39.

Cited in *Morrison v. Holladay*, 27 Oreg. 187, as authority to the ruling stated. Approved in *Carothers v. Mining etc. Co.*, 122 Fed. 308, resident agent of foreign corporation who has merely served notice to quit, signed by himself as managing director, cannot be made party defendant to ejectment against corporation to prevent removal of cause.

**Same.**—Ejectment will lie against an officer of the United States in possession of the demanded premises on behalf of the government, pp. 40-43.

Affirmed in *King v. La Grange*, 61 Cal. 227, 230; and doctrine approved in *Lee v. Kaufman*, 3 Hughes, 98, 137; *Miller v. Blackett*, 47 Fed. Rep. 548.

**44 Cal. 43-46. GALE v. TUOLUMNE COUNTY WATER COMPANY.**

Grounds of special demurrer not presented in court below, will not be considered on appeal, p. 45.

Cited in *Kippen v. Ollasson*, 136 Cal. 642, as to objection of misjoinder of plaintiffs. Referred to in *Hemenway v. Francis*, 20 Oreg. 459, discussing question of defendant's answer in ejectment.

**44 Cal. 46-50. KARR v. PARKS.**

**Party to Action.**—Infant appearing in action by guardian is none the less the real party in interest, p. 48.

Approved in *Emeric v. Alvarado*, 64 Cal. 593; *Dixon v. Cardozo*, 106 Cal. 507, the latter case holding that the appointment of a guardian of an insane person does not vest in him a cause of action in favor of the insane person, nor deprive the latter of his right or property therein.

Judgment in favor of an infant for injury inflicted is no bar to an action by the father for services and expenses incurred in nursing and healing the child, p. 48.

Cited in *Sykes v. Lawler*, 49 Cal. 238, as to right of parent to recover for injury to minor child; principle of decision approved in *Union Pac. Ry. Co. v. Jones*, 21 Colo. 344; *Ramka v. Chicago etc. R. R. Co.*, 61 Minn. 552; 52 Am. St. Rep. 620; *Smith v. Pittsburgh etc. Co.*, 90 Fed. 785, quoting *The Oriflamme*, 3 Saw. 404, as authority for recovery of damages by person injured for injury arising from permanent disfigurement; 48 Am. Dec. 622, 623, 624, extended note.

#### 44 Cal. 51-53. MURPHY v. DE GROOT.

**Eminent Domain.**—Just compensation must be made or fund provided before the taking of land for public use, p. 52, 53.

Approved and applied in *Brady v. Bronson*, 45 Cal. 643, proceedings to acquire right of way for a public road. Explained and distinguished in *Tehama County v. Bryan*, 68 Cal. 60, also an action to condemn land for the use of the public as a highway. Cited in 31 Am. Dec. 374, note, as authority that the statute must be strictly pursued.

#### 44 Cal. 53-65. SMITH v. MOYNIHAN.

**Partnership.**—Joint contract by several to furnish materials and labor does not per se create a partnership, unless relations of profit and loss are defined, p. 61.

Referred to in *Smith v. Schultz*, 99 Cal. 535, in which case the contract between the parties was held to be in legal effect a lease for a definite term of years, creating the relation of landlord and tenant, and not a partnership. Cited in *Herbert v. Callahan*, 35 Mo. App. 502, to the ruling stated, and holding also that the burden of proof is on him who alleges a partnership to show it affirmatively.

Rule that parol evidence is not admissible to vary the terms of a written contract is confined in its operation to the parties to the contract, their representatives, and those claiming under them, p. 64.

Cited in *Barbour v. Flick*, 126 Cal. 633, admitting certain parol evidence to prove trust; *Moyle v. Cong. Soc.*, 16 Utah, 79, but holding parol evidence not otherwise admissible when inconsistent with written agreement.

Approved in *Hussman v. Wilke*, 50 Cal. 254; *Robinson v. Moseley*, 93 Ala. 75; *Roof v. Pulley Co.*, 36 Fla. 296; *Burns v. Thompson*, 91 Ind. 150; *Bank of California v. White*, 14 Nev. 376; and *Clapp v. Banking Co.*, 50 Ohio St. 541.

#### 44 Cal. 65-71. PEOPLE v. ANDERSON.

**Self-Defense.**—Killing need not be absolutely necessary, if necessity

seems apparent, and there is reasonable ground to fear a felony, or imminent danger of great bodily injury, pp. 68, 69.

Approved in *People v. Gonzales*, 71 Cal. 577; and *People v. Dollor*, 89 Cal. 515, where it is held that "necessary self-defense" sufficient to excuse a man for committing assault includes every case where there is reasonable ground to apprehend a design to commit a felony or to do some great bodily injury, and where the circumstances are sufficient to excite the fears of a reasonable man.

**Instructions.**—An erroneous instruction to jury at request of prosecution is not cured by a correct one on the same point afterward given at the instance of the defendant, p. 69.

Ruling approved in *Chidester v. Ditch Co.*, 53 Cal. 58; *McClaine v. Territory*, 1 Wash. 354.

It is the duty of jury in a criminal case, to take the law from the court, p. 70.

Approved in *Johnson v. Culver*, 116 Ind. 292, holding that the jury should take the law from the court; *State v. Burpee*, 65 Vt. 28, 36 Am. St. Rep. 795, disapproving doctrine that jurors are judges of the law; *Sparf v. United States*, 156 U. S. 83, holding that such is the rule in the courts of the United States.

As a general rule, practice of allowing counsel to read law to the jury is objectionable, and ought not to be tolerated, p. 70.

Cited in *Meyer v. Foster*, 147 Cal. 171, upholding refusal to permit counsel to read to jury from Civil Code in action on note; *People v. Godwin*, 123 Cal. 376, holding no error shown on record in this regard; *People v. Bezy*, 67 Cal. 224, as authority that counsel for defendant may be restricted to a statement of the facts which he expects to prove without any argument thereon; *People v. Treadwell*, 69 Cal. 238, stating the matter to be one resting within the discretion of the trial court, and not reviewable except for an apparent abuse of such discretion. So, to same effect, in *Gregory v. Railroad Co.*, 37 W. Va. 619; *Sullivan v. Royer*, 72 Cal. 249, 1 Am. St. Rep. 52, that it is not error for the court to disallow legal argument to the jury; *People v. Goldenson*, 76 Cal. 350, that it was not error for the court to prevent counsel from commenting upon the actions of juries in other homicide cases tried in the same jurisdiction; *Baldwin's Appeal*, 44 Conn. 41; and *Territory v. Hart*, 7 Mont. 59, both in approval of the ruling stated. Cited, discussing the subject, in notes to 59 Am. Dec. 187; 33 Am. Rep. 792; 38 Am. Rep. 579; and 1 Am. St. Rep. 54.

#### 44 Cal. 71-84. YEOMANS v. CONTRA COSTA STEAM NAVIGATION COMPANY.

Employer is not liable for injuries to servant resulting from negligence of fellow-servant, engaged in the same general business, if not at fault in selecting such fellow-servant, p. 81.

Ruling affirmed in *Hogan v. Central Pac. R. R. Co.*, 49 Cal. 130; *Brown v. Central Pac. R. R. Co.*, 68 Cal. 176, dissenting opinion of McKee, J.; *Congrave v. Southern Pac. R. R. Co.*, 88 Cal. 365, holding that a brakeman and a conductor on a railroad train are fellow-servants within the rule; *Stevens v. San Francisco etc. R. R. Co.*, 100 Cal. 567, treating a fireman and oiler and an engineer of a ferry boat as fellow-servants; *Price v. Houston etc. Nav. Co.*, 46 Tex. 538, in approval of the rule; *Mellor v. Missouri Pac. Ry. Co.*, 105 Mo. 480, holding that a United States postal agent riding on a railroad train in discharge of his duties is not a fellow-servant of the train operatives within the rule; so in *Houston etc. Ry. Co. v. Hampton*, 64 Tex. 431, as to a mail clerk on a railway train in the discharge of his duties. Cited in 36 Am. Dec. 280, note; and 38 Am. Dec. 346, note, to the ruling stated.

An express messenger, when carried under contract with a railroad company made by the express company for the transportation of express matter in his charge, occupies the position of an ordinary passenger, as regards the liability of the carrier, for injuries he may sustain through the negligence of the carrier's servants, p. 83.

Approved in *Fordyce v. Jackson*, 56 Ark. 597; and *Voight v. Baltimore etc. R. R. Co.*, 79 Fed. Rep. 562. Cited in 36 Am. Dec. 288, extended note; 11 Am. Rep. 304, note, as to who are passengers; 61 Am. St. Rep. 99, 101, note; note to 62 Am. St. Rep. 520, 523.

As between passenger and carrier, the proof of the occurrence of an accident by which the passenger sustains injury without his fault, is prima facie proof of negligence on part of carrier, p. 84.

Approved in *Ryan v. Gilmer*, 2 Mont. 525, 25 Am. Rep. 750, injuries to passenger caused by the overturning of the carrier's sleigh driven by his servant. Cited in *In re Cal. Nav. etc. Co.* 110 Fed. 672, noted under *Boyce v. Stage Co.*, 25 Cal. 460; 62 Am. Dec. 681, 684, extended note, where the authorities bearing upon the subject are collected.

#### 44 Cal. 84-89. EX PARTE BENNETT.

**Judgment.**—Rendered upon a trial at chambers by consent is not necessarily void, p. 87.

Cited in *Johnson v. San Francisco Sav. Union*, 75 Cal. 139, 7 Am. St. Rep. 131, as holding that a judgment ordered without a trial cannot be attacked collaterally, and as authority that the question whether findings support the judgment cannot be raised in a collateral action. Approved in *Roy v. Horsley*, 6 Oreg. 387, 25 Am. Rep. 539, a similar case.

**Jurisdiction** is the power to hear and determine, or to hear without determining, or to determine without hearing, p. 88.

Definition approved in *Mellor v. Gilmore*, 33 La. Ann. 1405; and *Brownsville v. Basse*, 43 Tex. 449.

**44 Cal. 89-92. TRUCKEE AND TAHOE TURNPIKE ROAD COMPANY v. CAMPBELL.**

Right to collect tolls is a franchise. It is a sovereign prerogative, and vests in an individual only by virtue of a legislative grant, p. 91.

Approved in Spring Valley W. W. v. Schotter, 62 Cal. 110, as to nature of franchises; so in Evans v. Hughes County, 3 S. Dak. 581, and applied to ferry franchise.

Grant of turnpike franchise is not liable to be attacked by a private person, or in a collateral proceeding, for mere error in the exercise of the authority to make the grant, pp. 91, 92.

Cited in People v. Volcano etc. Toll-Road Co., 100 Cal. 90, quo warranto against a toll-road company for usurpation of franchise. Approved in California Reduction Co. v. Sanitary Reduction Works, 126 Fed. 42, validity of grant of franchise not collaterally attackable by private party in equity suit on ground of irregularity in exercise of power by city nor because of failure of grantee to perform conditions imposed. Explained and distinguished in Waterloo Turnpike Road Co. v. Cole, 51 Cal. 385, in that in the latter case the grant was void for want of jurisdiction in the board of supervisors to make it, and not merely that the board erred in the exercise of its admitted jurisdiction.

**44 Cal. 92-95. PEOPLE v. CONGLETON.**

**Criminal Law.**—Where indictment charges an assault with a deadly weapon, with intent to murder, and the verdict finds the assault to have been made with intent to do bodily harm, the offense found is necessarily included in the charge, p. 94.

Cited in People v. Murat, 45 Cal. 284, as to the necessity of charging use of deadly weapon; People v. Villarino, 66 Cal. 229, to same effect; so in People v. Pape, 66 Cal. 367, holding that conviction of assault with a deadly weapon may be had under an information charging an assault with intent to murder; Williams v. State, 41 Fla. 301, holding indictment for assault to commit murder sufficient to include assault to commit manslaughter. So, to same effect, in Territory v. Conrad, 1 Dak. Ter. 355; People v. Savercool, 81 Cal. 651, sufficient, in general terms, to aver the assault to have been made with a "deadly weapon," the kind of weapon being a matter of proof only; State v. White, 45 Iowa, 327, holding that assault with intent to commit manslaughter is included in an assault with intent to commit murder, and the indictment for the latter offense will sustain a conviction for the former. So, to same effect, in State v. Johnson, 3 N. Dak. 152; and State v. Collyer, 17 Nev. 285, the latter holding, however, in opposition to the principal case, that in an indictment for an assault with intent to kill it is not necessary to allege in direct terms that the instrument used was a "deadly weapon," or to aver such facts as would enable the court to see that it was necessarily such. Referred to in State v. Doty, Notes Cal. Rep.—140.

5 Oreg. 493; and State v. Lynch, 20 Oreg. 391, as to sufficiency of indictment for assault with intent to kill.

Application to change place of trial in a criminal case is addressed to the sound discretion of the court, p. 95.

Approved in State v. St. Clair, 6 Idaho, 111, following rule; People v. Yoakum, 53 Cal. 567, in which case an order refusing to change the venue was reversed, no counter-affidavit having been filed; People v. Goldenson, 76 Cal. 339; People v. Elliott, 80 Cal. 298, in affirmance; Kennon v. Gilmer, 5 Mont. 262; and Territory v. Manton, 8 Mont. 103, holding that the power of courts to grant changes of venue is limited to the exercise of a judicial discretion, on good cause shown.

Where the affidavits on motion for change of venue set forth merely that in the belief or opinion of the affiants the prisoner could not have a fair trial owing to the popular prejudice against him, it is no abuse of the discretion of the court to deny the motion, p. 95.

Cited in People v. Yoakum, 53 Cal. 567, setting forth the requisites of affidavits in support of such motion; approved in Territory v. Egan, 3 Dak. Tr. 125; and Kennon v. Gilmer, 5 Mont. 262; State v. Spotted Hawk, 22 Mont. 53, noted under People v. McCauley, 1 Cal. 379.

#### 44 Cal. 96-100. PEOPLE v. HAUN.

**Murder.**—The term has but one meaning in California, namely, the unlawful killing of a human being with malice aforethought, either expressed or implied, p. 98.

Approved in People v. Jefferson, 52 Cal. 453, where it is said, "Killing with malice aforethought being alleged, there is an averment of all the facts which constitute each of the offenses, murder in the first degree, in the second degree, and manslaughter."

**Same.**—Act of 1856, dividing crime of murder into two degrees, and prescribing imprisonment as the punishment for murder in the second degree, did not make murder in the second degree less or other than murder, pp. 97, 98.

Cited in People v. Doyell, 48 Cal. 96, holding that the amendment of 1856 did not change the law of murder; so, People v. Keefer, 65 Cal. 235, holding that a defendant indicted for murder and found guilty of murder of second degree, who on his own motion secures a new trial, may on a new trial be convicted of murder of the first degree; and so holding in Bohanan v. State, 18 Neb. 64, 65; 53 Am. Rep. 796, 797.

**Homicide.**—Prosecution for murder in the first or second degree is not barred by limitations, p. 99.

Cited in State v. Erving, 19 Wash. 437, construing similar local statute.

**Instructions.**—Party in criminal case, who fails to ask the court to

give instructions to the jury upon a particular point, cannot complain of error on the part of the court in not giving the instructions, p. 100.

Approved in *People v. Ah Wee*, 48 Cal. 239; *People v. Gray*, 66 Cal. 277; *People v. Flynn*, 73 Cal. 514; *People v. Olsen*, 80 Cal. 128; and *People v. McLean*, 84 Cal. 483. Cited in *People v. Balkwell*, 143 Cal. 264, as to omission of instructions of circumstantial evidence. Distinguished in *State v. Myers*, 8 Wash. 183, and holding that where the accused fails to testify in his own behalf, it is the duty of the court, under Washington code, without an affirmative request, to charge that no inference of guilt should arise against the defendant on account thereof.

#### 44 Cal. 100-104. **HELLMAN v. HOWARD.**

**Deed.**—Word "deed" in its largest sense includes a mortgage; but not so when it appears from the language of a contract that it was used therein in a limited sense, and as meaning an instrument conveying the title to land, p. 104.

Approved in *Lockridge v. McCommon*, 90 Tex. 239.

#### 44 Cal. 105. **PEOPLE v. PARKS.**

**Locus Delicti.**—In a criminal case, the prosecution must prove that the offense was committed in the county charged in the indictment, p. 105.

Affirmed in *People v. Roach*, 48 Cal. 382; and *People v. Bevans*, 52 Cal. 471, holding that the plea of not guilty puts in issue all the material averments of the indictment, including that of the locus delicti. Approved in *State v. McGinnis*, 74 Mo. 246; *State v. First Nat. Bank*, 3 S. Dak. 54.

#### 44 Cal. 106-117. **SAN DIEGO v. SAN DIEGO AND LOS ANGELES RAILROAD COMPANY.**

The law will not permit one who acts in a fiduciary capacity to deal with himself in his individual capacity. The rule applies equally, whether one deals with himself, acting as sole trustee, or with a board of trustees, of which he is a member, or with the directors of a corporation of whom he is one, p. 113.

Cited in *Pacific Vinegar etc. Works v. Smith*, 145 Cal. 366, 368, where president of corporation purchases its notes outright and caused corporation by himself as president to become indorser thereof to himself individually guaranteeing payment of notes without authority of corporation, he cannot sue on indorsement; *Reclamation Dist. v. McCullah*, 124 Cal. 183, but sustaining payment to trustee for work done and money advanced, when no unfairness shown and his vote was not necessary to pass the resolution therefor; *In re Evans*, 22 Utah, 377, 83 Am. St. Rep. 796, holding void a contract between an attorney

and his employer on behalf of third person to remit to the agent part of fees received from client; Northport v. Northport Townsite Co., 27 Wash. 549, interest of councilman in city contract shown where councilman was stockholder and manager of lumber company which sold to contractor material to construct improvement under agreement to receive improvement warrants in payment therefor; Andrews v. Pratt, 44 Cal. 318, holding that boards of supervisors are bound to the same measure of good faith toward the county which is required of an ordinary trustee toward his cestui que trust, or an agent toward his principal; Wilbur v. Lynde, 49 Cal. 292, 19 Am. Rep. 646, holding that a promissory note made by a corporation, payable to its acting trustees, is void; Davis v. Rock Creek etc. Co., 55 Cal. 365, 36 Am. Rep. 43, to same effect, applying the principle of the decision; Golson v. Dunlap, 73 Cal. 159, holding that if a trustee attempts to purchase from himself, the transaction is voidable at the election of the cestui que trust; Shakespear v. Smith, 77 Cal. 640, 11 Am. St. Rep. 329, an order for a requisition on the county superintendent of public schools by two of the trustees of a school district, one of whom was personally interested in it, held to be void; Graves v. Mining Co., 81 Cal. 320, holding that resolutions passed by the vote of interested directors of a corporation making allowances in their own favor are voidable at the election of the corporation, or at the election of a minority of the stockholders, if the corporation refuses to avoid them; Finch v. Riverside etc. Ry. Co., 87 Cal. 602, holding void a franchise, granted by a committee of two, one of whom was a subscriber to the stock of the company for whose benefit the franchise was granted; Wickersham v. Crittenden, 93 Cal. 29, violation of trust by president and cashier of bank, in loaning moneys to a third person, without authority from the board of directors. Approved in Rocky Ford etc. Co. v. Simpson, 5 Colo. App. 33, setting forth nature of relation between irrigation company and its members; Martin v. Townsend, 32 Fla. 327, relation of county commissioners to county; Miner v. Ice Co., 93 Mich. 111, in which case a contract of officers of a corporation with the corporation was held to be void; Union Trust Co. v. Railroad Co., 10 Saw. 132, 20 Fed. Rep. 86, over issue of bonds by railroad company; and Santa Ana Water Co. v. Town of San Buenaventura, 65 Fed. Rep. 327, holding that the principle is applicable to all officers and trustees of public and private corporations. Cited in 87 Am. Dec. 163, note, that trustee cannot purchase at his own sale; and in 17 Am. St. Rep. 300, extended note, collecting the authorities bearing upon the subject. Distinguished in Seeley v. San Jose etc. Lumber Co., 59 Cal. 25, where notes were given by the defendant corporation to secure payment of moneys advanced, at its request, to pay debts acknowledged by the corporation, and on which suit was threatened. The transaction was held to be within the scope of the business intrusted by the corporation to its president as its superintendent and general agent, and was one which the board

of directors or stockholders could sanction and ratify; *Jones v. Morgan*, 67 Cal. 312, sustaining contract of district attorney with board of supervisors for extra compensation; *Capital Gas Co. v. Young*, 109 Cal. 143, where a gas company, having furnished the city of Sacramento with gas, the city was held liable for the reasonable value thereof, although the mayor of the city was a stockholder in and president of the gas company, and the city charter inhibits its officers from being interested in any contracts or sales to the city involving the payment of money from its treasury. So, to same effect, in *City of Concordia v. Hagaman*, 1 Kan. App. 39, recovery by a city councilman on a quantum meruit for services rendered; *Bassett v. Mining Co.*, 15 Nev. 302, holding that where bonds are issued and a mortgage given to a third party, though for the benefit of the agent or trustee, they are not void, but merely voidable at the election of the cestui que trust. Referred to in *Jones v. Hanna*, 81 Cal. 519, dissenting opinion of Thornton, J., as authority that a purchase by an executrix at her own sale is only voidable. Disapproved in *Hope v. Salt Co.*, 25 W. Va. 806, maintaining the doctrine that a corporation may contract debts to its individual corporators, and secure the same.

**General Citation.**—In *Redington v. Cornwell*, 90 Cal. 56, as to nature of stockholder's interest in property of corporation.

**44 Cal. 117-120. BLETHEN v. BLAKE.**

**Appellate Court** will presume all the material facts upon which evidence was introduced, p. 120.

Cited in *Culmer v. Caine*, 22 Utah, 224, 231, applying rule to support of findings by evidence when latter is not in the record.

Contract rights may be waived, p. 120.

Cited in *Valley Lumber Co. v. Smith*, 146 Cal. 270, fact that owner made payment on building contract after completion of building and before its acceptance by architect contrary to terms of contract, does not render payment invalid as to lien holders under C. C. P. § 1184, who had not given previous notice of claims; *Truckee Lodge v. Wood*, 14 Nev. 307, also case of a building contract, asserting the rule that a party cannot insist on a condition precedent when he himself has defeated a strict performance.

Breach of contract relied on as a defense must be specially pleaded, p. 120.

Affirmed in *McGuire v. Quintana*, 52 Cal. 428, a similar case.

**44 Cal. 121-126. BUSH v. LINDSEY.**

Probate court has no authority to cite the administrator of an administrator to settle the account of his intestate with the estate of which he was the administrator, p. 125.

Affirmed in Wetzler v. Fitch, 52 Cal. 643; Chaquette v. Ortet, 60 Cal. 600; In re Allgier, 65 Cal. 230, holding that jurisdiction vests in the appropriate court of equity. Cited in Slater v. McAvoy, 123 Cal. 439, affirming jurisdiction of court of equity to compel such accounting, and further discussing parties to such an action. Distinguished in Herren's Estate, 40 Or. 95, county court has jurisdiction of suit by administrator de bonis non to compel representatives and sureties of first administrator, who died, to settle accounts of principal. Approved in Cross v. Baskett, 17 Oreg. 86, holding that no Oregon statute has expressly conferred such jurisdiction upon the county courts, and without such statute its existence cannot be assumed; Moulton v. Smith, 16 R. I. 129, 27 Am. St. Rep. 730, to substantially same effect. Cited in notes on subject, 51 Am. Dec. 534; 73 Am. Dec. 559; and 8 Am. St. Rep. 684.

Probate court has not jurisdiction of all matters relating to the estates of decedents, but of such matters only as the statute directs it to exercise jurisdiction over, p. 125.

Cited in Haverstick v. Trudel, 51 Cal. 434, as authority that probate courts, in the exercise of their jurisdiction, can proceed only in the modes prescribed by the statute; Auguisola v. Arnaz, 51 Cal. 439, as authority that probate courts have the exclusive jurisdiction of the final distribution of the estates of decedents; to same effect in Rosenberg v. Frank, 58 Cal. 419, dissenting opinion of Myrick, J.; Burris v. Kennedy, 108 Cal. 338, discussing nature of probate jurisdiction under constitution of 1879; 99 Am. Dec. 354, note, probate jurisdiction, when exclusive.

Devise to grandson does not show intentional omission of living children as matter of legal construction, p. 126.

Approved in Estate of Wardell, 57 Cal. 493; In re Stevens, 83 Cal. 329, 17 Am. St. Rep. 257; In re Salmon, 107 Cal. 617; 48 Am. St. 166; and referred to as bearing on subject, in Newman v. Waterman, 63 Wis. 6-19; 53 Am. Rep. 313.

**General Citation.**—In Hubbard v. Urton, 67 Fed. Rep. 421, as authority for maintenance of suits in equity by heirs and devisees to recover personal property unadministered upon, of which their ancestor was defrauded.

#### 44 Cal. 127-131. WHITCHER v. WEBB.

**Interest.**—If a promissory note, payable at a future time, provides for the payment of interest quarterly, and contains a clause that if default be made then the note shall immediately become due at the option of the holder, a failure to pay the interest makes the whole amount of the note due absolutely, at the option of the holder, if he so elect, without any notice from the holder to the payor, pp. 129, 130.

Doctrine approved in Life Ins. Co. v. Shepardson, 77 Cal. 347, though

the particular case did not call for a decision of the question as to notice from holder to payor; Hewitt v. Dean, 91 Cal. 8, in affirmance; and principle of the decision approved and applied in Broadbent v. Brumback, 2 Idaho, 339; Noell v. Gaines, 68 Mo. 634; and Morling v. Bronson, 37 Neb. 611; Conn. etc. Co. v. Westerhoff, 58 Neb. 381, 76 Am. St. Rep. 103, applying rule to foreclosure of installment mortgage on such default. Cited in 76 Am. Dec. 228, note, to ruling stated.

Same.—In such case, a failure to pay the interest makes the principal due, and equity will not relieve against the enforcement of the contract as made, p. 130.

Approved in Swearingen v. Lahner, 93 Iowa, 151, 57 Am. St. Rep. 264, suit to foreclose a mortgage.

**44 Cal. 132-138. HALEY v. AMESTOY.**

**Deed.**—If containing two descriptions, one describing the premises conveyed generally by name, and the other giving a particular description by metes and bounds, which is erroneous and does not cover all the land contained in the first, the latter will be rejected, pp. 137, 138.

Approved in Aguirre v. Alexander, 58 Cal. 37, dissenting opinion of Ross, J.; People v. Blake, 60 Cal. 509, dissenting opinion of McKee, J.; Tredinnick v. Red Cloud etc. Min. Co., 72 Cal. 82, noting that the same rule has been since embodied in the code (Cal. Civ. Code, sec. 1092); Martin v. Lloyd, 94 Cal. 203, a very similar case; Murray v. Irrigation Co., 120 Cal. 315; Boone v. Clark, 129 Ill. 502; and Arambula v. Sullivan, 80 Tex. 621; so in Terry v. Berry, 13 Nev. 524, as authority that parol evidence is admissible in order to ascertain the correct description of the land, and to reject that portion of the description shown to be false. Cited in 30 Am. Dec. 735, note, to ruling stated.

Same.—Tract of land having a well known name may be described by that name in a deed, p. 138.

Approved in Burnett v. Kullak, 76 Cal. 536, holding that description of land by name in a contract of sale may be sufficient if the boundaries are known and well defined. So, to same effect, in Metart v. Allen, 139 Ind. 652; Paroni v. Ellison, 14 Nev. 63, description of land in deed.

**44 Cal. 139-144. SIMPSON v. PACIFIC MUTUAL LIFE INSURANCE COMPANY.**

Check drawn upon one day may be presented the next day during banking hours, when the payee resides near the place of payment, p. 142.

Approved in Holmes v. Roe, 62 Mich. 203; 4 Am. St. Rep. 847. Cited in Morris v. Bank, 122 Ala. 592, discussing rights on payment of check by maker before expiration of such time; 17 Am. St. Rep. 808, extended note, to the ruling stated.

**Same.**—First presentment of check for payment fixes the rights of parties, pp. 143, 144.

Approved in *Comer v. Dufour*, 95 Ga. 379; 51 Am. St. Rep. 92; *Anderson v. Gill*, 79 Md. 322; 47 Am. St. Rep. 410.

**44 Cal. 144-153. HARKRADER v. MOORE.**

**Malicious Prosecution.**—Defendant in action for, in order to avail himself of the defense of probable cause, must show that at the time of commencing the prosecution he believed the plaintiff to be guilty as charged, pp. 151, 152.

Affirmed in *Dawson v. Schloss*, 93 Cal. 202; *Ball v. Rawles*, 93 Cal. 235, 27 Am. St. Rep. 184. Cited in 26 Am. St. Rep. 160, extended note, as to evidence of the facts justifying the prosecutor.

Jury are not to determine whether the facts amount to probable cause, but it is the province of the court to determine that question, p. 152.

Affirmed in *Fulton v. Onesti*, 66 Cal. 576; *Ball v. Rawles*, 93 Cal. 233; 27 Am. St. Rep. 182; *People v. Kilvington*, 104 Cal. 90; 43 Am. St. Rep. 76; *Sandell v. Sherman*, 107 Cal. 394. Approved in *Clement v. Major*, 8 Colo. App. 88; *Wright v. Ascheim*, 5 Utah, 491.

Malice must be shown, in order to support the action, but it is not necessarily to be inferred from want of probable cause, p. 153.

Cited in *Griswold v. Griswold*, 143 Cal. 622, 623, citing main case also, on point that plaintiff must show malice and want of probable cause. Approved, as to necessity of showing malice, in *Gonzales v. Cobliner*, 68 Cal. 155; *Collins v. Shannon*, 67 Wis. 447; and *Casebeer v. Rice*, 18 Neb. 214, as authority that malice may be found by the jury from the same facts which show a want of probable cause. Cited in 26 Am. St. Rep. 151, 152, extended note.

**44 Cal. 153-157. DYER v. PIXLEY.**

**Street Assessments.**—Act of 1879, relative to street assessments in San Francisco, does not apply to contracts made prior to the passage of that act, nor to the remedies for their enforcement, p. 157.

Affirmed in *Dyer v. North*, 44 Cal. 160; *Dyer v. Barstow*, 53 Cal. 81.

**44 Cal. 157-161. DYER v. NORTH.**

**Pleading.**—Requisites of complaint in action to recover street assessments in San Francisco, set forth, p. 160.

Approved in *Himmelmann v. Haskell*, 46 Cal. 67.

**Street Improvements.**—Jurisdiction to order street improvement in San Francisco, p. 161.

Approved in *Gately v. Leviston*, 63 Cal. 366, as to the necessity of

petition from property owners, or a recommendation by the superintendent of streets.

**44 Cal. 161-168. SMITH v. PENNY.**

**Intervention.**—Right of cannot be objected to for first time on appeal, p. 164.

Affirmed in *People v. Reis*, 76 Cal. 273, where the objection was, the insufficiency of the facts stated in the complaint of intervention. Ruling approved in *Newman v. Bullock*, 23 Colo. 224; and cited, to the ruling stated, in notes to 15 Am. Dec. 163; 16 Am. Dec. 181. Distinguished in *Ortega v. Cordero*, 88 Cal. 226, placing the decision upon the principle of equitable estoppel, and holding that the rule can only apply when the record shows that the party against whom the estoppel is invoked consciously participated or acquiesced in the trial of the issue, as if it had been made, and in such manner as may have induced the other party to believe that it had been properly made, or diverted his attention from the fact that it was not made, and from supplying or curing the defect by an amendment of his pleading.

**Equitable Estoppel.**—Fact alone, that one, as the attorney in fact of another, executes to a third person a deed of land, does not constitute an equitable estoppel, so as to prevent the person who thus acted as attorney in fact from afterward setting up a title to the property acquired by him from the person for whom he acted as attorney in fact, before he executed the deed, p. 165.

Cited in *Dean v. Parker*, 88 Cal. 288, in approval, setting forth what must be shown in order to constitute an equitable estoppel from claiming title to land by an admission of the owner that he had no title; *Gjerstadengen v. Hartzell*, 9 N. Dak. 276, noted under *Boggs v. Merced, etc. Co.*, 14 Cal. 367. Commented on in *MERCHANTS' NAT. BANK v. EUSTIS*, 8 Tex. Civ. App. 356, discussing subject of equitable estoppel. Doubtful in *North v. Henneberry*, 44 Wis. 315, favoring the view that the attorney under the circumstances in the principal case would be estopped. Referred to in *Hannah v. Chase*, 4 N. Dak. 354, 50 Am. St. Rep. 658, recitals in deed as evidence; and cited in notes to 49 Am. Dec. 385; 85 Am. Dec. 171.

**44 Cal. 166-168. MILLER v. BOARD OF EDUCATION.**

**Undertaking on Appeal**, p. 166.

Cited in *Mitchell v. Board*, 137 Cal. 375, as example of case in which board of education as appellant, gave undertaking or had it waived by stipulation.

**Ratification of Unauthorized Act**, if made under a misapprehension of the full scope of the act, is voidable to the extent of the mistake, and the party can be relieved pro tanto, pp. 167, 168.

Cited in *Sharp v. Nat. Bank of Birmingham*, 87 Ala. 651, as to right to disaffirm ratification made under mistake.

**44 Cal. 168-173. FRANKEL v. STERN.**

**Attachment.**—Words omitted in undertaking or by mistake, may be supplied without first reforming the instrument, p. 171.

Approved in *Whitney v. Darrow*, 5 Oreg. 445, omission of word "dollars"; *Jackson v. Johnson*, 67 Ga. 185, omission of word "thousand." Referred to in *Storz v. Finklestein*, 50 Neb. 186, as authority that an attachment bond is valid without the signature of the attaching plaintiff.

**Same.**—Judgment for damages on an undertaking on attachment for the depreciation in value of the goods taken during the time they were in the officer's hands, is not excessive, p. 173.

Approved in *Blaul v. Thorp*, 83 Iowa, 674; and cited in 81 Am. Dec. 473, extended note.

**44 Cal. 173-177. KIMBALL v. UNION WATER COMPANY.** 13 Am. Rep. 157.

**Mandamus.**—Writ lies only when it is evident that the law has provided no other sufficient remedy, p. 175.

Approved in *Durham v. Monumental S. M. Co.*, 9 Oreg. 44, construing similar provisions of the Oregon code.

**Mandamus** will not lie for refusal to transfer shares in a private corporation when party has an action in damages, p. 175.

Affirmed in *Ralston v. Bank of California*, 112 Cal. 213, McFarland, J., concurring, p. 215, on principle of stare decisis. Approved in *Freon v. Carriage Co.*, 42 Ohio St. 39; 51 Am. Rep. 797; *Birmingham Fire Ins. Co. v. Commonwealth*, 92 Pa. St. 77; and *State v. Guerrero*, 12 Nev. 107. Cited in *Thompson v. Hudgins*, 116 Ala. 110, 115, but holding corporation may be compelled to make a proper transfer at instance of owner; *State v. First Nat. Bank*, 89 Ind. 307, recognizing the general rule, but holding that mandate lies to compel the officers of a bank to give a sheriff access to its books to make a transfer of stock to one to whom he has sold it on execution, as the Indiana statute requires; 89 Am. Dec. 736, note; 30 Am. St. Rep. 668, note; and 46 Am. St. Rep. 580, note, all to the ruling stated.

**44 Cal. 177-182. LAURENCE v. DAVIDSON.**

**Ejectment.**—If the land recovered is described in the judgment, so that it appears upon the record that its boundaries are capable of being identified in the field, the judgment upon its face is not void for uncertainty, pp. 181, 182.

Approved in *Hihn v. Mangenberg*, 89 Cal. 270, rule applied sustaining sufficiency of complaint in ejectment; *Burnham v. Stone*, 101 Cal. 170, applied to writ of restitution.

**44 Cal. 182-185. DELGER v. JOHNSON.**

**Injunction.**—**Verified Pleading** will be treated as an affidavit, p. 184.

Cited in *Smith v. Stearns etc. Co.*, 129 Cal. 61, noted under *Falkenburg v. Lucy*, 35 Cal. 52.

**Injunction.**—Where motion to dissolve injunction is made upon complaint and answer, or affidavits, the plaintiff may present counter-affidavits, p. 184.

Cited in *Hefflon v. Bowers*, 72 Cal. 272, construing sections 532 and 937 of the Code of Civil Procedure; *Kahn v. Mining Co.*, 2 Utah, 16, as to right of defendant to present additional affidavits. Referred to in 95 Am. Dec. 90, note, practice on dissolution of injunction.

**Same.**—Injunction will not be retained where it appears that the acts, the performance of which is sought to be restrained, had been performed before the order for the injunction was made or served, p. 185.

Cited in *Gardner v. Stroever*, 81 Cal. 151, affirming the rule “*a fortiori*, where the fact of performance appears in the complaint.”

**44 Cal. 186-187. PEOPLE v. PROSPERO.**

**Instructions.**—It is error per se, in a criminal case, to charge the jury orally, except with the consent of the parties, p. 187.

Cited in *People v. Hersey*, 53 Cal. 575, noting that the only change made by section 1093 of the Penal Code, as amended in 1874, is that the charge need not be in writing, provided it is taken down at the time by the phonographic reporter; *State v. Fisher*, 23 Mont. 552, noted under *People v. Chares*, 26 Cal. 78.

**44 Cal. 187-193. BAXTER v. ROBERTS.** 13 Am. Rep. 160.

**Master and Servant.**—One who contracts to perform labor for another takes upon himself such risks as are necessarily and usually incident to the employment, p. 192.

Cited in *Fries v. American etc. Co.*, 141 Cal. 614, holding rule applicable to minor employee and instruction erroneous; *Atlas Engine Works v. Randall*, 100 Ind. 297, 50 Am. Rep. 802, servant held to assume the risk, danger from use of the machinery being apparent; so in *Fugler v. Bothe*, 43 Mo. App. 69, dissenting opinion of Ronnbauer, P. J., approved and adopted on appeal, 117 Mo. 501, where the injury was sustained while at work in sideboarding air shafts; and *Kelley v. Ry. Co.*, 53 Wis. 80, holding that employee assumes risk of injury in a railroad company's caryard.

**Same.**—If employer has knowledge that the particular employment is, from extraneous causes, hazardous or dangerous to a degree beyond what it fairly imports or is understood by the employee to be, he is bound to inform the employee of the fact, and if he fails to do so, he is liable to the employee for such damages as he sustains by reason of such causes, p. 192.

Cited and principle of the decision applied in the following cases: Rodgers v. Central Pac. R. R. Co., 67 Cal. 608, death of employee caused by falling off negligently constructed bridge maintained by railroad company as part of its road; Daley v. Quick, 99 Cal. 183, injury to tenant from falling of defective woodshed; Foster v. Greeley, 15 Colo. App. 178, upholding sufficiency of complaint in action for employee for injuries received by negligence in construction of trench, though plaintiff was under control of another employee; May v. Smith, 92 Ga. 97, 44 Am. St. Rep. 85, injury to inexperienced employee, not warned of dangerous nature of machinery; Louisville etc. Ry. Co. v. Wright, 115 Ind. 388, 7 Am. St. Rep. 439, injury from low bridge maintained by railway company; Lorentz v. Robinson, 61 Md. 70, as applicable to and covering cases of injury to servant from direct act or negligence of master; Guirney v. St. Paul etc. Ry. Co., 43 Minn. 499, 19 Am. St. Rep. 258, liability of master to indemnify servant for damages resulting from the latter's violation of an injunction by the former's order; Kelley v. Cable Co., 7 Mont. 81; Berg v. Boston etc. Min. Co., 12 Mont. 217, injury to employee, because not warned of danger from unexploded blast; Sinnott v. Mullen, 82 Pa. St. 340, injury from falling of stone wall, employer having failed to give notice of its defective condition; Missouri Pac. Ry. Co. v. Watts, 64 Tex. 570, holding that failure on part of employee to ask for information does not vary the employer's liability; Wall v. Texas and Pac. Ry. Co., 2 Posey, 434, injury received while engaged in work of car-repairing, and considering the question as to when an agent is master to another employee; Moon v. Richmond etc. R. R. Co., 78 Va. 752, 49 Am. Rep. 406, injury from defective railway track; Strahlendorf v. Rosenthal, 30 Wis. 679, injury sustained in digging shaft; McGowan v. Smelting Co., 3 McCrary, 397, 9 Fed. Rep. 861, holding that the law will not presume that men of ordinary intelligence know the explosive power of hot slag when thrown into water; Thompson v. Chicago etc. Ry. Co., 14 Fed. Rep. 566, injury sustained while excavating earth from embankment; Gowen v. Bush, 76 Fed. Rep. 351, injury caused by explosion of gas in coal mine; and notes to the following cases, where the authorities are fully collected and carefully collated; 77 Am. Dec. 223; 92 Am. Dec. 216; 16 Am. Rep. 502; 17 Am. Rep. 127; 1 Am. St. Rep. 330, 530; 4 Am. St. Rep. 264, 615.

#### 44 Cal. 200-203. CROSETT v. WHELAN.

**Evidence.**—Party may introduce his evidence in any order he prefers,

subject to the control of the court in the exercise of a sound discretion, p. 203.

Affirmed in Bates v. Tower, 103 Cal. 406, as the general rule, which will not be interfered with by the appellate court, except in cases of abuse of discretion.

When verdict is general, and there is sufficient evidence to sustain it on one of the issues, it will not be set aside, p. 203.

Affirmed in Verdelli v. Commercial Company, 115 Cal. 525, action to recover damages for personal injuries, the complaint setting forth several charges of negligence, upon each of which issue was taken, and there was a general verdict for the plaintiff. Cited in Norfolk etc. Co. v. Hight, 56 Neb. 170, but not considering question.

#### 44 Cal. 204-200. PORTER v. PECKHAM.

**Attorney at Law.**—Where one, as agent of another, employs an attorney for such other, it does not establish the relation of attorney and client between the agent and attorney, pp. 208, 209.

Approved, as a general rule, in Bates v. American Co., 37 S. C. 101.

**New Trial.**—Admission of irrelevant testimony, which does no injury, is not ground for a new trial, p. 209.

Cited in 66 Am. Dec. 717, extended note, where the authorities are collected.

**General Citations.**—Strong v. West, 110 Ga. 386; In re National Guard, 71 Vt. 512.

#### 44 Cal. 210-213. LUCAS v. CITY OF MARYSVILLE.

**Statement on Motion for New Trial** should not be stricken from files although improperly settled, p. 212.

Cited in Beach v. Spokane etc. Co., 25 Mont. 374, noted under Quivey v. Gambert, 32 Cal. 304.

It is duty of court to settle a proposed statement in all cases where the attorneys are unable to agree to it as filed, no matter what reasons exist which render them unable to agree to it, 212, 213.

Practice approved in Sweeney v. Railway Co., 11 Mont. 37.

#### 44 Cal. 213-228. HIMMELMANN v. HOADLEY.

**Street Assessment** is not vitiated by clerical error in certificate, p. 225.

Cited in Moffitt v. Jordan, 127 Cal. 625, as to clerical defect in record of engineer's certificate under act of 1891.

**Judicial Notice.**—Courts will take judicial notice of the officers of a county, and of the genuineness of their official signatures, and of the

element of damage. Cited in 6 Am. Dec. 195, extended note, as authority that no interest can be allowed on an unliquidated account.

**44 Cal. 246-252. McCREERY v. EVERDING.**

Exception to instruction is sufficient if it points out clearly the error complained of, p. 249.

Cited in Brown v. Kentfield, 50 Cal. 132, holding that a general exception to the charge or instructions given, will not be noticed in the appellate court; Sukeforth v. Lord, 87 Cal. 407, sustaining sufficiency of exception to the written requests to charge given and refused in the particular case; Geary v. Parker, 65 Ark. 525, holding exception sufficiently specific; 99 Am. Dec. 138, extended note, as authority that when a party procures the court to give to the jury instructions which contain legal propositions, it is sufficient for the other party, in his exception, to say generally that he excepts to each and all of the instructions, without specifying the objectionable part.

New Trial will be granted, when instructions upon a material point in issue are contradictory and inconsistent, p. 251.

Ruling approved in Black v. Sprague, 54 Cal. 272, action of ejectment, instructions relative to boundaries of the land; Haight v. Vallet, 89 Cal. 249, 23 Am. St. Rep. 468, also ejectment, instructions relative to a forged deed. Followed in McCreery v. Everding, 44 Cal. 288.

**Possession.**—Actual possession of land may be had without fences or inclosure, p. 250.

Cited in Andrus v. Smith, 133 Cal. 81, and Smith v. Hicks, 139 Cal. 219, noted under Coryell v. Cain, 16 Cal. 574; Sheldon v. Mull, 67 Cal. 300, action of ejectment, holding that an ouster by the defendant may be established without evidence that the land in dispute was enclosed so as to deprive the plaintiff of the possession thereof; Webber v. Clarke, 74 Cal. 15, to same effect; Townsend v. Edwards, 25 Fla. 588; and Gildehaus v. Whiting, 39 Kan. 713, referred to as to what constitutes adverse possession. Cited in 12 Am. Dec. 358, note, to ruling stated.

**44 Cal. 253-264. CASTRO v. TENNENT.** Referred to in Rogers v. Tennent, 45 Cal. 186, appeal from order dissolving an injunction.

**Deeds.**—Rules for construction of, set forth at length, pp. 257, et seq.

Cited in Douglas v. Fulda, 50 Cal. 79, as to sufficiency of power of attorney, holding that a joint power of attorney from husband and wife is effectual to authorize the attorney in fact to execute a lease of the separate estate of the wife; Faivre v. Daley, 93 Cal. 670, holding that the parties to a deed may limit or qualify the meaning of the word "grant" as used therein, if they chose so to do, and the court should not hesitate to carry out their expressed intention.

**44 Cal. 264-269. DOYLE v. PHOENIX INS. CO.**

**Pleading.**—In action to recover money alleged to be due on a contract, an allegation that the sum sued for is now due, is a conclusion of law merely, p. 268.

Approved in Hershfield v. Aiken, 3 Mont. 449, action on promissory note, sustaining demurrer to complaint; Vogel v. Walker, 3 Utah, 229, principle approved and applied.

**Same.**—In action on fire insurance policy which provides for payment within sixty days after proof and ascertainment of loss, complaint must show that such period of sixty days had elapsed before suit, p. 268.

Affirmed in Cowan v. Phoenix Ins. Co., 78 Cal. 188; McCormack v. North British Ins. Co., 78 Cal. 469. Cited in Newhall v. Sherman, 124 Cal. 511, holding complaint demurrable when not showing maturity of debt sued upon; Gillon v. Northern etc. Co., 127 Cal. 483, holding complaint in action in policy bad on demurrer. Approved in German Ins. Co. v. Hall, 1 Kan. App. 50; First Nat. Bank v. Ins. Co., 6 S. Dak. 428; Carberry v. Insurance Co., 51 Wis. 609. Principal of decision approved in Perry v. Phoenix Assur. Co., 8 Fed. Rep. 645. Followed in Cal. Sav. Bank v. American Surety Co., 82 Fed. Rep. 867, 888. Distinguished in Wright v. Fire Ins. Co., 12 Mont. 478; also, Connecticut Mut. L. Ins. Co. v. McWhirter, 70 Fed. Rep. 449, action on life policy, the complaint alleging that proofs of death were delivered to and received by the insurer on a certain date, which was more than thirty days before the filing of the complaint, and it was sustained as sufficient.

**44 Cal. 269-276. POORMAN v. MILLER.**

**Evidence of contents of deed**, p. 275.

Cited in 95 Am. Dec. 71, extended note, treating of effect as evidence of declarations of persons in possession of property.

**Declarations of Decedent** are inadmissible when in support of his own interest, p. 275.

Cited in Rulofson v. Billings, 140 Cal. 458, noted under Rice v. Cunningham, 29 Cal. 500.

**44 Cal. 276-279. HIMMELMANN v. HOADLEY.**

**Street Assessment.**—Including of additional work not specified in the contract of appeal to the board of supervisors, but does not vitiate the assessment as to lots not fronting on the unauthorized work, p. 279.

Approved in Dyer v. Scalmanini, 69 Cal. 641; Blair v. Luning, 76 Cal. 136; Jennings v. Le Breton, 80 Cal. 11, as to remedy by appeal to board of supervisors; so in Frick v. Morford, 87 Cal. 579; McVeery v. Boyd, 89 Cal. 310; Perine v. Forbush, 97 Cal. 312, waiver of objection by failing to appeal; so in McSherry v. Wood, 102 Cal. 651; and Dowling v. Notes Cal. Rep.—141.

Conniff, 103 Cal. 78. Distinguished in *McBean v. Redick*, 96 Cal. 103, in which case the contract was absolutely void, and its validity could not be remedied by appeal. Referred to in *Brady v. Bartlett*, 56 Cal. 369, as not involving question of fraud in the contract.

**44 Cal. 280-283. ROGERS v. HATCH.**

**Limitation of Action.**—Successive absences of person from state must be aggregated together and deducted from the whole time which has elapsed since the cause of action accrued, and the balance is the time the statute of limitations has run, p. 282.

Cited in *Watt v. Wright*, 66 Cal. 205, holding that the absence of a mortgagor from the state stops the running of the statute as to him, but not as to subsequent lienholders. Approved in *Knox v. Gerhauser*, 3 Mont. 273; and cited, to ruling stated, in 36 Am. Dec. 74, note; and 83 Am. Dec. 645, note.

**44 Cal. 284-288. McCEERY v. EVERDING.**

**New Trial.**—Error in granting nonsuit must be specified in new trial statement, p. 285.

Approved in *Toulouse v. Pare*, 103 Cal. 252.

**Substitution of Parties.**—Where action is allowed to be continued against representatives of deceased defendant, service of the order of continuance and substitution on the new parties, with a notice to appear, is sufficient to give the court jurisdiction over them, p. 286.

Cited in *Emeric v. Alvarado*, 64 Cal. 596, holding that, in partition, infant defendants may be brought in and the case continued against them by motion and order of court; 50 Am. St. Rep. 742, extended note, discussing subject of substitution of parties.

Judgment rendered in favor of a deceased person is a nullity, p. 286.

Cited in *Todhunter v. Klemmer*, 134 Cal. 63, as overruled by later cases (*Phelan v. Tyler*, 64 Cal. 82; *Tyrrell v. Baldwin*, 67 Cal. 2), and holding such judgment merely voidable. Disapproved in *Phelan v. Tyler*, 64 Cal. 82, holding that the death of a party pending an appeal does not render the judgment of the appellate court void, although there was no substitution of his representatives; *Tyrrell v. Baldwin*, 67 Cal. 5, to the effect that a judgment against a person dead at its rendition cannot be collaterally attacked; so in *Hayes v. Shaw*, 20 Minn. 408; and *King v. Burdett*, 28 W. Va. 608, 57 Am. Rep. 693. Cited in *Taylor v. Elliott*, 52 Ind. 590, in which case it was held that the judgment, whether void or voidable, should be set aside; extended notes in 52 Am. Dec. 110; and 29 Am. St. Rep. 816, where the authorities are collected and collated.

**Ejectment.**—Admission of defendant's possession renders proof unnecessary, p. 287.

Cited in *Murphy v. Coppieters*, 136 Cal. 319, applying rule to admission of alleged negligence.

**44 Cal. 288-294. PEOPLE v. ASHE.**

A "reasonable doubt" is such a one as, after the entire comparison and consideration of all the evidence, leaves the minds of the jurors in such a condition that they cannot say they feel an abiding conviction, to a moral certainty, of the truth of the charge, p. 290.

Approved in *People v. Beck*, 58 Cal. 213; *State v. Rover*, 11 Nev. 346. Cited in 52 Am. Dec. 738, note.

Defendant may show good character to raise a doubt, without regard to whether the case is doubtful otherwise, pp. 290, 291.

Approved in *People v. Chrisman*, 135 Cal. 288, but holding such evidence confined to trait involved in the charge preferred; *Daniels v. State*, 2 Penne. (Del.) 593, discussing instructions; *State v. Porter*, 32 Or. 159, but holding instruction on subject requested by defendant properly refused; *People v. French*, 137 Cal. 219, and *People v. Hancock*, 7 Utah, 170, holding requested instructions improperly refused; *People v. Fenwick*, 45 Cal. 288, indictment for murder; *People v. Raina*, 45 Cal. 293, conviction of crime of larceny; *People v. Shepardson*, 49 Cal. 631, conviction of robbery; *People v. Bell*, 49 Cal. 489, 490; *People v. Casey*, 53 Cal. 361, conviction of murder; so in *People v. Smith*, 59 Cal. 607; *People v. Daggett*, 62 Cal. 29; *State v. Northrup*, 48 Iowa, 585, 30 Am. Rep. 410, conviction of larceny; *Commonwealth v. Leonard*, 140 Mass. 480, 54 Am. Rep. 487; and *State v. Garraud*, 5 Oreg. 222, all holding good character of fact for the jury. Cited, to same effect, in 53 Am. Dec. 134, note.

**44 Cal. 294-303. WETMORE v. SAN FRANCISCO.**

In action to recover money due, the defendant, under an answer containing a general denial, may prove payment, or that the plaintiff had transferred the demand to another person, p. 300.

Cited in *County v. Johnson*, 125 Cal. 340, noted under *Frisch v. Caler*, 21 Cal. 71; *Bank of Shasta v. Boyd*, 99 Cal. 606, action to foreclose mortgage; 61 Am. Dec. 61, note, as to evidence under general issue.

Assignee of money demand may maintain as action for the amount due, p. 302.

Cited in *Toby v. Oregon Pac. R. R. Co.*, 98 Cal. 497, holding that a trustee to whom a chose in action has been transferred for collection is, in contemplation of law, so far the owner that he may sue on it in his own name; *Widaman v. Hibbard*, 88 Fed. 812, sustaining action by assignee of life insurance policy; *East Tex. Fire Ins. Co. v. Coffee*, 61 Tex. 291, case of assignment of policy of insurance as collateral security; *Stevens v. Brown*, 20 W. Va. 459, assignment of judgment. Distinguished in *In re Sime*, 3 Saw. 309, 12 Bank. Reg. 320, assignment of

claim proved in bankruptcy, and assignee held not a purchaser for value. Cited in 34 Am. Dec. 723, note, to ruling stated.

**44 Cal. 303-305. CITY OF OAKLAND v. WHIPPLE.**

**Taxation.**—Where taxes are levied under a law is repealed by a subsequent act, unless it be made apparent by clear and unequivocal language that the repealing act was intended to have a retrospective operation, it will be inferred that the intent of the legislature was that the taxes should be collected in accordance with the law in force at the time they were levied, p. 305.

Approved and applied in State v. Sloss, 83 Ala. 94; State v. Certain Lands, 40 Ark. 38; New Orleans v. Lloyds, 31 La. Ann. 784; New Orleans v. Vergnole, 33 La. Ann. 39; and State v. City of Kearney, 49 Neb. 339, cases of statutes relative to taxation; Flanigan v. Sierra County, 122 Fed. 27, where county under authority of California statute imposed license tax on sheep, and pending action to collect license fee, legislature repealed statute. action was not abated thereby.

**44 Cal. 306-309. McFADDEN v. McFADDEN.**

**Interlocutory Decree.**—Bill in equity will not lie to carry such decree into effect, p. 308.

Referred to, as to the power of the courts to make interlocutory decrees, in Thompson v. Whitf, 63 Cal. 509, and holding that such decrees are valid and binding until vacated by some appropriate proceeding.

**44 Cal. 309-319. ANDREWS v. PRATT.**

**Boards of Supervisors** are guardians of the county property, and are bound to the same measure of good faith toward the county which is required of an ordinary trustee toward his cestui que trust, or an agent toward his principal, p. 317.

Cited in Pacific Vinegar etc. Works v. Smith, 145 Cal. 366, where president of corporation purchased its notes out right and caused corporation by himself as president to become endorser thereof to himself individually guaranteeing payment of note without authority of corporation, he cannot sue on indorsement; Davis v. Rock Creek etc. Co., 55 Cal. 364, 36 Am. Rep. 43, applied to relation between president of corporation and the corporation; Shakespear v. Smith, 77 Cal. 690, 11 Am. St. Rep. 329, order drawn by trustees of school district held void, one of the trustees being interested in the order; Graves v. Mining Co., 81 Cal. 320, holding that resolutions passed by vote of interested directors of corporation are voidable at election of corporation, or at election of minority of stockholders; State v. Baxter, 50 Ark. 452, applying the rule to county courts in Arkansas. Distinguished in Jones v. Morgan, 67 Cal. 312, sustaining contract made by board of supervisors for extra compensation to county officer.

Supervisor is not entitled to any remuneration for services rendered to county as supervisor, except his per diem and mileage, p. 317.

Cited in Irwin v. County of Yuba, 119 Cal. 690, denying compensation to supervisor for services rendered and moneys expended by him as a representative of the board in attendance upon meetings of an anti-debris association.

Court of equity, upon complaint of taxpayer, will enjoin payment of and cancel county warrants illegally drawn on the treasurer by order of board of supervisors, p. 318.

Cited in Gibson v. Board of Supervisors, 80 Cal. 366, as authority that a taxpayer can restrain any illegal action which would increase the burden of taxation; 2 Am. St. Rep. 98, extended note, to same effect. Distinguished in Ada County v. Bullen Bridge Co., 5 Idaho, 93, 193, where county commissioners issued warrants without authority and in violation of constitution, equity cannot cancel warrant, as Revised Statutes, section 4928, provide adequate remedy.

Certiorari will not lie to set aside the proceedings of board of supervisors in allowing an illegal claim against county, p. 318.

Cited in Townsend v. Copeland, 56 Cal. 615, holding that certiorari will not lie to review action of board of supervisors in rejecting a bid of county printing; State v. Washoe County Commissioners, 23 Nev. 260, dissenting opinion of Bonnfield, J., in which case it is held that an order of the board of county commissioners employing a firm of attorneys in a certain litigation in which the county was interested could not be reviewed on certiorari; extended notes, 12 Am. Dec. 535; 40 Am. St. Rep. 30, treating of subject of remedy by certiorari.

**Parties Defendant.**—Where several are jointly concerned in a series of fraudulent acts, they may be united as defendants in a suit to annul such acts, although the gains they realize are several, p. 319.

Ruling approved in Wickersham v. Crittenden, 93 Cal. 33, action by stockholder against directors of corporation.

**44 Cal. 320-323. CERF v. HOME INSURANCE COMPANY. 13 Am. Rep. 165.**

Policy of fire insurance prohibiting the use of kerosene oil, except in dwellings is annulled by use in a clerk's sleeping-room directly connected with the store, p. 322.

Cited in Bastian v. British etc. Co., 143 Cal. 291, ruling similarly where dynamite was kept upon the premises, though not shown to have caused the fire; Smith v. Birmingham Water Work Co., 104 Ala. 324, as to what constitutes a "dwelling," as regards a water supply to dwellings; Wheeler v. Traders' Ins. Co., 62 N. H. 452, 13 Am. St. Rep. 584, as authority that where a stipulation provides that the policy shall be avoided by the use of an article expressly named, and there is nothing in the policy from which a permission to use the article in a partial, limited,

or temporary way can be inferred, full effect is usually given to the prohibitive clause by a forfeiture of the policy for its violation. Referred to, on subject of forfeiture of policy, in notes to 24 Am. Rep. 150, 152; 13 Am. St. Rep. 585; and 35 Am. St. Rep. 515.

#### 44 Cal. 323-326. PEOPLE v. GOLDTREE.

Filing of complaint is necessary to give board of equalization jurisdiction to increase the valuation of property beyond the amount at which it has been assessed, p. 324.

Approved in Los Angeles v. Water Works Co., 49 Cal. 642; State v. Dodge County, 20 Neb. 602; Dixon County v. Halstead, 23 Neb. 701. Cited in C. P. Ry. Co. v. Evans, 111 Fed. 79, quoting State v. C. P. Ry. Co., 21 Nev. 176. Examined in Railroad Co. v. Standing, 13 Utah, 493, holding that a written complaint is not necessary; and so, in State v. Northern etc. Min. Co., 12 Nev. 94; State v. Washoe County, 14 Nev. 142; State v. Central Pac. R. R. Co., 21 Nev. 176, the last as to necessity of complaint to confer jurisdiction.

Curative laws cannot validate or legalize an assessment which is void for want of jurisdiction or authority to make it, p. 325.

Affirmed in Brady v. King, 53 Cal. 45, case of street assessment void for want of jurisdiction in the board of supervisors to levy it. Approved in Strosser v. Fort Wayne, 100 Ind. 455; and Mowry v. Blandin, 64 N. H. 4. Cited in 78 Am. Dec. 529, 533, extended note on subject.

Board of equalization, in passing on question whether an assessment is too high or too low, acts in a judicial capacity, and its decision is an adjudication, p. 325.

Approved in Orr v. State Board of Equalization, 2 Idaho, 927. Cited in Oakland v. S. P. Co., 131 Cal. 228, but denying to such board any arbitrary power of assessment or reassessment, without evidence.

#### 44 Cal. 326-328. PEOPLE v. ARMSTRONG.

**Appeal—Reporter's Notes** are no part of record even if certified by him, p. 327.

Cited in State v. Shepphard, 23 Mont. 327, noted under People v. Woods, 43 Cal. 176.

#### 44 Cal. 328-331. McDONALD v. EDMONDS.

Quitclaim Deed does not pass after-acquired title, p. 330.

Cited in 58 Am. Dec. 586, extended note; 79 Am. Dec. 192, note.

**Pre-emption—Evidence.**—Certificate of receiver of land office of the United States, that a person therein named has made full payment for a tract of land therein described, under a pre-emption entry, is evidence that the person to whom it is given has taken the necessary steps toward pre-empting the land, and has paid therefor, and establishes in

such person a right to the possession of the land, as against one who shows no title, p. 330.

Referred to in Goodwin v. McCabe, 75 Cal. 588, action of ejectment, in which plaintiff relied on prior possession, and defendant relied on a homestead entry under the laws of the United States. Cited in Witcher v. Conklin, 84 Cal. 502, 504, holding that ejectment may be maintained on the title and right of possession evidenced by a receiver's receipt for land pre-empted in a United States land office.

**44 Cal. 331-332. COOK v. FRINK.**

**Mexican Law.** Under Mexican law in force in 1848, parol sales of real estate in California, when fully executed, were valid and binding between the parties, and passed the title to the vendee, p. 322.

Affirmed in Hall v. Yoell, 45 Cal. 587.

**44 Cal. 332-335. BOYLE v. DALTON.**

**Execution.—Redemption** from redemptioner must be made within sixty days after his redemption, p. 334.

Cited in State v. O'Connor, 6 N. Dak. 288, so construing a similar local statute.

**44 Cal. 335-343. FREY v. CLIFFORD.**

**Bona Fide Purchaser.**—A mortgagee, in mortgage given to secure a pre-existing debt, is a purchaser for a valuable consideration, and is protected, under the Registry Act, against a prior unrecorded deed, pp. 342, 343.

Approved in Chapman v. Hughes, 134 Cal. 658, but holding such mortgagee affected with notice of prior conveyance under facts stated; Conn. L. Ins. Co. v. McCormick, 45 Cal. 583, case of mortgage executed by wife under alleged compulsion of husband; Taylor v. Weston, 77 Cal. 538, holding that the purchaser of a mortgage is protected by the rule as to bona fide purchasers. Cited in 68 Am. Dec. 321, note, to the ruling stated.

A pre-existing debt is a valuable consideration, p. 342.

Cited in Hart v. Church, 126 Cal. 480, 77 Am. St. Rep. 204, and Stroud v. Thomas, 139 Cal. 276, holding extinguishment of such debt a valuable consideration for a note and mortgage; Aden v. City, 139 Cal. 168, noted under Clark v. Troy, 20 Cal. 219; dissenting opinion in Rock Springs etc. Bank v. Luman, 6 Wyo. 151, discussing rights of holder of negotiable paper taken as collateral security for such debt; and cf. Genesee etc. Bank v. Kindt, 7 Wyo. 328; Davis v. Russell, 52 Cal. 616. 28 Am. Rep. 650, applied in case of transfer of warehouse receipt in good faith; Sackett v. Johnson, 54 Cal. 109, indorsement and transfer of negotiable instrument; Schluter v. Harvey, 65 Cal. 159; Gassen v.

Hendrick, 74 Cal. 446; *Foorman v. Wallace*, 75 Cal. 554; and *Riley v. Martinelli*, 97 Cal. 583, 33 Am. St. Rep. 213, holding that a conveyance in consideration of the cancellation of a pre-existing indebtedness is a conveyance for a valuable consideration; *Henry v. Vliet*, 33 Neb. 135, 29 Am. St. Rep. 481, holding that a pre-existing debt, already due, is a good consideration for a chattel mortgage. Cited in 12 Am. Dec. 137, note, to ruling stated. Doctrine denied in *Gest v. Packwood*, 13 Saw. 210; 34 Fed. Rep. 374.

**Quitclaim Deed** "of all my right, title, and interest in Sacramento City, Upper California, consisting of town lots and buildings thereupon," passes the grantor's interest in his lots in Sacramento, pp. 342, 343.

Cited in *McCulloh v. Price*, 14 Mont. 323, 43 Am. St. Rep. 639, and applied to description of real estate in deed of assignment. So, to same effect, in *Brown v. Warren*, 16 N.W. 238; *Connell v. Galligher*, 36 Neb. 763; *Hubermann v. Evans*, 46 Neb. 797; and *Armijo v. New Mex. Town Co.*, 3 N. Mex. 247, all holding that a description affording means of identification is sufficient. Approved in *Idaho Gold Min. Co. v. Union Min. Co.*, 5 Idaho, 120, deed conveying all of grantor's property, real, personal and mixed, located in certain county, conveyed mining claim owned by grantor at date of execution of deed.

**Quitclaim Deed**, if made in good faith and for a valuable consideration, and without notice, will prevail over an older deed which is subsequently recorded, p. 343.

Cited in *Rego v. Van Pelt*, 65 Cal. 256, in approval; so in *Allison v. Thomas*, 72 Cal. 564, 1 Am. St. Rep. 90, but holding that the decision is made to turn upon the language of the recording act defining the word "conveyance"; *Taylor v. Opperman*, 79 Cal. 470, holding that quitclaim deeds are as effectual to pass whatever title the grantor has as any other deeds; *Smith v. McClain*, 146 Ind. 84, in approval; so in *Cutler v. James*, 64 Wis. 178; 54 Am. Rep. 606; *Parker v. Randolph*, 5 S. Dak. 558, dissenting opinion of Corson, P. J. Denied in *American Mort. Co. v. Hutchinson*, 19 Oreg. 347, where it is said that the decision appears to be questioned in *Allison v. Thomas*, *supra*. Cited in 25 Am. Dec. 165, note, to the ruling stated.

**General Citation.**—*Wells-Fargo Co. v. Enright*, 127 Cal. 673, agreement to plead statute of limitations is not against public policy.

#### 44 Cal. 347-353. **BERRY v. CAMMET.**

**State Lands.**—Judicial department of state has no jurisdiction of controversies arising between applicants for the purchase of state lands, except in cases where jurisdiction is expressly conferred by statute, and the facts conferring jurisdiction must be stated in the complaint, p. 351.

**Affirmed** in Youle v. Thomas, 146 Cal. 543, where contest was instituted by settler applying for purchase of half section as fit for cultivation, against holder of certificate of purchase by prior claimant of whole section as unfit for cultivation, another settler who has applied to purchase same half section pending contest, is not in privity with state and cannot intervene; Danielwitz v. Temple, 55 Cal. 43, holding that the order of reference of the controversy to a court must be professed or averred in the complaint, and proved; so in Lane v. Pferdner, 56 Cal. 123. Distinguished in Rose v. Richmond Min. Co., 17 Nev. 53, action to determine right of possession of mining claim, and noting that the Nevada statute differs from the statute considered in the principal case.

**General Citation.**—In Ward v. Clay, 82 Cal. 505, as authority that defects of form of averment or uncertainty cannot be considered upon general demurrer, sustaining sufficiency of complaint on promissory note.

**44 Cal. 355-363. McCALLEY v. FULTON.**

**Jurisdiction.**—Mode of acquiring jurisdiction of the person is a matter of legislative discretion, p. 360.

Cited as authority in Alexander v. Archer, 21 Nev. 31, an original application for writ of certiorari to review proceedings of justice of the peace.

**Same.**—Upon a collateral attack, recitals in judgment are conclusive of question of jurisdiction of the person, when the judgment is rendered by a court of superior jurisdiction, p. 361.

Approved in Drake v. Duvenick, 45 Cal. 462; Anderson v. Goff, 72 Cal. 74, 1 Am. St. Rep. 41, personal judgment against nonresident; so in In re Newman, 75 Cal. 220; 7 Am. St. Rep. 150; Dowell v. Lohr, 97 Ind. 153; and Epping v. Robinson, 21 Fla. 49.

**Same.**—Superior court of city of San Francisco was a court of superior jurisdiction, pp. 359, 360.

Cited in Amy v. Amy, 12 Utah, 306, as to what constitutes a court of record, and applied to probate court.

**Same.**—In collateral attack on judgment which recites the service of summons by publication, the affidavits and order showing service cannot be considered, p. 361.

Approved in In re Newman, 75 Cal. 220, 7 Am. St. Rep. 150, default judgment in action for divorce. Cited in 94 Am. Dec. 765, note.

**Partnership.**—Purchaser of interest in the real estate of a partnership acquires the legal title, and not a mere equity, p. 362.

Principle approved in People v. Greening, 102 Cal. 386, question arising out of description of partnership property in information for arson; Lindley v. Davis, 7 Mont. 219, dissenting opinion of Bach, J.;

Brown v. Warren, 16 Nev. 236, ejectment by cotenant. Cited in 47 Am. Dec. 320, note; 60 Am. Dec. 539, note; and 98 Am. Dec. 198, note.

Equitable defense in action of ejectment must be distinctly pleaded and proved, p. 362.

Cited in Kentfield v. Hayes, 57 Cal. 411, as to requisites of equitable defense in ejectment; Hicks v. Lowell, 64 Cal. 18, 49 Am. Rep. 680, as to matters of defense in ejectment; McClory v. Ricks, 11 N. Dak. 42, in action to recover possession where defendants made joint answer alleging ownership in one of them, and that other held under former, but alleging no equitable title, evidence pertinent to title of defendant cannot be resorted to to sustain equitable right of possession; Golden State etc. Iron Works v. Davidson, 73 Cal. 392, enforcement of priority of firm creditors; and Reece v. Roush, 2 Mont. 590, as to right of defendant to set up equitable defense in ejectment.

#### 44 Cal. 366-371. RANDOLPH v. BAYNE.

**Statutes.**—Courts will not permit an erroneous punctuation of a statute, in printing it, to have the effect of giving it an absurd construction, p. 369.

Approved in Strohm v. Iowa City, 47 Iowa, 45; Murray v. State, 21 Tex. Civ. App. 631; 57 Am. Rep. 626.

**Streets.**—Contractor for improvement of street does not lose his lien by mere lapse of two years before entry of judgment, from date of recording the assessment, et cetera, if action is commenced within that time, p. 371.

Affirmed in Dougherty v. Henarie, 47 Cal. 12; Himmelman v. Carpenter, 47 Cal. 46. Distinguished in Page v. W. W. Chase Co., 145 Cal. 585, where purchaser took title without actual or constructive notice of commencement of foreclosure of street assessment, and after lapse of two years from date of lien, he took title discharged from lien.

#### 44 Cal. 371-384. COLLINS v. BARTLETT.

**Public Lands.**—Location of school land warrant on unsurveyed land is void, p. 380.

Affirmed in Chant v. Reynolds, 49 Cal. 217; McLaughlin v. Menotti, 89 Cal. 361; United States v. Curtner, 14 Saw. 546, 38 Fed. Rep. 9, case of lieu lands. Distinguished in Roberts v. Columbet, 63 Cal. 24; so in McNee v. Donahue, 76 Cal. 505, as having relation to unsurveyed lands, and therefore different from the case before the court.

**Trust—Estoppel.**—When two or more persons separately purchase distinct parcels of land from a common grantor, who possesses the same under an invalid title, and one of them afterward acquires the true title to the whole, he does not hold it as trustee for the other,

nor is he estopped from denying that the purchase from the holder of the invalid title was void, p. 381.

Cited in South End Min. Co. v. Tinney, 22 Nev. 60, dissenting opinion of Murphy, C. J., case of patent to a mining claim fraudulently obtained; 49 Am. Dec. 384, extended note, treating of estoppel of persons claiming under a common source of title.

**Same.**—No title to such lands passes from the United States to the state, or to the purchaser from the state, until the same are certified over to the state by the commissioner of the general land office at Washington, p. 382.

Approved in Chant v. Reynolds, 49 Cal. 218.

**Pleading.**—Neither an agreed statement of facts nor a finding of facts can add a material fact to a cross-complaint. It must fall unless sustainable on its own allegations of fact, p. 381.

Cited in Sigourney v. Zellerbach, 55 Cal. 440, as sustaining the rule that the pleadings of the party to whom relief is awarded must be sufficient to warrant the relief; Brodrib v. Brodrib, 56 Cal. 566; Coulthurst v. Coulthurst, 58 Cal. 240; Harrison v. McCormick, 69 Cal. 618, in affirmance of the ruling stated; Loup v. California South. R. R. Co., 63 Cal. 100, as authority that each count in a complaint must contain in itself facts sufficient to constitute a cause of action; 83 Am. Dec. 254, note, as to nature and object of cross-bills.

**Public Lands.**—Party claiming land under patent from United States has the benefit of the presumption that the officers rightly performed all their duties in selling the land and issuing the patent, and it devolves on the party assailing the patent to show that it was issued without authority of law, p. 383.

Approved in Leviston v. Ryan, 75 Cal. 297; so in Galvin v. Palmer, 113 Cal. 55, and applied to a deed from the city of San Francisco under and pursuant to act of Congress of 1870. Cited in Hooper v. Young, 140 Cal. 279, holding presumption of regularity not overcome by evidence adduced.

**Same.**—Improvements on public lands of the United States, which became a part of the realty, pass to the purchaser from the United States, pp. 383, 384.

Cited in Pennybecker v. McDougal, 48 Cal. 163, holding that a building set upon blocks, and a portable fence, were not within the rule; McKiernan v. Hesse, 51 Cal. 596, case of steam engine and boilers so affixed to the land as to be within the rule.

#### 44 Cal. 385-389. LAWRENCE v. WEBSTER.

**Ejectment.**—Plaintiff cannot recover on ground that a purchase made

by the defendant should, in equity, inure to his benefit, but must rely on legal title, p. 389.

Cited in Tarpey v. Salt Co., 5 Utah, 213, holding that plaintiff in ejectment who bases his claim upon a legal title cannot recover upon an equitable one.

**General Citations.**—Examined at length and distinguished in Olney v. Sawyer, 54 Cal. 382, holding that tenants in common, in possession as such, cannot assail the common title, or call its validity in question; 35 Am. St. Rep. 420, extended note, as authority that if tenants in common wish to share in a purchase by a cotenant, they must, within a reasonable time after knowledge thereof, elect to bear their share of its burdens.

#### 44 Cal. 389. HOPKINS v. WESTERN PAC. R. R. CO.

**Motion for New Trial** may be dismissed for want of diligence in its prosecution, p. 392.

Cited in Galbraith v. Lowe, 142 Cal. 298, noted under Warden v. Mendocino Co., 32 Cal. 655. Distinguished in Prout v. Mounce, 6 Idaho, 593, petition for rehearing will not lie in case of interlocutory orders made by supreme court.

#### 44 Cal. 392-397. GATES v. LANE.

**Parties.**—When one of the defendants in a joint judgment sues to have the judgment perpetually enjoined, his codefendants should be made parties to the action, and the court may require the omitted parties to be brought in, p. 396.

Cited and applied in Harrison v. McCormick, 69 Cal. 621, action to enforce a joint partnership liability; McBrown v. Dalton, 70 Cal. 97, action to enforce trust, and holding that all the beneficiaries must be made parties; so in O'Connor v. Irvine, 74 Cal. 444, as to duty of court to order necessary parties to be brought in.

**Pleading.**—Essential facts upon which the legal points in the controversy depend, should be stated with clearness and precision, so that nothing is left for the court to surmise, p. 397.

Approved in Going v. Dinwiddie, 86 Cal. 637, sustaining demurrer to complaint for false imprisonment.

#### 44 Cal. 397-414. WELLS, FARGO & COMPANY v. PACIFIC INSURANCE COMPANY.

**Insurance.**—Policies of insurance are to be interpreted by the same rules which apply to other contracts, and to be enforced according to the intention of the parties, p. 407.

Approved in Continental Ins. Co. v. Kyle, 124 Ind. 134, 19 Am. St.

Rep. 79, construing condition in policy against dwelling becoming vacant and unoccupied. Cited in Schroeder v. Imperial etc. Co., 132 Cal. 19, holding insurance company not liable under its policy; 10 Am. St. Rep. 390, extended note.

**44 Cal. 414-430. SHEA v. POTRERO AND BAY VIEW RAILROAD COMPANY.**

Street railroad company, in running its cars in a public street, must exercise such care and precaution for the purpose of avoiding accidents, as a reasonable prudence would suggest, p. 427.

Cited in Lanfer v. Bridgeport Traction Co., 68 Conn. 491, and applied to electric street railway company; Memphis City Ry. Co. v. Logue, 13 Lea, 34, approved as to degree of care required; Clark v. Bennett, 123 Cal. 279, holding company liable, and sustaining instructions given; Citizens' etc. Co. v. Howard, 102 Tenn. 485, holding instruction erroneous; 25 Am. St. Rep. 481, extended note.

A person may walk on a street railroad track in a public street, using reasonable care and prudence to avoid injuries, and if injured by the carelessness of the company while so doing, the fact that he might have walked by the side of the track is not contributory negligence on his part, pp. 427, 428.

Cited in Swain v. Fourteenth St. R. R. Co., 93 Cal. 184, holding it not negligence per se for the driver of a patrol wagon to drive along and upon a street-car track; Driscoll v. Cable Railway Co., 97 Cal. 566; 33 Am. St. Rep. 207; Mahoney v. San Francisco etc. Ry. Co., 110 Cal. 475; Shea v. St. Paul City Ry. Co., 50 Minn. 400; Cincinnati Street Ry. Co. v. Snell, 54 Ohio St. 208, all holding that the question of contributory negligence in such cases is one for the jury; so, Hall v. Ry. Co., 13 Utah, 254; 57 Am. St. Rep. 730, to same effect; Bailey v. Market St. Ry. Co., 110 Cal. 327; and Rascher v. East Detroit etc. Ry. Co., 90 Mich. 415, 30 Am. St. Rep. 449, holding that a street-car has no exclusive right of travel upon its track; so in 25 Am. St. Rep. 475, 476, extended note.

Exceptions to instructions, practice pointed out, p. 429.

Approved in Ellis v. Tone, 58 Cal. 302; Sukeforth v. Lord, 87 Cal. 407; Cavallaro v. Ry. Co., 110 Cal. 358, 52 Am. St. Rep. 101; Geary v. Parker, 65 Ark. 525, noted under McCreery v. Everding, 44 Cal. 246, 99 Am. Dec. 136, note.

In action for damages for injury to person, the jury cannot take into consideration the fact that the plaintiff is a man who has to depend on his manual labor for a living, p. 429.

Approved in Malone v. Hawley, 46 Cal. 414, holding that the jury cannot consider the plaintiff's "condition in life"—whether he is rich or poor. So, to same effect, in City of Delphi v. Lowery, 74 Ind. 521. Referred to in McKeever v. Market St. R. R. Co., 59 Cal. 300.

**General Citation.**—In *Taggart v. Newport Street Ry. Co.*, 16 R. L. 687, holding that a horse railroad is not a new servitude, and applying the rule to electric motive power.

#### 44 Cal. 430-434. PEOPLE v. SARGENT.

**Statutes.**—A general act which is in irreconcilable conflict with a prior special act, repeals it by implication, p. 432.

Approved in *Matter of Yick Wo*, 68 Cal. 304, construing municipal ordinances, applying the rules applicable to construction of statutes.

**Taxation.**—Assessment, to be valid, must be made by the assessor of the district where the tax is levied, p. 434.

Cited in *Savings and Loan Soc. v. Austin*, 46 Cal. 512, declaring unconstitutional an act creating a state board of equalization. Affirmed in *Williams v. Corcoran*, 46 Cal. 556, holding an assessment for a local improvement void, because not made by an assessor elected by the electors of the district; *People v. White*, 47 Cal. 617, assessment for special school tax held void on same ground; so in *People v. Stockton etc. R. R. Co.*, 49 Cal. 421; so in *Smith v. Farrelly*, 52 Cal. 80, holding that if an act creates a district within a county, and authorizes the supervisors to levy a tax upon the property therein for the purpose of building a bridge, the property within the district cannot be assessed for the tax by an assessor elected by the county, nor can the tax be collected by a collector elected by the county; *Houghton v. Austin*, 47 Cal. 664, holding that the state board of equalization cannot be clothed with the power of fixing, for the purposes of taxation, the value of real estate or personal property; and approved in *State v. Tonellia*, 70 Miss. 711, as authority that if the constitution devolves the duty of assessing upon a certain officer, the legislature cannot substitute another.

#### 44 Cal. 435-440. PEOPLE v. McLAUGHLIN.

**Criminal Evidence.**—Defendant indicted for murder cannot introduce in evidence, on his own behalf, statements of the deceased concerning the circumstances attending the difficulty in which he was wounded, made three days after he was wounded, p. 437.

Referred to in *People v. Southern*, 120 Cal. 646, as casting some doubt upon the point, but holding nevertheless that dying declarations of deceased made in extremis are admissible as evidence for the defendant; dissenting opinion in *Gafford v. State*, 122 Ala. 76, main opinion holding certain evidence admissible as bearing upon motive; *State v. Curtis*, 70 Mo. 597, as authority that declarations of party injured is not admissible against the state; *State v. McCoy*, 111 Mo. 526, that the state cannot be bound by admissions of persons not parties to the record; and *Shields v. State*, 149 Ind. 404, that declarations of persons injured is hearsay.

**44 Cal. 440-452. BLANCHARD v. KAULL.**

**Corporation.**—Abortive attempt to incorporate does not necessarily result in a partnership or joint stock company, p. 451.

Cited as authority in 13 Am. Dec. 524, 525, note, defining quasi corporations; 43 Am. Dec. 695, note; 89 Am. Dec. 69, note. Approved in Rutherford v. Hill, 22 Oreg. 223, 29 Am. St. Rep. 600, denying partnership liability; so, in Stafford Bank v. Palmer, 47 Conn. 449; Doty v. Patterson, 155 Ind. 66, noted under Mokelumne Hill Mining Co. v. Woodbury, 14 Cal. 424. Distinguished in Sniders Sons' Co. v. Troy, 91 Ala. 229, 24 Am. St. Rep. 889, stating that the question of liability as partners was not before the court. Denied in Furnace Co. v. Bodwell, 73 Mo. App. 393, sustaining individual liability of corporation promoters.

Plank and turnpike road companies are corporations, though denominated joint-stock companies, p. 451.

Cited in Dean v. Davis, 51 Cal. 410, applying the principle of the decision to levee district; Miller v. Way, 5 S. Dak. 474, as to admissibility of parol evidence to establish liability of corporation.

Trustees of corporation who make and sign notes, as such trustees, with the intention of not binding themselves personally, are not personally liable, even if they had no authority from the corporation to make the notes, p. 450.

Ruling approved in Bean v. Pioneer Min. Co., 66 Cal. 455, 56 Am. Rep. 108. Cited in Melone v. Ruffino, 129 Cal. 523, 524, 79 Am. St. Rep. 134, 135, noted under Hall v. Crandall, 29 Cal. 568; Jones v. Woolley, 2 Idaho, 792, maintaining liability of stockholders; 17 Am. St. Rep. 162, extended note, treating of relation of promoters to corporation; 29 Am. St. Rep. 601, extended note, on liability of persons acting as corporation, but without authority; 33 Am. St. Rep. 186, extended note, on defective formation of corporations; and 48 Am. St. Rep. 914, extended note, as to personal liability of officers of corporations to third persons.

**General Citation.**—In Vincent v. County of Lincoln, 30 Fed. Rep. 750, as to liability to suits of Nevada counties.

**44 Cal. 452-462. PEOPLE v. DEVINE.**

**Witnesses.**—Credibility of witness cannot be assailed by proof of something he may have said elsewhere contradictory of the testimony as given unless he first be inquired of concerning it, and the time, place and person involved in the supposed contradiction be called to his attention, p. 457.

Approved in People v. Bosquet, 116 Cal. 80, where it is said that "the identification of the occasion and the person to whom the statement is made are of prime importance in directing the attention of the witness

to the subject matter"; Taussig v. Schields, 26 Mo. App. 328, in approval of the practice; so in Sheppard v. Yocom, 10 Oreg. 410. 411. Cited in 15 Am. Dec. 100, note, on impeachment of witnesses; so in 73 Am. Dec. 763, 766, extended note on subject.

Witness cannot be impeached by contradicting him upon collateral matters, p. 458.

Cited in People v. Arrighini, 122 Cal. 125, holding evidence inadmissible showing defendant's perjury at coroner's inquest, when not testified to in chief. Ruling affirmed in People v. Furtado, 57 Cal. 346; People v. Webb, 70 Cal. 121; People v. Dye, 75 Cal. 112; and Faulkner v. Rondoni, 104 Cal. 148, which was an action to quiet title to a certain ditch and water right and it was held that a witness for the plaintiff could not be impeached by showing contradictory statements made by him, in the absence of the plaintiff, as to the rights of the defendant in the waters of the stream.

Deposition of witness taken before a coroner's jury is admissible in evidence on the trial for the purpose of contradicting the statement of the witness, after the proper foundation has been laid, p. 458.

Cited in People v. Lambert, 120 Cal. 175, as to proper practice on reading deposition of witness taken at preliminary examination of accused. Approved in State v. Crockett, 39 Or. 78, testimony given at coroner's inquest which has been reduced to writing must be shown witness before its introduction to impeach him; United States L. Ins. Co. v. Vecke, 129 Ill. 566, as to admissibility of coroner's inquisition in evidence; and so, in Chicago City Ry. Co. v. McLaughlin, 146 Ill. 361. Cited in 73 Am. Dec. 768, extended note, to ruling stated.

When, in a criminal case, the evidence offered by the defense is not plainly inadmissible, it is the better practice for the prosecuting attorney to let it go in without objection, pp. 460, et seq.

Approved in People v. Benson, 52 Cal. 382.

**44 Cal. 462-471. MAHAN v. WOOD.** S. C. on second appeal, 79 Cal. 258, being an appeal from an order granting the plaintiff a new trial, and the rule applied that where the evidence is conflicting, an order granting a new trial will be affirmed; S. C. on third appeal, 105 Cal. 13, which was taken by the plaintiff from an order denying his motion for a new trial, and the order was affirmed.

**Corporation.**—Subscriber for stock in a corporation about to be formed is at liberty to stand upon the terms of his contract, and may refuse to accept the stock if the terms of the contract are not complied with, p. 469.

Cited in Norwich Lock Mfg. Co. v. Hackaday, 89 Va. 563, as authority that a material change in the purpose of a corporation, as set forth in the prospectus, will release a subscriber thereto from liability, if made without his consent. Referred to in Mahan v. Wood, 105 Cal. 13, giving a history of the case.

**44 Cal. 471-475. LOVELL v. FROST.**

**Findings.**—If the court does not expressly find on an issue made, it will be presumed that the finding on that issue was in favor of the prevailing party, p. 474.

Approved and applied in *More v. Lott*, 13 Nev. 380.

**Statute of Limitations.**—To acquire title to land by, a party must not only have a possession adverse to the true owner, but also must claim the title as against the owner during the entire statutory period, p. 475.

Ruling approved in *Unger v. Mooney*, 63 Cal. 595, but the particular case held not to be within the decision, p. 597; approved in *Townsend v. Edwards*, 25 Fla. 588, as to what constitutes adverse possession.

Offer by party in possession of land to purchase it from the true owner is a recognition of the owner's title, and will stop the running of the statute, p. 474.

Affirmed in *Central Pacific R. R. Co. v. Mead*, 63 Cal. 113; *Pacific Mut. L. Ins. Co. v. Stroup*, 63 Cal. 154. Approved in *McMahill v. Torrence*, 163 Ill. 284; *Litchfield v. Sewell*, 97 Iowa, 253; *Davis v. Young*, 36 La. Ann. 376; *Hull v. Chicago etc. R. R. Co.*, 21 Neb. 386, rule applied where a railroad company in possession of right of way instituted condemnation proceedings against the real owner; and so in *Nebraska Railway Co. v. Culver*, 35 Neb. 152. Cited, *Dietrick v. Noel*, 42 Ohio St. 21, 51 Am. Rep. 789, holding that possession of land ceases to be adverse when the owner, for a valuable consideration, agrees with the holder that suit for possession shall not be brought during the lifetime of either; dissenting opinion in *Oldig v. Fisk*, 53 Neb. 162, main opinion holding running of statute not so stopped; 95 Am. Dec. 209, note, to the ruling stated.

**44 Cal. 475-478. GALLAND v. GALLAND.** 13 Am. Rep. 167.

Husband attached for contempt in failing to pay a monthly sum for his wife's support, which he has been adjudged to pay by a court of equity, may purge himself of the contempt by showing that he is unable to pay, and that the inability has not been voluntarily created by his own act, p. 478.

Affirmed in *Ex parte Spencer*, 83 Cal. 465; 17 Am. St. Rep. 270. Approved in *Ex parte Hardy*, 68 Ala. 328, dissenting opinion of Brickell, C. J.; *Hendryx v. Fitzpatrick*, 19 Fed. Rep. 814. Cited in *Stonehill v. Stonehill*, 146 Ind. 447, as authority for remedy by attachment for contempt to enforce payment of alimony; *In re Jaramillo*, 8 N. Mex. 611, applying rule to administrator's noncompliance with order for payment of estate moneys; *In re Geiser*, 129 Fed. 230, where constable sells debtor's property on execution and returns execution as satisfied, and that he returned surplus to purchaser, he is liable to debtor's bank.

Notes Cal. Rep.—142.

ruptee trustee for surplus if he sold on credit or failed to collect amount; notes to 11 Am. St. Rep. 444; 12 Am. St. Rep. 282; and 17 Am. St. Rep. 272, to ruling stated.

Statute relative to contempt is a limitation upon the power formerly exercised by courts to punish for contempt, p. 478.

Cited in *Ex parte Cohn*, 55 Cal. 196, holding that disobedience of a decree of distribution by an executor or administrator is a contempt, and the decree may be enforced by proceedings under the provisions of the Code of Civil Procedure relative to contempt; *Johnson v. Superior Court*, 63 Cal. 579, as authority that the power of courts in California to punish for contempt has been regulated by statute. Cited in *State v. Clancy*, 24 Mont. 363, noted under *Batchelder v. Moore*, 42 Cal. 412; *State v. Tugwell*, 19 Wash. 247, but holding contempt committed by newspaper publication reflecting on court; *Levan v. Richards*, 4 Idaho, 671, applying rule in construing Revised Statutes, section 5184. So, to same effect, in *Ex parte Kellogg*, 84 Cal. 345; *In re Jessup*, 81 Cal. 482, as authority that the legislature may control the procedure of the courts in the matter of contempt; *Foley v. Foley*, 120 Cal. 39, 65 Am. St. Rep. 151, in approval of the doctrine; 98 Am. Dec. 419, note to ruling stated. Disapproved in *Cooper v. People*, 13 Colo. 356; and *Zimmerman v. Zimmerman*, 7 Mont. 117.

#### 44 Cal. 479-481. LICK v. DIAZ.

**Evidence.**—On issue raised as to whether a person, since deceased, during his lifetime asserted title to land, evidence may be introduced by thos claiming under such person that during his lifetime he performed work on the land, p. 480.

Cited in *Stockton Sav. Bank v. Staples*, 98 Cal. 193, action to quiet title to land claimed by adverse possession, and held that as against a tenant in common, declarations of a cotenant while in actual possession, that he claimed to be the sole owner of the land, are admissible in favor of his grantee of the entire premises as tending in some degree to show the character of his possession.

**Law of Case.**—Where new trial is granted by supreme court, the views expressed by the court in its opinion become the law of the case in all its stages, p. 481.

Ruling approved in *Creighton v. Hershfield*, 2 Mont. 170; *Daniels v. Andes Ins. Co.*, 2 Mont. 502; *Venard v. Green*, 4 Utah, 458. Cited in 27 Am. Dec. 634, note.

#### 44 Cal. 481-489. POND v. DAVENPORT. S. C. on second appeal, 45 Cal. 229, setting forth what constitutes new matter in answer.

**Judgment by Confession.**—Filing a verified statement after service of summons, consenting to a judgment, is a confession of judgment, p. 486.

Cited in *Gilbert v. Gilbert*, 33 Mo. App. 268, as to necessity of statement to sustain a judgment by confession.

**Same.**—Presumption that confession was fraudulent in not stating facts may be rebutted by proof of the necessary facts which were omitted, p. 487.

Cited in 65 Am. Dec. 522, note; 87 Am. Dec. 74, note; and 99 Am. Dec. 275, 276, extended note, collecting and collating the authorities on the subject of judgment by confession.

**General Citation.**—In *Creighton v. Hershfield*, 2 Mont. 170, but not in point, and apparently cited by mistake or through inadvertence.

#### 44 Cal. 489-494. **RUSSELL v. HARRIS.**

**Law of Case.**—Decision of supreme court in a given case becomes the law of the case in all its subsequent stages, if the evidence is substantially the same as that upon which the decision was based, p. 494.

Cited in *Plymouth County Bank v. Gilman*, 3 S. Dak. 178, 44 Am. St. Rep. 787, holding that the decision will not be reviewed when the case comes up on a second appeal, the facts being the same; 27 Am. Dec. 634, 635, extended note, discussing "law of the case."

**Possession.**—Actual occupancy of part of a tract of land amounts to possession of the whole, pp. 493, 494, affirming S. C. 38 Cal. 426; 99 Am. Dec. 421.

Referred to in 85 Am. Dec. 125, note, as so holding; so in 99 Am. Dec. 422, note.

#### 44 Cal. 494-496. **PEOPLE v. WOOLEY.**

Indictment for arson charging that defendant, at a time named, was in the county where the indictment was found, and then and there feloniously burned a building sufficiently shows that the offense was committed at a place within the jurisdiction of the court, p. 495.

Cited in 81 Am. Dec. 76, extended note on subject of "arson." Distinguished in *People v. Mooney*, 127 Cal. 341, holding information insufficient when not averring specific intent to destroy.

Building burned may be alleged to have been the property of one not the owner, but who was occupying it as a residence when burned, p. 496.

Cited in *People v. Davis*, 135 Cal. 166, sustaining refusal of instructions on the subject; 81 Am. Dec. 71, extended note treating of arson.

#### 44 Cal. 496-508. **HERRINGTON v. SANTA CLARA COUNTY.**

**District Attorneys.**—It is not duty of district attorney to prosecute or defend civil actions in which the county is increased, which are pending in any other county than his own, p. 506.

Examined at length and overruled as to this proposition, in *Buck v. City of Eureka*, 109 Cal. 517, 520, holding that a city attorney or district attorney is bound to perform all services connected with his office for the salary affixed thereto, no matter in what court the litigation is had.

Pleadings are to be construed most strongly against the pleader, p. 508.

Approved and applied in *Gibson v. Parlin*, 13 Neb. 294.

**44 Cal. 508-519. THOMPSON v. PIOCHE.** S. C. again under title of *Thompson v. Felton*, 54 Cal. 547, 551.

**Landlord and Tenant.**—Attornment of tenant to person other than his landlord is void as to the landlord, unless made with his consent, or in consequence of a judgment or decree of some court of competent jurisdiction, p. 515.

Cited as authority in *Douglas v. Fulda*, 45 Cal. 594, holding that the tenant must show that his landlord was notified of the pendency of the action in which the judgment was rendered, and had an opportunity to defend. So, to same effect, in 95 Am. Dec. 473, note. Criticised in *Thompson v. Felton*, 54 Cal. 555, in so far as the attornment was held to be void, but yielded to as the law of the case.

Possession of tenant, though not of itself notice of title of landlord, is sufficient to put a person dealing with the property upon equity, p. 516.

Cited in *Dreyfus v. Hirt*, 82 Cal. 625, case of possession under an unrecorded lease, and held sufficient to put purchaser on inquiry; *Randall v. Lingwall*, 43 Or. 387, where decedent deeded land to brother, who reconveyed to decedent, but deed was unrecorded, and decedent leased premises, and after decedent's death brother demanded and received rent, possession of tenant was sufficient to put purchaser on inquiry as to decedent's rights. Ruling approved in *Emeric v. Alvarado*, 90 Cal. 473; and cited, possession of land as constructive notice, in 13 Am. Dec. 250, note; 82 Am. Dec. 776, note, 89 Am. Dec. 172, note.

**Adverse Possession.**—To constitute adverse possession, so as to set in motion the statute of limitations, the occupation of the one holding adversely must be open and notorious, under a claim of right, and the person against whom it is held must have knowledge or the means of knowledge of such occupation and claim of right, p. 517.

Affirmed in *Thompson v. Felton*, 54 Cal. 555, as to elements of defense of adverse possession; so in *Pulliam v. Bennett*, 55 Cal. 373, ejectment, and the cause of action held not barred; *Davis v. Baugh*, 59 Cal. 575, in which case the defendant was in possession, and it did not appear that the plaintiff made inquiry and failed to ascertain the nature of the defendant's title; so in *Pacific Mut. L. Ins. Co. v. Stroup*, 63 Cal.

152, ejectment, and possession of defendant held sufficient to put plaintiff upon inquiry; *Unger v. Mooney*, 63 Cal. 590, 595, 49 Am. Rep. 102, 103, in approval, as to elements required to make out an adverse possession; so in *Mauldin v. Cox*, 67 Cal. 394, as to right of owner to notice of adverse claim; *Furlong v. Cooney*, 72 Cal. 327, in approval of ruling stated; *Montgomery v. Keppel*, 75 Cal. 131, 7 Am. St. Rep. 126, holding that having readily accessible means of acquiring knowledge of a fact, is equivalent to notice and knowledge of it; *De Frieze v. Quint*, 94 Cal. 663, 28 Am. St. Rep. 156, case of possession of unimproved and uninclosed land, and the facts held not sufficient to justify a finding of adverse possession; *Townsend v. Edwards*, 25 Fla. 588, in approval, as to what constitutes adverse possession, *Deerfield v. Connecticut River R. R. Co.*, 144 Mass. 340, as to necessity of notice to owner; *Colvin v. Land Association*, 23 Neb. 81, 8 Am. St. Rep. 118, holding that naked possession, unaccompanied with any claim of right, injures to the benefit of the real owner. Approved in *McDonald v. Fox*, 20 Nev. 368, holding that if one occupies land up to a fence which he believes to be the boundary line, but not claiming up to the fence if it should be beyond the line, an indispensable element of adverse possession is wanting; *Altschul v. O'Neill*, 35 Or. 217, but holding adverse possession not established; *Betts v. Letcher*, 1 S. Dak. 194, as to nature of possession sufficient to constitute notice; and *Neilson v. Grignon*, 85 Wis. 553, case of mortgagor remaining in possession after foreclosure by permission. Harmonized in *Webber v. Clarke*, 74 Cal. 19, holding that where a party enters under color of title upon an uncultivated piece of grazing land, in a grazing country, and pastures sheep upon it, under the care of herders, during the pasturing season of each year, he has sufficient possession under the statute of limitations. Cited in 28 Am. St. Rep. 158, extended note on subject of "adverse possession."

.44 Cal. 519-537. **BARBER v. REYNOLDS.**

**Mechanic's Lien.**—In action to foreclose, all lienholders may join as plaintiffs, though their claims are several, p. 532. Complaint set forth, pp. 520-522.

Approved in *Curnow v. Blue Gravel etc. Co.*, 68 Cal. 266, as to sufficiency of complaint.

Claim will not be rejected because filed for too much, unless it appears that it was a willfully false claim, p. 533.

Principle applied in *Gordon Hardware Co. v. Railroad Co.*, 86 Cal. 622, holding that the fact that a claim of lien was in part for articles not the subject of lien will not vitiate the claim, if it was not willfully false. Ruling approved in *Snell v. Payne*, 115 Cal. 222; *McCormack v. Phillips*, 4 Dak. Ter. 541.

**Judgment.**—Generally, a levy under execution upon sufficient personal property to satisfy it amounts to a satisfaction of the judgment, but

such is not the case as to the debtor if he consents to an application of the proceeds of sale to junior executions, p. 534.

Cited as authority, discussing the subject at length in 58 Am. Dec. 350, 354, 359, note. Distinguished in *Dickson v. Back*, 32 Or. 230, holding levy of attachment on personalty not a satisfaction of judgment attained thereafter so as to prelude execution on other property.

#### 44 Cal. 538-542. PEOPLE v. RODUNDO.

**Evidence.**—Officer having accused in custody may testify to statements made by the latter after his arrest, if made voluntarily, without any threats or promises of reward, p. 540.

Approved in *People v. Goldenson*, 76 Cal. 350; and cited in 6 Am. St. Rep. 243, extended note, discussing the subject at length.

**Instructions.**—Where defendant in criminal case testifies in his own behalf, the court need not, of its own motion, instruct the jury as to the credit to be given to his testimony, p. 540.

Cited in *People v. McLean*, 84 Cal. 483, holding that "the law casts upon the parties the duty of calling the judge's attention to the matter by a formal request for an instruction in relation to it." So, to same effect, in *Carroll v. State*, 45 Ark. 549. Referred to in *State v. Maguire*, 69 Mo. 202, as not an analogous case.

Instruction that "the possession of stolen property is not alone sufficient to convict," and that "it is merely a guilty circumstance which, taken in connection with other testimony, is to determine the question of guilt," is not erroneous by reason of the use of the words "guilty circumstance," p. 541.

Approved in *People v. Etting*, 99 Cal. 578, a case in which the instructions are very similar, and asserting the rule that "instructions are to be taken together and read as a whole"; so in *People v. Abbott*, 101 Cal. 647; and so, to same effect, *State v. Loveless*, 17 Nev. 428. Cited in 70 Am. Dec. 447, extended note, discussing subject of "possession of stolen property, effect as evidence of larceny."

**Receiving Verdict.**—Irregularity in receiving verdict in criminal case, without first polling the jury, does not prejudice a defendant, if the jury were all present and had agreed, p. 541.

Disapproved in *People v. Gilbert*, 57 Cal. 99, 100, dissenting opinion of Sharpstein, J., in which case the verdict was not recorded in the minutes until after the discharge of the jury, and it was held that the irregularity did not effect the validity of the judgment of conviction. Approved in *People v. Nichols*, 62 Cal. 520, where the verdict was ordered to be recorded before the jury were polled.

#### 44 Cal. 542-553. GAMBERT v. HART.

Attorney is liable for want of such skill, prudence, and diligence as

lawyers of ordinary skill and capacity commonly possess and exercise, p 552.

Approved in Estate of Kruger, 130 Cal. 625, holding attorney negligent in proceedings on motion for new trial; Drais v. Hogan, 50 Cal. 128, case of negligence of attorney in conducting proceedings to obtain new trial; Citizens' Loan etc. Assn. v. Friedley, 123 Ind. 146, 18 Am. St. Rep. 322, holding an attorney liable where his client's interests suffer on account of his failure to understand and apply those rules and principles of law that are well established and clearly defined in elementary books, or which have been declared in adjudged cases. So, to same effect, Spangler v. Sellers, 5 Fed. Rep. 889. Cited, to ruling stated, in notes to 34 Am. Dec. 90; 50 Am. Dec. 389; and 68 Am. Dec. 142.

Same.—It is want of ordinary care and skill in attorney to submit motion for new trial before statement in support of it is certified, p. 553.

Cited, as authority to ruling stated in 34 Am. Dec. 94, extended note, treating of attorney's liability.

#### 44 Cal. 555-558. EX PARTE RYAN.

Presumed Guilt.—Except for purpose of fair and impartial trial before a petit jury, the presumption of guilt arises against the prisoner upon indictment against him, p. 558.

Affirmed in Ex parte Duncan, 53 Cal. 411; Ex parte Duncan, 54 Cal. 80; and approved in In re Scott, 38 Neb. 507, but holding that evidence may be received to repel that presumption. Cited in 37 Am. Dec. 364, extended note.

Fixing Bail is matter within discretion of court in which indictment is found, p. 557.

Approved in In re Williams, 82 Cal. 183, holding that the exercise of such discretion will not be interfered with, unless it appears per se that the amount fixed is unreasonably great, and clearly disproportionate to the offense involved.

#### 44 Cal. 559-562. IRVINE v. ADLER.

Statute of Limitations.—Where two conterminous landowners, both ignorant of the true boundary line, fix a line agreeing that each shall possess to that line till the true boundary is ascertained, and the true boundary, when ascertained, leaves one in possession of a part of the other's land, this possession is not adverse, so as to set the statute in motion, until there is a distinct repudiation of the agreement under which it was taken, pp. 561, 562.

Doctrine approved and applied in Quinn v. Windmiller, 67 Cal. 463; Peters v. Gracia, 110 Cal. 94.

**44 Cal. 562-579. MILLER v. DALE.**

**Mexican Grant.**—Approved of, by departmental assembly, and the giving of judicial possession, held necessary to give a definite grant, p. 574.

Approved in *Taylor v. Escandon*, 50 Cal. 429.

**Same.**—Patent is a record of the government which cannot be assailed on the ground that it was obtained by false or fraudulent evidence, in a collateral action in which it is used as evidence as a source of title, p. 578.

Approved in *Montgomery v. Donnelly*, 57 Cal. 69.

**General Citation.**—In *Phelan v. Poyoreno*, 74 Cal. 452, holding that persons whose titles to lands were perfect at the time of the acquisition of California by the United States were not compelled to submit them for confirmation to the board of land commissioners.

**44 Cal. 579-581. EX PARTE MAX.**

**Verdict on Indictment for Assault with intent to murder**, finding defendant guilty of assault to do great bodily harm, is verdict for misdemeanor only, pp. 580, 581.

Approved in *State v. Snider*, 32 Wash. 307, words “with deadly weapon” in verdict are mere surplusage, as there is no such offense as assault with deadly weapon.

Questions of mere error cannot be inquired into upon writ of habeas corpus, p. 581.

Affirmed in *Ex parte Cohn*, 55 Cal. 197; *Ex parte Lehmkuhl*, 72 Cal. 54; *Ex parte Turner*, 75 Cal. 228, noting that the case of *Ex parte Ah Cha*, 40 Cal. 426, was overruled in the principal case; *Ex parte Long*, 114 Cal. 161. Cited in *Jackson v. United States*, 102 Fed. 489, quoting *United States v. Pridgen*, 153 U. S. 62. Approved in *State v. Klock*, 48 La. Ann. 72; 55 Am. St. Rep. 263; *State v. Barnes*, 3 N. Dak. 137; *In re Taylor*, 7 S. Dak. 390; 58 Am. St. Rep. 850; and *United States v. Pridgeon*, 153 U. S. 62. Cited to same effect in 26 Am. Dec. 402, note.

**General Citations.**—In *People v. Helbing*, 61 Cal. 622, holding that an assault is a misdemeanor, but when made with a deadly weapon, with a felonious intent, is a felony, which, in its elements and unity, includes the misdemeanor. So, to same effect in *Sullivan v. State*, 44 Wis. 596; *Territory v. Conrad*, 1 Dak. Ter. 355.

**44 Cal. 584-590. ESTATE OF McQUEEN.**

**Estate of Decedent.**—Under what circumstances administrator is chargeable with interest, set forth, pp. 587-590.

Followed in *Estate of Miner*, 46 Cal. 572.

**44 Cal. 591-597. PRICE v. STURGIS.**

**Statute of Frauds.**—Verbal agreement by grantee at time of sale, to pay a further sum out of proceeds of resale, is valid, pp. 596, 597.

Approved, contracts very similar, in *Byers v. Locke*, 93 Cal. 496; 27 Am. St. Rep. 215; *Reyman v. Mosher*, 71 Ind. 600; *Jones Nat. Bank v. Price*, 37 Neb. 295.

**44 Cal. 598-599. PEOPLE v. HART.**

**Instructions.**—Charge to jury in criminal case upon court's own motion forms no part of the judgment-roll, and cannot be reviewed upon an appeal from the judgment-roll alone, p. 518.

Approved in *People v. Flahave*, 58 Cal. 253; *People v. Biles*, 2 Idaho, 106; *State v. Forsha*, 8 Nev. 139; *State v. Burns*, 8 Nev. 254; *People v. Berlin*, 10 Utah, 47, dissenting opinion of Bartsch, J.; and *People v. Hart*, 10 Utah, 206.

**44 Cal. 599-609. LE ROY v. CUNNINGHAM.**

Actual bona fide possession under Act of Congress of July 1, 1870, releasing to San Francisco, to hold in trust for the possessors, the "Point San José Military Reservation," is an actual possession, bona fide as between adverse claimants, and not as against the government, p. 608.

Approved in *Iburg v. Suanet*, 47 Cal. 269, considering the meaning of the term "bona fide possession," in the similar statute of 1866; *Schnepel v. Mellen*, 3 Mont. 135, defining meaning of words, "actual possession and occupation."

Persons not entitled to a conveyance from the city cannot raise the question whether a portion of said reservation was rightfully conveyed to the person who was entitled to it, p. 609.

Affirmed in *McCreery v. Sawyer*, 52 Cal. 261; *Palmer v. Galvin*, 72 Cal. 186; to same effect in *Rousset v. Reay*, 60 Cal. 340; *Galvin v. Palmer*, 113 Cal. 53; *Murray v. Hobson*, 10 Colo. 69, case of conveyance of town-site lands. Cited in *San Francisco etc. Co. v. Hartung*, 138 Cal. 228, as to conveyance under Van Ness ordinance.

**General Citation.**—Referred to in *Baker v. Brickell*, 87 Cal. 334, as to the nature of title of city of San Francisco to the pueblo lands, as successor to the pueblo of San Francisco.

**44 Cal. 609-612. LAMB v. GALLAND.**

**Malicious Prosecution.**—In action for, what defendant may prove in defense, p. 611.

Cited as authority in *Ross v. Hixon*, 26 Am. St. Rep. 161, extended note, treating at length the subject of "malicious prosecution of criminal charges."

**44 Cal. 613-616. PEOPLE v. BOARD OF SUPERVISORS.**

**Tax Assessment.**—Board of supervisors, sitting as a board of equalization, has no power to cancel an assessment for taxes placed by the assessor upon the assessment-roll, p. 616.

Affirmed in *People v. Ashbury*, 44 Cal. 619.

**44 Cal. 620-623. PEOPLE v. CULVERWELL.**

**Taxation.**—Blocks of land in city may be assessed by blocks, where they are assessed to the owner, even if they have been subdivided into lots, p. 622.

Cited, as so holding, under the Revenue Act of 1861, in *Cadwalader v. Nash*, 73 Cal. 50, but noting that the duty of the assessor has been made more specific and imperative, under the provisions of section 3650 of the Political Code. Principle of decision approved in *Roth v. Gabbert*, 123 Mo. 30; *Land etc. Imp. Co. v. Bardon*, 45 Fed. Rep. 709.

**In Action for Recovery of Street Assessment** plaintiff must prove that notice of award of contract for improvement was published for requisite period, pursuant to order, p. 623.

Approved in *Co-operative etc. Assn. v. Green*, 5 Idaho, 665, two contiguous town lots owned by same person may be jointly assessed, and one valuation fixed for both.

**44 Cal. 623-628. TRUMAN v. ROBINSON.**

**Recital in Judgment** rendered for a tax on real estate, that all owners and claimants of the property have been duly summoned to answer the complaint, is proof of those facts, p. 628.

Approved in *Branson v. Caruthers*, 49 Cal. 380; *Mayo v. Haynie*, 50 Cal. 75, dissenting opinion of Crockett, J. Followed in *McCoy v. Morrison*, 61 Cal. 384.

**44 Cal. 628-630. SHEPARD v. COLTON.**

**Street Assessment.**—In action for recovery of, plaintiff must prove that notice of the award of the contract for the improvement was published for the requisite period, pursuant to an order of the board of supervisors, p. 630.

Cited in *Donnelly v. Tillman*, 47 Cal. 40; and *Donnelly v. Marks*, 47 Cal. 190, holding that publication of notice of the award is void, in the absence of an order of the board of supervisors directing the publication to be made.

**44 Cal. 630-635. LYMAN v. MILTON.**

**Summons.**—Provisions of statute as to what summons shall contain are mandatory, and must be observed, at least substantially, p. 634.

Approved in *Ward v. Ward*, 59 Cal. 141, defective notice in summons; so in *Sawyer v. Robertson*, 11 Mont. 421; *Smith v. Aurich*, 6 Colo. 392, summons not sufficiently stating nature of cause of action; *Black v. Clendenin*, 3 Mont. 48, a subpoena in chancery held not a summons within the terms of the Civil Practice Act; *Schuttler v. King*, 12 Mont. 161, dissenting opinion of De Witt, J.; *Sharman v. Huot*, 20 Mont. 557, holding that without the signature of the clerk there is no summons; *White v. Johnson*, 27 Oreg. 294, 50 Am. St. Rep. 733, omission of name of party. Distinguished in *Bewick v. Muir*, 83 Cal. 369, where a more liberal construction is contended for, and holding that a summons is sufficient if it states the nature of the action in general terms. So, to same effect, in *People v. Dodge*, 104 Cal. 491; *Ralph v. Lomer*, 3 Wash. 405; and *Schuttler v. King*, 12 Mont. 158.

Defendant may appear for special purpose of moving to dismiss a defective summons, and if the motion is denied, a general appearance afterward and an answer do not waive the right or cure the error, p. 635.

Approved in *Kent v. West*, 50 Cal. 186; *Arroyo, etc. Water Co. v. Superior Court*, 92 Cal. 52; 27 Am. St. Rep. 94; *Black v. Clendenin*, 3 Mont. 49; *Miner v. Francis*, 3 N. Dak. 553; *Kinkade v. Myers*, 17 Oreg. 472; *Sealey v. California Lumber Co.*, 19 Oreg. 95; *Benedict v. Johnson*, 4 S. Dak. 392; and *Lung Chung v. Railway Co.*, 10 Saw. 20, 19 Fed. Rep. 256. Disapproved in *Union Pac. Ry. Co. v. De Busk*, 12 Colo. 297; 13 Am. St. Rep. 223. Cited in *McDonald v. Agnew*, 122 Cal. 450, but denying prohibition to review irregularities in service and return of summons; overruled in *In re Clarke*, 125 Cal. 392, noted under *Deidesheimer v. Brown*, 8 Cal. 340.

#### 44 Cal. 635-637. FORD v. DOYLE.

**Res Adjudicata.**—Doctrine of, in its strict sense, does not apply to motions made in the course of practice, and the court may allow a removal in its discretion, p. 637.

Approved in *Bowers v. Cherokee Bob*, 46 Cal. 285; *Reed v. Allison*, 54 Cal. 490, as authority that a motion renewed without leave of court would be a sufficient ground for the denial thereof. So, in *Tyrrell v. Baldwin*, 78 Cal. 472; *Kenney v. Kelleher*, 63 Cal. 444, holding that leave to renew may be granted by the judge at chambers; *Johnston v. Brown*, 115 Cal. 697, in approval. So, to same effect in *Wallace v. Lewis*, 9 Mont. 403, and *Jensen v. Barbour*, 12 Mont. 575. Cited in *Commissioners v. McIntosh*, 30 Kan. 235, and the rule as stated held to be relaxed in Kansas; *Bank v. Jennings*, 4 N. Dak. 236, as to the necessity of diligence in sustaining motion and obtaining leave of court to renew it.

#### 44 Cal. 638-641. PEOPLE v. COOK.

**Legal Tender.**—County bonds, made payable in money generally, may be paid in legal tender notes, p. 640.

Cited in 87 Am. Dec. 125, extended note, collecting the authorities on the subject.

**44 Cal. 641-645. RUSSELL v. KELLEY. 13 Am. Rep. 169.**

In Action for Libel oral testimony is admissible to show the application of the alleged libel to the plaintiff, p. 645.

Cited in Hearne v. De Young, 119 Cal. 679, but holding evidence inadmissible of deductions drawn by witnesses on reading the alleged libel, when unambiguous and in ordinary language; Nidiver v. Hall, 67 Cal. 83, action for slander, and holding that the testimony of hearers as to how they understood the alleged slanderous words, is admissible. So, in Lewis v. Humphries, 64 Mo. App. 471; ruling approved, Harris v. Zanone, 93 Cal. 66; Finnegan v. Detroit Free Press, 78 Mich. 680; State v. Mason, 28 Oreg. 275; 46 Am. St. Rep. 630; and People v. Ritchie, 12 Utah, 189. Cited in notes to 4 Am. Dec. 354; 52 Am. Dec. 771; and 53 Am. St. Rep. 700, as authority sustaining the doctrine.

**44 Cal. 646-648. CAMPBELL v. WEST.**

**Adverse Possession.**—Right to maintain water ditch over the lands of another can be acquired by adverse user, p. 648.

Approved in Alhambra, etc. Water Co. v. Richardson, 72 Cal. 601; and cited, to the same effect, in 11 Am. Dec. 663, note.

## VOLUME XLV.

By ALBERT RAYMOND.

Revised to include citations to Volume 147, by CHARLES L. THOMPSON.

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**45 Cal. 6-7. LINDEN v. ALAMEDA COUNTY.**

Writ of Mandate in matter involving public cannot be applied for by private citizen who shows no special interest or injury, p. 7.

Cited to same effect in Fritts v. Charles, 145 Cal. 513, denying mandamus to compel arrest of person accused by applicant before justice of peace, of misdemeanor in unlawfully using slot machine; Marini v. Graham, 67 Cal. 133, denying right of private citizen under like circumstances to sue for abatement of public nuisance; Ashe v. Board, 71 Cal. 238, denying right to writ of review to annul order of supervisors granting use of highway for steam railroad. Distinguished in Maxwell v. Supervisors, 53 Cal. 392, granting certiorari to taxpayer to annul order making printing contract; and held to have been overruled by this and other cases in Eby v. School Trustees, 87 Cal. 174, 175, 176, (but see 177), granting mandamus to taxpayer to compel school trustees to locate schoolhouse as determined upon by electors; and see Frederick v. San Luis Obispo, 118 Cal. 392, granting writ for call of election, on petition of "property owner and taxpayer"; State's Attorney v. Selectmen, 59 Conn. 409, granting writ under local statutes to state's attorney to compel selectmen to repair highway; State v. Gracey, 11 Nev. 229, granting writ to taxpayer to compel county officers to collect taxes; Smith v. Lawrence, 2 S. Dak. 193, granting writ to candidate against board of election canvassers. Denied in State v. Commissioners, 21 Mont. 474, and held overruled by Eby v. Trustees, 87 Cal. 174.

**45 Cal. 8-10. LOVENSOHN v. WARD.**

**Claim and Delivery.**—Answer cannot set up cause of action relating to property other than that described in complaint, p. 10.

Cited to same effect in Hall v. Susskind, 109 Cal. 206, 209, holding improper a plea in abatement concerning such other property; Wigmore v. Buell, 116 Cal. 97, holding claim for damages by cattle to defendant's land not proper counterclaim in action in ejectment for contiguous land; Miser v. O'Shea, 37 Or. 234, 82 Am. St. Rep. 753, denying right to set up independent trespass as a counterclaim.

**45 Cal. 12-15. PLACER COUNTY v. DICKERSON.**

Sureties on Official Bond are liable for all moneys received until office actually transferred, p. 15.

Cited to same effect in Lynn v. Mayor, 77 Md. 455, as to defalcation during second term, although incumbent failed to again qualify; State v. Ransom, 73 Mo. 92, on point that "term of office" extends till election and qualification of successor; Union Society v. Mitchell, 26 Mo. App. 212, on same point, and holding sureties liable for officer in private corporation, and, further, as to right to trace trust funds; Baker City v. Murphy, 30 Oreg. 416, as to defalcation while holding over; State v. Wells, 61 Tex. 563, holding sureties liable after withdrawal until bond of new sureties approved by state controller. Distinguished in Fresno etc. Co. v. Allen, 67 Cal. 510, holding sureties of officer of private corporation not liable for defalcations after reappointment; and on same point, Harris v. Babbitt, 4 Dill. 192, 11 Fed. Cas. 614, as to bank cashier; King County v. Ferry, 5 Wash. 555, 34 Am. St. Rep. 896, ruling similarly when legislature has extended term during incumbency. Cited also, in note on general subject to Crawn v. Commonwealth, 10 Am. St. Rep. 856.

Action on Official Bond is for breach of the contract and is on the written instrument, p. 14.

Denied in County v. Hall, 132 Cal. 590, 591, holding liability thereon one created by statute and action barred in three years. Distinguished in Oregon v. Davis, 42 Or. 36, an action on official bond for defalcation is barred in six years.

Receipts of County Treasurer are *prima facie* evidence to charge his sureties, p. 15.

Cited to same effect in People v. Huson, 78 Cal. 158, as to receipts given by wharfinger; Keowne v. Love, 65 Tex. 158, applying rule to declarations of administrator. Cited, also, in note to Crawn v. Commonwealth, 10 Am. St. Rep. 847, on liability of sureties on official bonds.

**45 Cal. 16-17. THURSTON v. ALVA.**

Sale by Pre-emptioner is valid after certificate of purchase though before patent, p. 17.

Cited to same effect in Hudson v. Johnson, 45 Cal. 25, holding illegal, however, contract of sale before entry; Witcher v. Conklin, 84 Cal. 504, on point that transfer of land and delivery of certificate is sufficient evidence of assignment of latter.

**45 Cal. 18-19. DORLAND v. McGLYNN.**

Motion to Restore Appeal.—Affidavit must show that substantial errors exist in record, p. 19.

Cited to same effect in *Lightle v. Ivancovich*, 10 Nev. 43, denying motion for insufficiency of affidavit.

45 Cal. 19-21. **PEOPLE v. MOORE.**

**Statements of Accomplice** are not admissible when made extra-judicially and outside of defendant's presence and after the alleged joint act, p. 21.

Cited to same effect in *People v. Opie*, 123 Cal. 296, and *State v. Hinkle*, 33 Or. 98, reversing convictions for admissions of such evidence; *People v. Stanley*, 47 Cal. 118, 17 Am. Rep. 403, as to flight of accomplice after attempt at robbery; *People v. Irwin*, 77 Cal 505, as to statement made before alleged conspiracy to murder; *People v. Oldham*, 111 Cal. 653, as to extrajudicial statements after act; *State v. Callahan*, 47 La. Ann. 482, rejecting evidence as to veracity of accomplice; *State v. English*, 14 Mont. 404, as to confessions after act; *State v. Jarvis*, 18 Oreg. 365, as to evidence of prosecuting witness in case of incest; *Freston v. State*, 4 Tex. App. 199, as to threats by accomplice against deceased, where no conspiracy proved.

45 Cal. 21-25. **HUDSON v. JOHNSON.**

**Pre-emption.**—Contract to pre-empt public lands and sell same is void, p. 25.

Cited to same effect in *Turner v. Donnelly*, 70 Cal. 604, as to agreement by settlers on unsurveyed land, different subdivisions, to make reciprocal conveyances after survey and patents.

45 Cal. 25-29. **PEOPLE v. WILLIAMS.**

**Bill of Exceptions** is most strongly construed against party presenting it, p. 27.

Cited to same effect in dissenting opinion in *People v. Stanley*, 47 Cal. 120, main opinion holding error in admission in testimony presumed prejudicial unless contrary appears; *People v. Brotherton*, 47 Cal. 405, on point that error as to exclusion of testimony must be affirmatively shown; *People v. Marks*, 72 Cal. 47, ruling similarly as to proof of venue; *People v. Huff*, 72 Cal. 119, as to regularity of view of premises by jury; *People v. Leong Sing*, 77 Cal. 119, as to identity between two names borne by murdered man; *People v. Gibson*, 106 Cal. 472, as to variance in instruction as shown in bill and judgment-roll; *State v. Shepphard*, 23 Mont. 324, holding insufficiency of evidence not reviewable unless bill purports to contain all the evidence introduced; *State v. Perry*, 4 Idaho, 243, following rule; *Olson v. Oregon etc. R. R.*, 24 Utah, 471, applying rule in action for personal injuries; dissenting opinion in *People v. Coulter*, 145 Cal. 78, majority holding where bill of exceptions purports only to state evidence directed solely to time

of offense, and tending to show burglary in first degree other questions as to sufficiency of evidence are not reviewable.

**45 Cal. 29-30. PEOPLE v. EARNEST.**

Indictment by Grand Jury is invalid when it was originally summoned as a trial jury, p. 29.

Cited In re Gannon, 69 Cal. 547, on point that irregularity in panel may be reached by motion to set aside indictment.

**45 Cal. 30-34. RICHARDSON v. TOBIN.**

Form of Complaint in street assessment cases can be prescribed by legislature, p. 33.

Cited to same effect in Sullivan v. Mier, 67 Cal. 265, as to designation of plaintiff in such actions; City v. Insurance Co., 73 Cal. 622, as to form of complaint in action for delinquent city taxes.

Publication in Newspaper is sufficient where newspaper used satisfies all statutory requirements stated, p. 33.

Cited to same effect In re O'Sullivan, 84 Cal. 448, holding publication in weekly sufficient under Code of Civil Procedure, section 1705; Northern etc. Trust v. Cadman, 101 Cal. 205, sustaining right of sheriff to select newspaper for publication of notice of sale under decree of foreclosure.

Newspaper Which is Published six days in each week is a daily newspaper, p. 33.

Approved in Puget Sound Pub. Co. v. Times Printing Co., 33 Wash. 560, a paper published every day except Sundays and legal holidays is a daily paper.

Resolution for Street Work is invalid if not published according to statute, p. 32.

Cited to same effect in Brady v. Burke, 90 Cal. 7, when not published for sufficient period.

**45 Cal. 34-35. WILSON v. DOUGHERTY.**

Presumption on Appeal.—Order will be presumed to have been made by consent in absence of statement, p. 35.

Cited to same effect in Schmidt v. Oregon etc. Co., 28 Or. 25, 52 Am. St. Rep. 762, presuming consent to form of entry of decree and dismissing appeal accordingly.

**45 Cal. 36-38. WINBIGLER v. MAYOR AND COMMON COUNCIL OF LOS ANGELES.**

City is not Liable, in absence of statute, for injuries sustained by reason of failure of officials to keep street in repair, p. 37.

Cited to same effect in *Doeg v. Cook*, 126 Cal. 216, 77 Am. St. Rep. 173, noted under *Huffman v. San Joaquin Co.*, 21 Cal. 426; *Tranter v. Sacramento*, 61 Cal. 275, as to defective sidewalk; *Barnett v. Contra Costa County*, 67 Cal. 78, as to liability of county for injury on bridge; *Chope v. Eureka*, 78 Cal. 590, 12 Am. St. Rep. 114 (but see dissenting opinion 591), as to sewer excavation in road; and on same point *Arnold v. San Jose*, 81 Cal. 620, explaining and distinguishing main case; *Sievers v. San Francisco*, 115 Cal. 654, 56 Am. St. Rep. 156, as to injuries caused by surface water during grading of public street; *Arkadelphia v. Windham*, 49 Ark. 146, 4 Am. St. Rep. 35, as to injuries caused by defective highway; *La Clef v. Concordia*, 41 Kan. 324, 13 Am. St. Rep. 286, as to injuries suffered by one in prison by reason of its bad condition; *Hill v. Boston*, 122 Mass. 357, as to injuries to schoolchild by defective staircase in schoolhouse; *Vail v. Amenia*, 4 N. Dak. 244, as to liability for unsafe bridge, part of highway; *Watkins v. County Court*, 30 W. Va. 662, as to liability for injuries caused by falling of dead tree near highway. Cited, also, in note on general subject to *Brown v. Springfield*, 63 Am. Dec. 354; *Goddard v. Inhabitants*, 30 Am. St. Rep. 384.

#### 45 Cal. 38-42. **HAWKINS v. ROBERTS.**

**Attachment Levy** may be good as against subsequent purchasers or subsequent levying creditors, but not as against levy under prior attachment, p. 41.

Cited in *People v. Sylva*, 143 Cal. 63, noted under *Dutertre v. Driard*, 7 Cal. 549.

**Replevin in the Detinet** will not lie against defendant not in possession, p. 42.

Cited to same effect in *Riciotto v. Clement*, 94 Cal. 108, discussing differences in actions for claim and delivery and conversion.

#### 45 Cal. 44-46. **PEOPLE v. PHILLIPS.**

**Transcript on Appeal** must show service and fitting of notice of appeal, p. 45.

Cited to same effect in *People v. Bell*, 70 Cal. 34 (cited in *People v. Conlon*, 19 Cal. 669), dismissing appeal for such defect in transcript; *People v. Gough*, 2 Utah, 69, rejecting affidavits as to service where record silent.

#### 45 Cal. 49-51. **ELDRIDGE v. KAY.**

**Failure to Serve Summons** within three years after issuance justifies dismissal when no sufficient excuse shown, p. 50.

Cited to same effect in *Ferris v. Wood*, 144 Cal. 428, but holding dismissal unauthorized under facts stated; *Murray v. Gleeson*, 100 Cal. Notes Cal. Rep.—143.

512, construing section 581 of the Code of Civil Procedure as amended. Cited, also, in note to *Grigsby v. Napa County*, 95 Am. Dec. 215, on dismissal for want of prosecution.

**45 Cal. 51-53. MATHEWS v. FERREA.**

Prescription as to Water Right cannot run as against United States, or against its grantee till patent issued, p. 53.

Cited to same effect in *Wilkin v. McCue*, 46 Cal. 661, holding statute not to run as against patentee until issuance of patent; and on same point in *Jatunn v. Smith*, 95 Cal. 156, holding, however, under terms of grant title vested in grantee, and statute began, before patent; and *Treadway v. Wilder*, 12 Nev. 114, holding, also, that title is in United States till patent issued. Cited in note to *Schneider v. Hutchinson*, 76 Am. St. Rep. 480, on general subject.

Prescription cannot be shown unless pleaded, p. 53.

Cited in *Southern Ry. Co. v. Ferguson*, 105 Tenn. 561, holding evidence thereof inadmissible under general issue.

**45 Cal. 53-54. GRACIER v. WEIR.**

Affidavit of Merits on motion to vacate default, cannot be rebutted by counter affidavits as to merits, p. 54.

Cited to same effect in *Douglass v. Todd*, 96 Cal. 657, 31 Am. St. Rep. 248, affirming order vacating default suffered under advice of counsel; *Griswold etc. Co. v. Lee*, 1 S. Dak. 535, 537, 538, 36 Am. St. Rep. 764, 766, holding, further, as to discretion in vacating defaults; *Minnesota etc. Co. v. Holz*, 10 N. Dak. 24, noted under *Francis v. Cox*, 33 Cal. 325. Distinguished in *Butte etc. Co. v. Clarke*, 19 Mont. 311, allowing counter-affidavits as to excuse for defendant's negligence. Cited, also, in note on general subject to *Burnham v. Hays*, 58 Am. Dec. 396.

**45 Cal. 55-56. REQUENA v. MAYOR AND COMMON COUNCIL OF LOS ANGELES.**

Nuisance.—Whether overflowing of sewer is a nuisance is question of fact, p. 55.

Cited to same effect in *People v. Park etc. Co.*, 76 Cal. 161, holding railroad not a nuisance under facts.

**45 Cal. 58-60. PRESCOTT v. PRESCOTT.**

Homestead cannot be created unless claimant then actually resided thereon, p. 59.

Cited to same effect in *Pfister v. Dascey*, 68 Cal. 573, affirming finding of homestead when evidence conflicting, and holding further fact of residence not provable by general understanding in community; Lubbock

v. McMann, 82 Cal. 228, 16 Am. St. Rep. 110, discussing effect of erection of second house on property duly homesteaded; Tromans v. Mahlman, 92 Cal. 7, holding no actual residence shown under facts. Cited, also, in note on general subject to Gregg v. Bostwick, 91 Am. Dec. 643.

**45 Cal. 60-63. KEYS v. WARNER.**

**Stipulation of Attorneys** as to entry of judgment will support judgment thus entered, p. 62.

Cited to same effect in Meredith v. Santa Clara etc. 60 Cal. 620, as to stipulation in appeal bond that judgment be entered against sureties under certain contingencies.

**Reopening of Cause** after submission, for further testimony, is within discretion of court, p. 62.

Cited to same effect in Clavey v. Lord, 87 Cal. 419, sustaining such reopening three months after jury's verdict on special issues in equity case.

**45 Cal. 63-64. MANN v. HALEY.**

**Appeal from Modified Judgment**.—Time begins to run from modification, p. 63.

Cited to same effect in Hayes v. Silver etc. Co., 136 Cal. 239, refusing to dismiss appeal; Bixby v. Bent, 59 Cal. 532, holding appeal from judgment premature if taken pending proceedings to modify or amend it.

**45 Cal. 64-70. ROUSSET v. BOYLE.**

**Mistake in Judgment** caused by clerk's error, will be corrected on motion, p. 69.

Cited to same effect in McLerar v. McNamara, 55 Cal. 512 (but see 515), affirming perpetual stay of execution on such judgments, against defendants as to whom plaintiff had dismissed; Sheldon v. Gunn, 57 Cal. 40, as to amendment of records so as to show true dates of entering judgment and filing roll; People v. Murback, 64 Cal. 372, as to amendment of statement of crime committed, although case then on appeal from judgment; Dreyfuss v. Tompkins, 67 Cal. 340, as to amendment of judgment, even after appeal and remand on affirmance; People v. Goldenson, 76 Cal. 345, as to amendment of return of service; Fallon v. Britton, 84 Cal. 514, as to amendment of name of street in record, identity of lot sufficiently appearing otherwise therein; San Joaquin etc. Co. v. West, 99 Cal. 348, holding such error in judgment amendable at any time, and on same point in Kaufman v. Shain, 111 Cal. 22, 23, 52 Am. St. Rep. 143, 144, as to amendment of minute entry; Fox v. West, 1 Idaho, 784, as to amendment of judgment for irregularity as embracing too many parties but entering in conformity with verdict; Territory v. Clayton, 8 Mont. 15, as to omission by clerk of entry of defendant's

plea, even when motion made at subsequent term; *Texas etc. Co. v. Connor*, 13 Tex. Civ. App. 424, but denying right of conviction after appeal and remittitur on affirmance. Distinguished in *Carpenter v. Superior Ct.* 75 Cal. 598, denying right to set aside verdict and judgment by motion. Cited, also, in note to *Ninde v. Clark*, 4 Am. St. Rep. 830, on nunc pro tunc entry of judgments.

#### 45 Cal. 72-73. MOTT v. FOSTER.

**Stipulation by Party Personally** is invalid when he has appeared by attorney, p. 72.

Cited to same effect in *Crescent etc. Co. v. Montgomery*, 124 Cal. 146, *Toy v. Haskell*, 128 Cal. 580, 79 Am. St. Rep. 71, and *Coonan v. Loewenthal*, 129 Cal. 200, noted under *Board v. Younger*, 29 Cal. 149; *Wyllie v. Sierra etc. Co.* 120 Cal. 487, as to extension of time granted by plaintiff. Cited, also, in notes to *Clark v. Randall*, 76 Am. Dec. 257, and *Board v. Younger*, 87 Am. Dec. 167, on power of attorneys to bind clients.

#### 45 Cal. 76-77. BROWN v. JOHNSON.

**Replevin.**—Judgment for damages alone is sufficient when return of property cannot be made, p. 77.

Cited to same effect in *Faulkner v. Bank*, 130 Cal. 286, sustaining similar judgment in detinue; *Erreca v. Meyer*, 142 Cal. 310, holding judgment for value alone not necessarily erroneous where circumstances warrant such form; *De Thomas v. Witherby*, 61 Cal. 97, 100, 44 Am. Rep. 545, 548, on point that plaintiff in replevin suit for cattle who has obtained possession pending suit cannot be excused from responding to judgment for defendant by reason of their death during such possession; *Burke v. Koch*, 75 Cal. 359, sustaining judgment for value alone of all property when part disposed of by defendants, and see *McCarthy v. Strait*, 7 Colo. App. 62; *Claudius v. Aguirre*, 89 Cal. 505, sustaining judgment for plaintiff for possession alone when goods had been delivered to him pending suit, and on same point in *Caruthers v. Hensley*, 90 Cal. 539, holding further that it will be presumed on appeal from such judgment, unless otherwise shown, that such delivery had been made; *Johnson v. Fraser*, 2 Idaho, 377, as to money judgment for defendant when return impossible, and holding, further, special findings as to return waived if not requested; *Burton v. Platter*, 53 Fed. Rep. 909, sustaining money judgment when goods sold on execution in other action. Denied in *New England etc. Co. v. Bryant*, 64 Minn. 260, but point not decided.

**Judgment.**—Presumption on appeal, on judgment-roll, is in favor of regularity and proof of all facts necessary to sustain, p. 77.

Cited to same effect in *Caruthers v. Hensley*, 90 Cal. 559. Cited *supra*; *Von Schmidt v. Von Schmidt*, 104 Cal. 550, as to setting aside of former judgment rendered on default.

**45 Cal. 78-80. MURPHY v. ROONEY.**

**Statute or Frauds—Consideration.**—Mutual promises are sufficient consideration to take case out of statute, p. 79.

Cited in note to Garden v. Derrickson, 95 Am. Dec. 290, on enforcement of sealed instrument though without consideration.

**Oral Testimony is Admissible** to reform written instrument for mutual mistake and enforce it as reformed, p. 79.

Denied in Macomber v. Peckham, 16 R. I. 490, rejecting such testimony in action to reform contract for sale of land.

**45 Cal. 80-86. BARRY v. BENNETT.**

**Recalling Witness** should be allowed on rebuttal when facts show necessity and no surprise occasioned thereby, p. 85.

Cited to same effect in Clavey v. Lord, 87 Cal. 419, sustaining order permitting reopening of case, under facts stated.

**45 Cal. 86-88. CLARKE v. SCOTT.**

**Application of Payments.**—One indebted on several notes can direct application to one of payment made by him, p. 88.

Cited to same effect in Eppinger v. Kendrick, 114 Cal. 626, holding debtor's surety on note discharged by misapplication by creditor of payment to open account instead of to such note as directed.

**45 Cal. 90-92. CLEAR LAKE WATER WORKS COMPANY v. LAKE COUNTY.**

**Claims against County** for damages for property destroyed by mob need not be presented to supervisors for allowance, p. 91.

Cited in City of Chicago v. Manhattan etc. Co. 178 Ill. 379, 69 Am. St. Rep. 325, sustaining statute creating such liability on part of the city for mob violence; note to Prather v. Lexington, 56 Am. Dec. 590, on liability of municipal corporations for such damages, and Darlington v. Mayor, 88 Am. Dec. 267, 270, on same subject.

**45 Cal. 92-95. JONES v. SINGLETON.**

**Newly Discovered Evidence.**—Order granting new trial for will not be reversed for lack of diligence, unless record clearly shows such lack, p. 94.

Cited to same effect in Oberlander v. Fixen, 129 Cal. 692, affirming order granting such new trial; People v. Sutton, 73 Cal. 248, on point that such application is regarded with distrust and disfavor, and sustaining order refusing such new trial; and Heintz v. Cooper, 104 Cal. 670, sustaining order granting new trial, no abuse of discretion appearing in either case; Smith v. Groves, 24 Neb. 549, affirming granting of

new trial as not being abuse of discretion; Gaines v. White, 1 S. Dak. 443, affirming its denial because of insufficiency of affidavit and holding further as to necessary elements thereof.

**45 Cal. 95-96. KINGSLEY v. MILLER.**

Decree Settling Administrator's Account that included claim by surviving partner is bar to subsequent action against such partner under claim that account rendered by him was false, p. 96.

Cited in note to Green v. Creighton, 48 Am. Dec. 746, on conclusiveness of such decrees.

**45 Cal. 97-99. PEOPLE v. GRANT.**

Writ of Assistance on Tax Sale will not be granted to vendee of purchaser, not being "holder" of sheriff's deed, p. 98.

Cited to same effect in San Jose v. Fulton, 45 Cal. 320, 321, holding further as to notice to be given on application for such writ; Langley v. Voll, 54 Cal. 437, as to grantee of purchaser at foreclosure sale, where also defendants claimed to have acquired new right from purchaser. Distinguished in Farmers' etc. Co. v. Chicago etc. Co. 44 Fed. Rep. 658, granting writ to assignee of purchaser at foreclosure sale under facts; Gibson v. Marshall, 64 Miss. 75, awarding writ to purchaser, who applies in own name but on behalf of his grantee. Cited, also, in note on general subject to Wilson v. Polk, 51 Am. Dec. 154, 158.

Appeal may be Taken from order refusing to vacate prior order when appellant could not have appealed from first, p. 98.

Cited to same effect in Credits Com. Co. v. Superior Court, 140 Cal. 85, discussing effect of reversal of order refusing to vacate prior order for payment of moneys by receiver; Elliott v. Superior Court, 144 Cal. 509, 103 Am. St. Rep. 110, discussing right of stranger to action to claim review of order directing receiver to pay counsel fees; Coburn v. Smart, 53 Cal. 745, as to order denying motion for leave to intervene; Green v. Hebbard, 95 Cal. 41, as to order denying motion to vacate or modify order for writ of possession and granting mandamus to fix amount of appeal bond on such appeal; and Pignaz v. Burnett, 119 Cal. 162, as to similar order; Harper v. Hildreth, 99 Cal. 289, holding, however, not appealable an order refusing to vacate nonappealable orders.

Writ of Assistance.—Appeal cannot be taken by stranger to record, p. 99.

Cited to same effect in Miller v. Bate, 56 Cal. 136, denying right to appeal under facts from order granting writ of assistance.

**45 Cal. 99-101. MAYO v. SPROUT.**

Writ of Restitution cannot be used against stranger to record who has not entered under defendant or in collusion with him, p. 101.

Cited to same effect in *Irving v. Cunningham*, 77 Cal. 54, restraining execution of writ against such strangers entering under title adverse to those of all parties, although after lis pendens filed. Cited, also, in notes on general subject to *Howard v. Kennedy's Exrs.*, 39 Am. Dec. 313; *Lee Chuck v. Quan etc. Co.*, 15 Am. St. Rep. 61.

**Writ of Restitution.**—One wrongfully dispossessed thereunder may be restored to possession on motion, p. 101.

Cited to same effect in *Sonnenberg v. Steinbach*, 9 S. Dak. 520, 62 Am. St. Rep. 886, where one in possession as trustee was removed under judgment against him personally. Cited, also, in note on general subject to *Howard v. Kennedy's Exrs.*, 39 Am. Dec. 314.

#### 45 Cal. 101-105. **SOUTHMAYD v. HENLEY.**

Possession sufficient as basis for ejectment consists in building of fence and use of land for pasture, p. 104 (102).

Cited to same effect in *Webber v. Clarke*, 74 Cal. 16 (cited in *Gildehaus v. Whiting*, 39 Kan. 713), holding use of land for pasture, during grazing seasons under care of herders, sufficient as adverse possession; *Goodwin v. McCabe*, 75 Cal. 586, holding inclosures in conjunction with natural barriers, sufficient as prior possession for action of ejectment; *Bullock v. Rouse*, 81 Cal. 595, holding aliter however when fences so erected had fallen down or become dilapidated. Cited, also, in note to *Plume v. Seward*, 60 Am. Dec. 604, on general subject.

#### 45 Cal. 105-107. **TORMEY v. TRUE.**

Equitable Defense is insufficiently pleaded if not setting up facts fully, p. 106.

Cited to same effect in *Hicks v. Lovell*, 64 Cal. 18, 49 Am. Rep. 688, as to equitable relief by cross-complaint in ejectment against vendee in possession. Cited, also, in *Reece v. Roush*, 2 Mont. 590, holding equitable defense pleadable in ejectment and sufficiently pleaded although asking no affirmative relief.

#### 45 Cal. 107-109. **POOLE v. CAULFIELD.**

**Appeal.**—Order setting aside dismissal cannot be reviewed on appeal where not incorporated in statement, p. 109.

Cited to same effect in *Reinhart v. Company D*, 23 Nev. 372, as to order refusing to vacate default, when brought upon appeal from judgment. Cited, also, in note to *Grigsby v. Napa County*, 95 Am. Dec. 215, on dismissal for want of prosecution.

#### 45 Cal. 110-111. **STILPHEN v. WARE.**

**Stockholder's Liability.**—Judgment against corporation does not extend statute of limitations as to action against stockholders, p. 111.

Cited to same effect in *Hyman v. Coleman*, 82 Cal. 653, 16 Am. St. Rep. 180, holding statute not affected by suspension of remedy against corporation nor by renewal of its notes; *Redington v. Cornwell*, 90 Cal. 57, holding rights of stockholder against others not extended as to statute by his subrogation to note of corporation; *Stebbins v. Scott*, 172 Mass. 362, holding bar against stockholders not removable by action and judgment against corporation and subsequent suit thereon; *Kilton v. Providence etc. Co.*, 22 R. I. 610, but holding right of action against stockholders not accrue, under local statutes, until remedies against corporation were all exhausted. Cited, also, in note to *Thompson v. Reno etc. Bank*, 3 Am. St. Rep. 872, on limitation of suits on stockholder's liability.

**45 Cal. 112-113. BUSH v. TAYLOR.**

Skeleton Statement is insufficient to support motion for new trial, p. 112.

Distinguished in *Sharon v. Sharon*, 79 Cal. 640, holding statement sufficient where reference made in body to exhibits collected at end although after authentication by judge; *Reclamation District v. Hamilton*, 112 Cal. 607, holding rule not to apply to proposed statement.

**45 Cal. 113-116. POWERS v. WHEATLEY.**

Breach of Promise of Marriage.—Defense of unchastity, if unsuccessful, is no ground for aggravation of damages, when interposed in good faith, p. 114.

Cited in *Kelley v. Highfield*, 15 Oreg. 289, discussing instructions as to damages but not deciding point; and *Haymond v. Saucer*, 84 Ind. 10, holding false plea of unchastity may be considered in aggravation of damages; note on general subject to *Burnham v. Cornwell*, 63 Am. Dec. 547.

**45 Cal. 118-121. MORRISON v. McCUE.**

Alteration of Findings.—Determination of trial judge upon question is conclusive, p. 119.

Cited in *People v. Ward*, 141 Cal. 632, discussing right of court to amend criminal record when incorrectly made.

**45 Cal. 121-125. ETCHEBORNE v. AUZERAIS.**

Devisee is Estopped by acceptance of devise as to which she was given election, p. 125.

Cited to same effect in *Estate of Lufkin*, 131 Cal. 293, noted under *Morrison v. Bowman*, 29 Cal. 346; *In re Smith*, 108 Cal. 120, discussing effect of devise in husband's will as putting wife on election between acceptance thereof or of community rights.

Equitable Estoppel must be specially pleaded, p. 125.

Cited to same effect in Newhall v. Hatch, 134 Cal. 273, noted under Davis v. Davis, 26 Cal. 23; Michalitschke v. Wells etc. Co., 118 Cal. 690, applying rule to pleading of special contract limiting defendant's liability; Parlman v. Young, 2 Dak. Ter. 184, holding error in pleading however, waived by failure to object to admission of testimony thereunder. Cited, also, in note to general subject to Tyler v. Hall, 27 Am. St. Rep. 344.

**45 Cal. 125-128. LORENZANA v. CAMARILLO.**

Mortgagor may Redeem although having no title to mortgaged property, p. 128.

Cited to same effect in Hall v. Arnott, 80 Cal. 356, holding grantor in mortgage in form of deed absolute entitled only to reconveyance of interest originally conveyed by him; Southern etc. Co. v. McDowell, 105 Cal. 101, as to redemption from foreclosure sale by successor of mortgagor. Cited, also, in note on general subject to Horn v. Bank, 21 Am. St. Rep. 246.

Statute of Limitations is to be considered as to filing of original complaint unless cause of action is changed by the amendment, p. 128.

Cited in Frost v. Witter, 132 Cal. 427, 84 Am. St. Rep. 59, holding action not barred.

**45 Cal. 128-130. McCREARY v. CASEY.**

Dismissal of equitable defense without presentation to court in rendition of judgment is not bar to subsequent action, p. 130.

Cited to same effect in Lord v. Dunster, 79 Cal. 489, as to dismissal of election contest before service of citation or appearance of defendant; School District v. Whalen, 17 Mont. 16, holding no estoppel by non-appearance where party was not necessary or proper defendant and rights not adjudicated; Witte v. Lockwood, 39 Ohio St. 144, holding party not estopped from asserting equitable title because of failure to allege same as defense in prior action in which he relied on legal title. Cited, also, in note to Little Rock etc. Co. v. Wells, 54 Am. St. Rep. 226, on relief from former judgment.

**45 Cal. 133-136. ROSS v. CORNELL.**

Suit against Retiring Partner cannot be brought by others for debt due them until final settlement and accounting, p. 136.

Cited to same effect in Walsh v. McKeen, 75 Cal. 521, holding complaint, however, sufficient for suit for accounting; Wicks v. Lipman, 13 Nev. 501, sustaining action at law, however, where private accounting already had between partners, and, on same point, Rose v. Bradley, 91 Wis. 625; Devore v. Woodruff, 1 N. Dak. 151, denying right of action at law for profits from single partnership transaction; Valensin v. Valens-

in; 12 Saw. 99, 28 Fed. Rep. 602, applying rule to contract between husband and wife to work their properties jointly; Dukes v. Kellogg, 127 Cal. 564, applying rule to action between partners for moneys due under the partnership articles. Distinguished in Haskins v. Curran, 4 Idaho, 579, where one partner makes express promise to repay other share of advances on account of partnership business, latter may sue therefor without dissolution of partnership or accounting.

**45 Cal. 137-146. PEOPLE v. MURPHY.**

Testimony of Deceased Witness on former trial may be read at re-trial, p. 143.

Cited to same effect in People v. Brotherton, 47 Cal. 402; People v. Bird, 132 Cal. 263, but holding common-law rule modified by section 686, Penal Code; State v. George, 60 Minn. 506, and Johnson v. State, 1 Tex. App. 344, as to evidence taken at preliminary examination; Hair v. State, 16 Neb. 505. Cited, also, in note on general subject to Cline v. State, 61 Am. St. Rep. 891.

Evidence of Acts of Wife and exclamations at time of homicide are admissible against husband when in his presence or hearing, p. 143.

Cited to same effect in Appleton v. State, 61 Ark. 593, as to such exclamations.

Fixing of Date of Execution in judgment is not erroneous but not best practice, p. 141.

Cited to same effect in State v. Shawen, 40 W. Va. 12, remanding case an affirmance with instructions to fix new date when other had passed pending appeal.

Allowance of Challenge for implied bias is not subject of exception, p. 142.

Cited to same effect in People v. Colson, 49 Cal. 680; People v. Atherton, 51 Cal. 496; People v. Cochran, 61 Cal. 549, as to objection for non-residence when facts not denied and no exception interposed to challenge; People v. Amaya, 134 Cal. 535, noted under People v. Arceo, 32 Cal. 40; People v. Durrant, 116 Cal. 199, when fair and impartial jury in fact obtained after such allowance; State v. Larkin, 11 Nev. 325; State v. Pritchard, 15 Nev. 79, holding, further, juror incompetent under facts; State v. Hing, 16 Nev. 309, holding further as to review of such allowance as being under general challenge; State v. Crutchley, 19 Nev. 369; United States v. Jones, 69 Fed. Rep. 976, applying rule to excusing of grand juror by court on own motion.

**Res Gestae.**—Statements of deceased several days before homicide are not admissible, when having no appreciable bearing on case, p. 146.

Cited to same effect in Carlton v. People, 150 Ill. 189, 41 Am. St. Rep. 351, excluding evidence of threats of third person against deceased; and on same point: State v. Mann, 83 Mo. 595.

**Testimony at Former Trial** of witness since deceased may be given by one having taken notes thereat who may refresh memory by such notes, p. 144.

Cited to same effect in *Hair v. State*, 16 Neb. 606, as to court reporter; dissenting opinion in *Pooler v. State*, 97 Wis. 639, main opinion holding admission of such evidence erroneous.

**Testimony at Former Trial.**—Substance only need be proved, p. 145.

Cited to same effect in *Black v. State*, 1 Tex. App. 383, where witness since deceased.

#### 45 Cal. 146-148. **PEOPLE v. McCUALEY.**

**Ground of Objection to Evidence** cannot be changed in argument on appeal, p. 148.

Cited to same effect in *State v. Leehman*, 2 S. Dak. 185, holding all objections waived except as specified on trial.

**New Trial for Newly Discovered Evidence** will not be granted when such evidence contradicts that given by moving party at trial, p. 148.

Cited to same effect in *People v. Freeman*, 92 Cal. 370, discussing generally requisites for granting motion on such ground.

#### 45 Cal. 149-152. **STRATTON v. GREEN.**

**State Controller Can Draw Warrants** only in cases where authorized and where specific appropriation for payment made, p. 151.

Cited to same effect in *Marshall v. Dunn*, 69 Cal. 225, holding refusal to draw warrant authorized when fund exhausted. Distinguished in *Proll v. Dunn*, 80 Cal. 225 (cited in note to *Carr v. State*, 22 Am. St. Rep. 642), holding appropriation specific and directing issuance of mandamus to compel drawing of warrant; and see *State v. Burdick*, 4 Wyo. 281, discussing conflicting cases.

**"Specific Appropriation"** is act by which named sum of money is set apart in treasury, devoted to payment of particular claim or demand, p. 151.

Cited to same effect in *State v. Auditor*, 37 La. Ann. 355, holding appropriation made and issuing mandamus to compel drawing of warrants; *Fish v. Cuthbert*, 2 Mont. 600, sustaining right of auditor to draw warrants under local statutes and custom; but see *State v. Kenney*, 9 Mont. 397, where this case distinguished; *State v. Moore*, 50 Neb. 96, 61 Am. St. Rep. 544, holding Sugar Bounty Act not to contain such appropriation; and *State v. La Grave*, 23 Nev. 28, 62 Am. St. Rep. 766, ruling similarly as to act providing for expenses of militia companies, when maximum amount alone provided; *State v. Lindsey*, 3 Wash. 128, ruling similarly when fund was otherwise appropriated. Cited, also, in note on general subject to *Care v. State*, 22 Am. St. Rep. 640 (cited in *State v. Burdick*, 4 Wyo. 281).

**45 Cal. 152-154. CALLAHAN v. DONNOLLY. 13 Am. Rep. 172.**

Contract in Restraint of Trade is void when territory of restraint is unlimited, p. 153.

Distinguished in City etc. Works v. Jones, 102 Cal. 514, holding contract partly valid and partly void as to territory embraced and enforcing it as to former limitations; Ford v. Gregson, 7 Mont. 98, holding void a contract between owners of water rights not to sell to others without consent of associates; Texas etc. Co. v. Adoue, 83 Tex. 663, 27 Am. St. Rep. 704, and note, ruling similarly as to cotton seed oil trust; Richards v. American etc. Co., 87 Wis. 513, as to contract not to supply other purchasers with similar wares and holding question determinable from complaint; Burns v. Madigan, 60 N. H. 199. Cited, also, in notes on general subject to Pike v. Thomas, 7 Am. Dec. 744; Angier v. Webber, 92 Am. Dec. 753, 759; Wright v. Ryder, 95 Am. Dec. 193; Smalley v. Greene, 35 Am. Rep. 272; Bishop v. Palmer, 4 Am. St. Rep. 343; Pacific etc. Co. v. Adler, 25 Am. St. Rep. 110; Vulcan etc. Co. v. Hercules etc. Co., 31 Am. St. Rep. 247; Matthews v. Associated Press, 32 Am. St. Rep. 748; More v. Bennett, 33 Am. St. Rep. 221; Gamewell etc. Co. v. Crane, 39 Am. St. Rep. 465.

**45 Cal. 154-161. SKAGGS v. ELKUS.**

Payment of Rent Monthly after expiration of term raises presumption of tenancy from month to month, p. 159.

Cited to same effect in Hurd v. Whitsett, 4 Colo. 82, holding tenancy from month to month shown under facts. Cited, also, in note to Blumberg v. Myres, 91 Am. Dec. 563, on implied renewal of lease, and page 565 on change of tenancy.

**45 Cal. 161-163. PLANT v. SMYTHE.**

Recording Act.—Grantee under unrecorded deed has priority over subsequent attaching creditor, p. 163.

Cited to same effect in Hoag v. Howard, 55 Cal. 565, holding writ of attachment not an "instrument" within Civil Code, section 1107; Morrow v. Graves, 77 Cal. 219, holding further as to effect of notice of attachment as affecting fraudulent character of conveyance; Ward v. Waterman, 85 Cal. 507, as to validity and reformation of trust agreement made prior to attachment; Houghton v. Davenport, 74 Me. 594, as to attachment of trust property standing in name of trustee, for latter's debt; Roblin v. Palmer, 9 S. Dak. 40, under like local statute; Dawson v. McCarty, 21 Wash. 318, 75 Am. St. Rep. 844, so construing similar local recording act; Kohn v. Lapham, 13 S. Dak. 83, as between mortgagee and execution purchaser.

**45 Cal. 163-165. PEOPLE v. FELIX.**

Judgment in Criminal Case need not be rendered at term of verdict, p. 164.

Cited to same effect in Thurman v. State, 54 Ark. 121, as to judgment in term after entry of plea; State v. Watson, 95 Mo. 415, as to sentence over two years after verdict; State v. Crook, 115 N. C. 764, as to suspension of judgment on payment of costs and its imposition upon their nonpayment in full.

**45 Cal. 165-167. McDUGAL v. DOWNEY.**

Foreclosure Sale for Installment due is no bar to action on subsequent installment, p. 166.

Cited in Stockton etc. Soc. v. Harrold, 127 Cal. 621, noted under Hunt v. Dohrs, 39 Cal. 304; Higgins v. Bank, 120 Cal. 187, 188, applying rule to foreclosure of lien for installments due on life annuity created by articles of separation; note on effect of sale on lien, to Bradley v. Snyder, 58 Am. Dec. 571.

**45 Cal. 176-177. GUARDIANSHIP OF FEGAN.**

Guardian for Insane Person may be appointed by probate court although such person is married, p. 177.

Cited in Hodgdon v. Southern Pac. etc. Co., 75 Cal. 648, on point that order appointing guardian for minor, is conclusive against collateral attack; Gardner v. Maroney, 95 Ill. 559, further sustaining sale of real estate by such guardian.

**45 Cal. 180-184. DONNER v. PALMER.** See Palmer v. Low, 2 Sawy. 248, Fed. Cas. No. 10693.**45 Cal. 184-186. ROGERS v. TENNANT.**

Order Dissolving Preliminary Injunction on filing of answer will not be reversed except for abuse of discretion, p. 186.

Cited to same effect in Tiede v. Schneidt, 99 Wis. 211, affirming such order; Efford v. Southern Pac. etc. Co., 52 Cal. 279, as to order modifying such injunction; and on same point Blue Bird etc. Co. v. Murray, 9 Mont. 475, holding further as to right of appeal from such order; Parrott v. Floyd, 54 Cal. 534, and Granniss v. Lorden, 103 Cal. 473, as to order of dissolution.

**45 Cal. 189-193. POWNALL v. HALL.**

Execution.—Redemptioner will be relieved by equity from consequences of mistake, when attempt to redeem made in good faith, p. 193.

Cited in Kofoed v. Gordon, 122 Cal. 324, as to failure to repay small amount of taxes paid by purchaser.

**45 Cal. 193-195. BELL v. KNOWLES.**

Objection for Variance is waived if not made at trial, p. 194.

Cited to same effect in Cushing v. Pires, 124 Cal. 666, noted under Dikeman v. Norrie, 36 Cal. 94; Louisville etc. Co. v. Thornton, 117 Ala. 285, holding variance so waived; Aulbach v. Dahler, 4 Idaho, 659, following rule; Yik How v. S. V. W. W., 65 Cal. 620, holding, however, no variance shown; Carpenter v. Ewing, 76 Cal. 488, applying rule to propriety of instructions and their application to evidence; North Star etc. Co. v. Stebbins, 3 S. Dak. 543, holding further variance immaterial unless party misled thereby to his prejudice; Grayson v. Lynch, 163 U. S. 479, when point first raised in United States supreme court on appeal from territorial court.

Judgments.—Interest is allowable on all money judgments, p. 195.

Cited to same effect in Atherton v. Fowler, 46 Cal. 322, as to judgment in replevin.

General Citation.—Walsh v. Erwin, 115 Fed. 536.

**45 Cal. 195-199. SNOW v. FERREA.**

Mexican Lands.—When A obtains possession from B under agreement to pay purchase price when B gets title, and afterward gets title himself by virtue of such possession, he must pay price less cost of obtaining title, p. 198.

Distinguished in Frisbie v. Moore, 51 Cal. 519 (but see dissenting opinion 520), where title of grantor rejected by United States and vendee acquired independent title.

**45 Cal. 199-219. IN THE MATTER OF MARKS.**

Misdemeanor in Office.—Complaint may be filed by any private person, p. 216.

Cited to same effect in Woods v. Varnum, 85 Cal. 643, applying rule to proceedings under section 722, Penal Code.

Jurisdiction.—Legislature may confer on district courts jurisdiction over accusations for misdemeanor in office, p. 216.

Distinguished in Green v. Superior Court, 78 Cal. 561, holding jurisdiction of police court exclusive, under statute, in cases of misdemeanor.

Misdemeanor in Office.—Proceedings under Act of 1853 are in nature of impeachment, p. 219.

Cited to same effect in In re Curtis, 108 Cal. 662, discussing right of appeal under section 772 of the Penal Code. Concurring opinion in Fitch v. Board, 122 Cal. 293, discussing proceedings under Penal Code, section 772 et seq.

**Misdemeanor in Office.**—Appeal may be had in proceedings under Act of 1853, p. 219.

Distinguished in *In re Curtis*, 108 Cal. 663, denying right of appeal in proceedings under section 772 of the Penal Code; but see *Morton v. Broderick*, 118 Cal. 485, granting right as to proceedings under article 14, section 1 of the constitution.

**45 Cal. 221-223. CAULFIELD v. DOE.**

**Bill of Exceptions** is improper to bring up review of order after final judgment, p. 222.

Cited to same effect in *Weinrich v. Porteus*, 12 Nev. 104, when order based on affidavits which were embodied in bill of exceptions; *Reinhart v. Company D*, 23 Nev. 372, on point that order refusing to vacate default cannot be reviewed on appeal from judgment when no statement filed and facts do not appear from judgment roll.

**Statute is Not Retroactive**, so as to apply to proceedings in action taken before its passage, p. 222.

Cited to same effect in *Poujade v. Ryan*, 21 Nev. 451, as to amendment to practice act relative to statement on new trial.

**45 Cal. 223-225. DRESBACH v. MINNIS.**

**Estoppel in Pais** will arise from giving sheriff accountable receipt for property levied on as another's, without disclosing claim of ownership, p. 224.

Cited in *Wood v. Blaney*, 107 Cal. 295, discussing elements of estoppel in pais, and holding party estopped by his representations; *Koeninger v. Creed*, 58 Ind. 558, as following 10 Cal. 172, and holding sureties on delivery bond not estopped under facts from showing real title.

**45 Cal. 230-231. WELCH v. SMITH.**

**Judgment in Replevin** is insufficient unless property definitely described therein or by reference to complaint, p. 231.

Cited to same effect in *Hawley v. Kocher*, 123 Cal. 83, holding description insufficient in complaint; *Cooke v. Aguirre*, 86 Cal. 483, where description was "two stallion horses"; *Pierce v. Langdon*, 2 Idaho, 883, where complaint described property as "five hundred and ninety sacks of wheat" and verdict and judgment merely referred to complaint.

**45 Cal. 231-233. TUBBS v. GHIRARDELLI.**

**Findings will be Implied** in support of judgment, when no express finding on issues presented, p. 233.

Cited to same effect in *Crane v. Ghirardelli*, 45 Cal. 236; *More v. Lott*, 13 Nev. 380.

**45 Cal. 235-236. CRANE v. GHIRARDELLI.**

Ejectment.—Possession of defendant need not be actual, as contradistinguished from constructive, p. 236.

Cited to same effect in Sheldon v. Mull, 67 Cal. 301, holding ouster by defendant shown although no actual enclosures made; Frazier v. Lynch, 97 Cal. 373, holding such possession, however, not inferable from acts of trespass.

**45 Cal. 241-242. PEOPLE v. BURDEN.**

Elections.—Ballots are not best evidence when opened and changed after canvass, p. 242.

Cited to same effect conversely in Beall v. Albert, 159 Ill. 132 (cited in Dooley v. Van Hohenstein, 170 Ill. 631), where ballots declared not best evidence under facts showing their having been tampered with; Dent v. Board, 45 W. Va. 758, holding election determined by official certificate in such case; Farrell v. Larsen, 26 Utah, 291, where, in election contest, contestant desires to introduce ballots in evidence, he must first show they have been kept in manner prescribed by statute.

**45 Cal. 245-246. PETTY v. COUNTY COURT.**

Certiorari Will not Lie to correct incorrect taxation of costs by county court, p. 246.

Cited to same effect in Spring Valley W. W. v. Bryant, 52 Cal. 135, denying writ to review legislative action of supervisors; Phillips v. Welch, 12 Nev. 169, ruling similarly as to adjudication of contempt by court of competent jurisdiction; State v. District Court, 16 Nev. 78, as to errors in taxation of costs.

**45 Cal. 247. STOCKTON (CITY OF) v. CREANOR.**

Insufficiency of Evidence to Sustain Decision cannot be considered on appeal from judgment, p. 247.

Cited to same effect in Allport v. Kelley, 2 Mont. 845, holding further order denying new trial not reviewable on such appeal.

**45 Cal. 252-253. LOS ANGELES (CITY OF) v. BABCOCK.**

Complaint on Bail Bond must allege release of prisoner by reason of its execution and delivery, p. 253.

Cited to same effect in Jenner v. Stroh, 52 Cal. 506, applying principle to suit on undertaking for release of attachment, and Coburn v. Pearson, 57 Cal. 308, to suit on undertaking to prevent levy of attachment; People v. Solomon, 5 Utah, 279, holding insufficient in complaint on bail bond, allegation that accused "did not appear."

**45 Cal. 253-254. PEOPLE v. HALL.**

**Appeal Does not Lie from order overruling demurrer to indictment, p. 253.**

Cited in note to Williams v. Field, 60 Am. Dec. 438, on final and interlocutory criminal judgments.

**45 Cal. 262-265. McDONALD v. BACKUS.**

**Notice of Mechanic's Lien should state person by whom claimant was actually employed, as matter of fact, p. 264.**

Criticised in Malone v. Big Flat etc. Co., 76 Cal. 584, sustaining notice reciting employment by corporation.

**45 Cal. 270-273. TENNANT v. PFISTER. S. C. 51 Cal. 511.**

**Demurrer.—When demurrer for misjoinder of plaintiffs has been overruled, same objection cannot again be raised at trial, p. 272.**

Cited to same effect in S. C. 51 Cal. 514; Eachus v. Los Angeles, 130 Cal. 497, on point that only jurisdiction and failure to state cause of action can be raised at trial; Sams etc. Co. v. League, 25 Colo. 134, holding such plea not assertable in answer after demurrer overruled; Porter v. Printing Co., 26 Mont. 182, where trial court found certain counter-claims well pleaded, and plaintiff defaulted and court adopted referee's findings, but declared part of counterclaims only sufficiently pleaded, new trial granted for surprise; Fillmore v. Wells, 10 Colo. 241, 3 Am. St. Rep. 577, on point that filing answer after overruling of demurrer for misjoinder constitutes waiver of objection for appeal; Wells v. Applegate, 12 Oreg. 209, on point that filing amended answer is waiver of exception to sustaining of demurrer to original answer.

**45 Cal. 273-275. MILLS v. LUX.**

**Description in Partition Decree.—Courses and distances must yield to visible monuments, p. 275.**

Cited to same effect in Irrigation District v. De Lappe, 79 Cal. 355, as to stake, in petition for formation of irrigation district.

**45 Cal. 275-277. HIXON v. BRODIE.**

**Street Assessment.—Posting notices inviting sealed proposals according to statute is a condition precedent to letting contract, p. 277.**

Cited to same effect in Burke v. Turney, 54 Cal. 487, applying principle to proper publication of award, and holding void a contract prematurely let.

**Insufficiency of Evidence to sustain findings will not be considered in absence of specifications, even when findings implied, p. 277.**

Cited to same effect in Rosina v. Trowbridge, 20 Nev. 116.

Notes Cal. Rep.—144.

**45 Cal. 278-280. LESZINSKY v. WHITE.**

**Affidavit for Continuance** must show due diligence in attempt to procure attendance or deposition of witness, p. 280.

Cited in note on general subject to Stevenson v. Sherwood, 74 Am. Dec. 145.

**Record on Appeal.**—Affidavits on motion will not be considered when not identified, although appearing in transcript, p. 280.

Cited in Moore v. Taylor, 1 Idaho, 584, on point that paper in transcript need not be incorporated in *haec verba* in transcript if sufficiently identified and referred to; Granite etc. Co. v. Weinstein, 7 Mont. 351, holding order sufficiently identified by clerk's certificate.

**Wrongful Levy.**—Sheriff in action against him for conversion cannot set up fraud in sale to plaintiff, unless he makes himself creditor's representative, p. 280.

Cited in Darville v. Mayhall, 128 Cal. 618, noted under *Thornburgh v. Hand*, 7 Cal. 562.

**45 Cal. 280-281. PIERCE v. STUART.**

**Ejectment.**—Priority of possession is sufficiently shown when land used as pasture for cattle, p. 281.

Cited to same effect in Webber v. Clarke, 74 Cal. 16, holding such use sufficient for adverse possession; Goodwin v. McCabe, 75 Cal. 586, as to proof of prior possession in ejectment where inclosure of land so used consisted of natural barriers and fence built by holder.

**45 Cal. 281-285. PEOPLE v. MURAT.**

**Assault is Misdemeanor** when not made with deadly weapon or with intent to commit murder, p. 284.

Cited to same effect in People v. Munn, 65 Cal. 213, reversing conviction of murder where blows inflicted with fist and without intent to murder; Territory v. Conrad, 1 Dak. Ter. 470, 471 (335, 370, 371), as to assault with intent to do bodily harm but making modification of sentence as for a felony on remand; Sullivan v. State, 44 Wis. 596, reversing judgment as for felony where verdict was for "assault with intent to do great bodily harm," and see People v. Gordon, 70 Cal. 468, as to assault with intent to rape.

**Indictment for Assault to Murder** will not support conviction of assault with deadly weapon unless indictment shows use of such weapon, p. 284.

Cited to same effect in People v. Arnett, 126 Cal. 681, noted under People v. Vanard, 6 Cal. 562; People v. Lightner, 49 Cal. 229, as to converse of rule. Denied in State v. Collyer, 17 Nev. 285, holding con-

viction for assault with deadly weapon sustained by indictment for assault with intent to kill.

**45 Cal. 285-286. PEOPLE v. GILL.**

New Trial will be denied where evidence is conflicting, p. 286.

Cited to same effect in Territory v. Stone, 2 Dak. Ter. 172.

Possession of Stolen Property, when unexplained, shortly after its theft, is circumstance tending to show guilt, p. 286.

Cited to same effect in People v. Mitchell, 55 Cal. 238, holding, however, such possession, even if unexplained, not to raise presumption of guilt; People v. Clough, 59 Cal. 441, sustaining instruction taken from main case; People v. Velarde, 59 Cal. 463, and State v. En, 10 Nev. 281, sustaining similar instruction; and see State v. Loveless, 17 Nev. 428, as to instruction that certain facts were a circumstance "indicating" that defendant was not owner of property alleged to have been stolen. Cited, also, in note on general subject to Hunt v. Commonwealth, 70 Am. Dec. 447.

**45 Cal. 287-288. PEOPLE v. FENWICK.**

Proof of Good Character of prisoner is immaterial when facts show guilt clearly, p. 288.

Cited to same effect in People v. Smith, 59 Cal. 607, sustaining instruction on subject.

Good Character.—Evidence of is admissible on question of guilt of accused, p. 288.

Cited in People v. French, 137 Cal. 219, noted under People v. Ashe, 44 Cal. 288.

Errors in Instructions will not warrant reversal, if without injury to defendant, p. 288.

Cited to same effect in People v. Smith, 59 Cal. 604, as to various technical errors and irregularities.

**45 Cal. 289-291. PEOPLE v. WOODY.**

Act of Any Conspirator is act of all when all were present aiding and abetting common design, p. 290.

Cited in note on general subject to Spies v. People, 3 Am. St. Rep. 477.

Criminal Law.—Accused is entitled to benefit of whatever doubt may exist, p. 290.

Cited to same effect in Reynolds v. State, 8 Tex. App. 209, holding erroneous an instruction as to presumption of malice.

**Murder.—Instruction as to degree in which defendant was guilty is erroneous, p. 291.**

Cited to same effect in People v. Hunt, 59 Cal. 433, sustaining instruction given and holding determination of degree properly left to jury (and see People v. Bawden, 90 Cal. 197, distinguishing main case); People v. Ah Lee, 60 Cal. 86, holding erroneous instruction that no circumstances existed to reduce offense below first degree.

**45 Cal. 292-293. PEOPLE v. RAINA.**

**Evidence of Good Character** of defendant is to be considered as tending to establish innocence, in connection with other facts proven, p. 292.

Cited to same effect in People v. Shepardson, 49 Cal. 631, holding erroneous the rejection of instruction proposed by defendant; and People v. Doggett, 62 Cal. 29, ruling similarly as to instruction that such evidence may be sufficient to create reasonable doubt as to guilt; State v. Porter, 32 Or. 159, noted under People v. Ashe, 44 Cal. 288. Cited, also, in note on general subject to O'Bryan v. O'Bryan, 53 Am. Dec. 134.

**45 Cal. 293-294. PEOPLE v. WOODWARD. 13 Am. Rep. 176.**

**"Aider and Abettor"** does not include one present at commission of crime but who does not participate therein, p. 293.

Cited to same effect in State v. Tally, 102 Ala. 68, holding defendant guilty, however, as accomplice under facts stated. Cited, also, in note on general subject to State v. Hildreth, 51 Am. Dec. 375; Bailey v. Commonwealth, 3 Am. St. Rep. 91, as applied to rape; People v. Meran, 20 Am. St. Rep. 746; Woolweaver v. State, 40 Am. St. Rep. 671.

**45 Cal. 301-303. WEBBER v. WILCOX.**

**Sureties on Injunction Bond** given on preliminary injunction are not liable for damages accruing after injunction made perpetual, p. 302.

Cited to same effect in Lambert v. Haskell, 80 Cal. 622, 623, where final decree reversed on appeal, but allowing counsel fees on appeal from order refusing to dissolve such injunction when segregated from those paid generally in cause; Spencer v. Sherwin, 86 Iowa, 121, on point that liability on such bond cannot be extended by intendment to matters not expressly within its undertaking; cited, also, in San Diego etc. Co. v. Steamship Co., 101 Cal. 218, on point that such injunction, if granted before filing complaint, ends with failure to prosecute motion to continue it in force.

Preliminary Injunction is merged in final decree awarding perpetual injunction, p. 302.

Cited to same effect in *Sheward v. Citizens' etc. Co.*, 90 Cal. 638, denying right of appeal from order granting former, after entry of latter.

**45 Cal. 304-306. PEOPLE v. VALENCIA.**

Certificate of Probable Cause for appeal in criminal case is equivalent to certificate that case is debatable, p. 305 (note).

Cited to same effect in *In re Adams*, 81 Cal. 167, holding certificate grantable under facts and further that it should be granted unless case so clear as to admit of no rational doubt or serious discussion.

**45 Cal. 306-316. PEOPLE v. STOCKTON AND VISALIA RAILROAD COMPANY.** 13 Am. Rep. 178.

**Corporations.**—Statutes as to formation of need be only substantially complied with, p. 313.

Cited to same effect in *People v. Lodge*, 128 Cal. 263, but holding no substantial compliance shown with sections 292, 593, 594, Civil Code; *People v. Montecito etc. Co.*, 97 Cal. 278, 33 Am. St. Rep. 173, 174, holding, however, no such compliance shown when articles not acknowledged by all incorporators; *State v. Inhabitants*, 2 Idaho, 913, as to proceedings to incorporate town, and holding substantial compliance shown. Cited, also, in note on general subject to *People v. Montecito etc. Co.*, 33 Am. St. Rep. 178.

**Deposit on Railroad Subscriptions** may be paid by check if in good faith and payable in praesenti, p. 313.

Cited in note on general subject to *Parker v. Thomas*, 81 Am. Dec. 398; *Durrant v. Abendroth*, 25 Am. Rep. 162, on special partner's payment of capital by check.

**45 Cal. 313-321. CITY OF SAN JOSE v. FULTON.**

**Writ of Assistance** is a summary proceeding, p. 318.

Cited in *Kerr v. Brawley*, 193 Ill. 207, denying appellate jurisdiction from order granting issuance.

**Writ of Assistance** is improper where right of defendant to possession has been changed by agreement with purchaser after sale, p. 318.

Cited to same effect in *Langley v. Voll*, 54 Cal. 438, denying application by purchaser's grantees under similar facts, and further discussing right to writ of stranger to suit; *Stanley v. Sullivan*, 71 Wis. 587, 5 Am. St. Rep. 247, where defendant set up homestead exemption. Distinguished in *Farmers' etc. Co. v. Chicago etc. Co.*, 44 Fed. Rep. 661, holding no waiver or relinquishment on part of purchaser shown. Cited, also, in note to *Wilson v. Polk*, 51 Am. Dec. 152-158, on general subject and various syllabi hereof.

**Writ of Assistance.**—Appeal lies from order refusing to set aside, when granted ex parte to stranger to original suit, p. 319.

Cited to same effect in Southern Cal. Ry. Co. v. Superior Court, 127 Cal. 421, noted under Gilman v. Contra Costa Co., 8 Cal. 52; Credits Com. Co. v. Superior Court, 140 Cal. 85, noted under People v. Grant, 45 Cal. 98; Beach v. Spokane etc. Co., 21 Mont. 8, noted under Calderwood v. Peyser, 42 Cal. 110; Green v. Hebbard, 95 Cal. 41, awarding mandamus to fix amount of stay bond on such appeal, and see Pignaz v. Burnett, 119 Cal. 162. Distinguished in Harper v. Hildreth, 99 Cal. 269, denying right of appeal from various orders refusing to set aside prior orders.

**Writ of Assistance.**—Notice of application for should be given to defendant and terre tenants, p. 320.

Cited to same effect in McLane v. Piaggio, 24 Fla. 100, holding such the better practice.

**Grantee of Execution Purchaser** is not entitled to writ of assistance, p. 320.

Distinguished in Gibson v. Marshall, 64 Miss. 75, granting writ to purchaser for benefit of his grantee.

#### 45 Cal. 321-323. PEOPLE v. DONAHUE.

**Errors in Instructions** will not justify reversal when evidence not in record, unless improper under any possible condition of evidence, p. 322.

Cited to same effect in People v. Wong Fook Sam, 146 Cal. 115, applying rule to instructions in prosecution for perjury; People v. Strong, 46 Cal. 303, sustaining instruction of as legal effect of prisoner's attempt to escape; People v. Smith, 57 Cal. 132, sustaining refusal to give instruction on theory that it was abstract, evidence not appearing in record; and see on same point People v. Gilbert, 80 Cal. 112; State v. Loveless, 17 Nev. 428, as to instruction that certain facts were a circumstance indicating defendant not to be owner of alleged stolen property; State v. Mason, 24 Mont. 344, noted under People v. Levison, 16 Cal. 98; Walker v. Superior Court, 135 Cal. 374, discussing right to compel settlement of bill.

#### 45 Cal. 323-337. TAYLOR v. WESTERN PACIFIC RAILROAD COMPANY.

**Jury.**—Right of peremptory challenge in civil cases need not be exercised until twelve competent jurors empaneled, p. 329.

Cited to same effect in Silcox v. Lang, 78 Cal. 124, granting right of peremptory challenge although juror once passed as satisfactory, but not sworn; Vance v. Richardson, 110 Cal. 416, holding right of such challenge waived by failure to exercise it in regular turn; United States

v. Davis, 103 Fed. 460, construing local (Tennessee) statute, but holding federal courts not barred by state practice.

**Railroad Company is Liable to third persons for negligent act of its switchman, p. 334.**

Cited to same effect in Overacre v. Blake, 82 Cal. 81, applying rule to liability of principal for agent's deceit; Smith v. Atchison etc. Co., 25 Kan. 745, as to acts of mining company in management of cars furnished by railroad company; Burton v. Galveston etc. Co., 61 Tex. 533, as to acts of persons employed and paid by company though road not formally turned over to it. Distinguished in Brady v. Chicago etc. Co., 114 Fed. 110, holding railroad not liable for negligence of employee of depot company over whom it had no power of control.

**Damages for Death of Father through negligence are confined to just compensation, irrespective of death of mother before trial, p. 335.**

Cited to same effect in Kansas etc. Co. v. Lundin, 3 Colo. 103, discussing conflicting authorities and holding probable accumulations of deceased during rest of life to be true criterion. Distinguished in Illinois etc. Co. v. Crudup, 63 Miss. 304, holding erroneous the admission of mortuary tables as to life of deceased and confining such injury to life of plaintiff, his son; Peterman v. Northern Pac. Ry. Co., 105 Fed. 336, construing Idaho statute taken from California statute discussed in main case. Cited, also, in note on damages for death to Carey v. Berkshire etc. Co., 48 Am. Dec. 639; Louisville etc. Co. v. Goodykoontz, 12 Am. St. Rep. 379.

**Substitution on Death of Plaintiff may be made on suggestion and proof of death and ex parte motion, p. 336.**

Cited to same effect in Kittle v. Bellegarde, 86 Cal. 561, as to substitution of executor without notice, and holding further as to form of proceedings thereafter; Ford v. Bushard, 116 Cal. 276, discussing substitution of assignee and proof of assignment; Ex parte Connaway, 178 U. S. 431, construing United States Revised Statutes, section 955, in case of death of defendant after service; Wood v. Watson, 107 N. C. 55, holding, however, judgment in favor of dead defendant not void, although no substitution made. Cited, also, in note on general subject to White v. Johnson, 50 Am. St. Rep. 741.

#### 45 Cal. 337-342. RUSSELL v. DENNISON. S. C. 50 Cal. 243.

**Errors in Admission of Testimony will not be considered on appeal unless exceptions taken to rulings when made, p. 338.**

Cited to same effect in Dickerson v. Dickerson, 108 Cal. 352, as to refusal to admit evidence; Lee v. Murphy, 119 Cal. 368, as to admission of mortgage; Pielke v. Chicago etc. Co., 6 Dak. Ter. 448, applying rule to alleged errors in instructions.

**Instructions to Jury.**—When jury return for further instructions, court need repeat only those requested by them, p. 338.

Cited to same effect in *Freezer v. Sweeney*, 8 Mont. 512, on point that court cannot on such return reopen case for new testimony.

**New Trial for Newly Discovered Evidence** will be denied where evidence cumulative and procurable at first trial, p. 339.

Cited to same effect in *Brown v. Evans*, 8 Saw. 495, 17 Fed. Rep. 917, denying new trial upon same reasons.

**Exemplary Damages** may be awarded in action for malicious prosecution, p. 341.

Cited to same effect in *Brown v. Evans*, 8 Saw. 491, 17 Fed. Rep. 914, as to aggravated assault. Cited, also, in note on general subject to *Austin v. Wilson*, 50 Am. Dec. 768.

**Damages.**—Verdict will not be disturbed as excessive unless so disproportionate to injury as to show rendition under influence of passion or prejudice, p. 342.

Cited to same effect in *Gorman v. Southern Pacific Co.*, 97 Cal. 7, 33 Am. St. Rep. 161, sustaining verdict for five hundred dollars for wrongful expulsion of passenger from train; *Brown v. Evans*, 8 Saw. 491, 496, 17 Fed. Rep. 914, 918, ruling similarly as to verdict for over eight thousand dollars for assault and battery, and holding exemplary damages allowable. Distinguished in *Phelps v. Cogswell*, 70 Cal. 203, reducing verdict for malicious prosecution from four thousand to one thousand dollars.

#### 45 Cal. 342-344. PEOPLE v. COX.

**Fraudulent Resale of Land** does not include giving mortgage upon it after sale to another, p. 343.

Cited to same effect in *Stewart v. Scott*, 54 Ark. 191, on point that mortgage is not sale, discussing title of mortgagor; dissenting opinion in *Ex parte Brenner*, 3 Wyo. 415, holding defendant not guilty where sale followed mortgage.

#### 45 Cal. 344-365. KIMBALL v. RECLAMATION FUND COMMISSIONERS.

**Swamp Lands.**—State assumed obligation, on grant to it of these lands, to reclaim them, p. 360.

Cited to same effect in *Lamb v. Reclamation District*, 73 Cal. 133, 2 Am. St. Rep. 781, sustaining right of reclamation district to erect levee to aid in such reclamation.

**Swamp Lands.**—Legislature may modify existing system of reclamation, p. 363.

Cited to same effect in *Kings County v. Tulare County*, 119 Cal. 516,

sustaining power to control custody of swamp land fund on creation of new county.

**45 Cal. 365-379. OAKLAND RAILROAD CO. v. OAKLAND, BROOKLYN & FRUITVALE RAILROAD CO.** 13 Am. Rep. 181.

**Forfeiture of Franchise** declared by statute does not require to be established by judicial declaration, p. 373.

Cited to same effect in dissenting opinion in *Omnibus etc. Co. v. Baldwin*, 57 Cal. 179, main opinion (distinguishing principal case, page 169) holding no forfeiture shown under facts; *Attorney General v. Chicago etc. Co.*, 112 Ill. 538, as to forfeiture declared by new state constitution; *State v. Boyce*, 43 Ohio St. 50, holding, however, no forfeiture declared by statute (and see, on same point, *Application of Brooklyn etc. Co.*, 125 N. Y. 441, and *Galveston etc. Co. v. State*, 81 Tex. 595, distinguishing main case). Distinguished, also, in *Hornbrook v. Elm Grove*, 40 W. Va. 548, holding judicial determination necessary in case of municipal corporation. Denied in *Bybee v. Oregon etc. Co.*, 139 U. S. 677 (quoted in *Utah etc. Co. v. Utah etc. Co.*, 110 Fed. 891), holding land grant to railroad under 14 U. S. Stats. 239, not forfeited per se by failure to complete road within the time limited; *California Reduction Co. v. Sanitary Reduction Works*, 126 Fed. 44, validity of franchise granted by city is not collaterally attackable by private party in equity on ground of failure to perform conditions imposed. Cited, also, in notes on general subject to *Atchison etc. Co. v. Nave*, 5 Am. St. Rep. 806, 807, and *State v. Atchison etc. Co.*, 8 Am. St. Rep. 197.

**Franchise** has legal character of an estate or property, p. 373.

Cited to same effect in *Spring Valley W. W. v. Schottler*, 62 Cal. 110, discussing taxation of water franchise.

**Forfeiture Declared by Statute** vests title to forfeited property in state immediately on happening of event for which forfeiture declared, p. 373.

Cited to same effect in *Upham v. Hosking*, 62 Cal. 258, holding forfeiture shown under facts; *Arcata v. Arcata etc. Co.*, 92 Cal. 646, holding, however, forfeiture not declared by statute under facts and judicial determination necessary; *State v. Emmert*, 19 Kan. 549, applying rule to forfeiture of interest of school lands for nonpayment therefor. Cited, also, in notes on general subject under first syllabus.

**Street Railroad Corporation** may be authorized by city council, under act of 1870, to lay tracks in street, part of which already used by another road, p. 378.

Distinguished in *People v. Rich*, 54 Cal. 75, holding ordinance void under section 490 of the Civil Code, granting right to lay track for more than five blocks.

**45 Cal. 379-392. MOTT v. REYES.**

**Record on Appeal.**—Document included in brief will be considered by court although not included in transcript, p. 386.

Cited to same effect in *In re Cahill*, 74 Cal. 59, as to opinion of trial court so included, showing grounds of granting motion for new trial.

**Judgment Will not be Reversed** for errors which have produced no injury to appellant, p. 390.

Cited to same effect in *Townsley v. Hornbuckle*, 2 Mont. 584, as to order denying motion to strike out parts of answer, and compelling replication.

**45 Cal. 394-395. LACORE v. LEONARD.**

**Mechanic's Liens.**—Decree of foreclosure may be changed to simple money judgment when lien shown to have expired, p. 394.

Cited in *Miller v. Carlisle*, 127 Cal. 330, on point that money judgment may be rendered in foreclosure action when lien is unenforceable.

**45 Cal. 395-398. PEOPLE v. BOARD OF SUPERVISORS.**

**Mandamus** denied to compel supervisors to order election, p. 395.

Cited in *County v. Gage*, 139 Cal. 403, on point that writ will be granted only in case of plain abuse of discretion or duty.

**Public Officers.**—Performance of duty, made dependent on happening of event, cannot be refused arbitrarily or capriciously because he is not satisfied of its having happened, p. 397.

Cited to same effect and explained in *Stockton etc. Co. v. Stockton*, 51 Cal. 339 (cited in note to *Weeden v. Town Council*, 98 Am. Dec. 397), as to refusal of common council to certify to construction of railroad in manner acceptable to them. Cited, also, in *Shotwell v. Covington*, 69 Miss. 737, on point that power to approve official bonds is ministerial.

**45 Cal. 399-405. WILSON v. WILSON.**

**Permanent Alimony** for support of child may be granted after decree for its past as well as its future support, p. 402.

Cited to same effect in *McKay v. McKay*, 125 Cal. 69, but held inapplicable under present statutes (Civ. Code, secs. 138, 139); *Sharon v. Sharon*, 75 Cal. 46, on point that permanent alimony may provide for payment from commencement of action or from defendant's appearance therein; *McKay v. Superior Court*, 120 Cal. 146, sustaining award of such alimony after making of decree of divorce. Distinguished in *Chester v. Chester*, 17 Mo. App. 659, 660, denying application for such allowance by wife five years after divorce decree awarding alimony in gross.

**Decree of Divorce** awarding alimony for support of child cannot be modified by stipulation of parents, p. 403.

Cited to same effect in Parkhurst v. Parkhurst, 118 Cal. 22, discussing effect of such stipulation as estoppel on wife. Cited, also, in note on general subject to Hall v. Green, 47 Am. St. Rep. 317.

**45 Cal. 406-429. REDINGTON v. WOODS.** 13 Am. Rep. 190.

**Drawee of Forged Check** cannot recover back from innocent holder moneys paid him thereon, p. 410.

Cited to same effect in First Nat. Bank v. First Nat. Bank, 4 Ind. App. 360, 51 Am. St. Rep. 225, holding holder liable, however, when drawer alone not in the wrong as to the transaction; First Nat. Bank v. Marshalltown St. Bank, 107 Iowa, 329, denying right of drawee bank to recover back moneys so paid, although acting without negligence; Crocker-Woolworth Bank v. Bank, 139 Cal. 581, on point that rule as to genuineness of check presented by indorser does not extend to special indorsement made by clearing-house; and cf., dissenting opinion, p. 588. Distinguished in Canadian Bank v. Bingham, 30 Wash. 492, bank paying forged check may, within reasonable time, recover amount thereof from bank which took check in due course of business and negligently paid money upon indorsement of check by payee named. Cited, also, in note on general subject to People's Bank v. Franklin Bank, 17 Am. St. Rep. 896.

**Drawee of Altered Check** may recover back from holder excess of money paid him thereon, as upon failure of consideration, pp. 419, 429.

Cited to same effect in dissenting opinion in Sutro v. Rhodes, 92 Cal. 128, 129, main opinion denying right of purchaser of overissued bonds to recover back their purchase price, when sold in good faith and without express warranty; Crane v. Horton, 5 Wash. 482, on point that bank need not regard handwriting in body of check, but must look to signature alone. Distinguished in Cranford v. West Side Bank, 100 N. Y. 57, 53 Am. Rep. 156, holding drawer of check not liable to drawee where date was altered, under facts. Cited, also, in note on general subject to Laborde v. Consolidated Association, 39 Am. Dec. 523; People's Bank v. Franklin, 17 Am. St. Rep. 890.

**Drawee of Altered Check** is barred as to action for repayment by failure to return or to offer to return it to payee, p. 424.

Cited to same effect in United States v. National Exchange Bank, 45 Fed. Rep. 168, holding drawee released from liability for payment on forged indorsement by drawee's laches under facts. Cited, also, in note on general subject to Laborde v. Consolidated Association, 39 Am. Dec. 526.

**Holder of Check** guarantees genuineness of prior indorsements and validity of his title thereto, p. 428.

Cited in *Town v. Bowler*, 107 U. S. 542, on point that burden of proof is on holder to show that he is holder for value on proof of fraud or illegality in inception of instrument, and discussing rights of bona fide holders of municipal bonds.

#### 45 Cal. 429-433. EX PARTE GUTIERREZ.

**Ex Post Facto Law.**—Code provision that second conviction of petty larceny shall be punished as felony is not ex post facto where second crime committed after provision took effect, p. 431.

Cited in dissenting opinion in *People v. Stanley*, 47 Cal. 119, on point that such provision is not unconstitutional as placing defendant again in jeopardy or inflicting unusual punishment; and *People v. King*, 64 Cal. 338, on same point, holding, further, that admission of prior conviction is insufficient unless also pleaded in information; *Commonwealth v. Marchard*, 155 Mass. 9, holding second conviction to be for "similar offense" under statute; *In re Miller*, 110 Mich. 677, 64 Am. St. Rep. 377, as to statute denying benefits of credits to criminals under second sentence; *Blackburn v. Tucker*, 72 Miss. 747, on point that prohibition as to charitable bequests takes effect where testator died after act, though will executed before it; *Blackburn v. State*, 50 Ohio St. 438, holding constitutional and construing local "habitual criminal act." Cited, also, in note to *People v. Hayes*, 37 Am. St. Rep. 589, on general subject.

**Penal Statutes.**—Rule as to strict construction is abolished by codes, p. 431.

Cited in *Snell v. Bradbury*, 137 Cal. 382, construing sec. 1183, C. C. P., but doubted.

#### 45 Cal. 433-439. SCHADT v. HEPPE.

**Order Creating Probate Homestead removes it from assets of estate and control of probate court**, p. 437.

Cited to same effect in *Estate of Burton*, 63 Cal. 38, holding application not to be denied because of adverse claim of title; *In re Ackerman*, 80 Cal. 210, 13 Am. St. Rep. 117, holding, further, denying right of surviving spouse to probate homestead from decedent's separate estate where homestead declared on community property during lifetime of both spouses; *McCloy v. Arnett*, 47 Ark. 454, holding void a probate sale of reversionary interest in homestead (not probate); *Durland v. Seiler*, 27 Neb. 37, on point that homestead selected by husband in lifetime is not liable for his debts upon his death and cannot be ordered sold by probate court.

**Parties in Foreclosure.**—Administrator of mortgagor is not necessary or proper defendant where probate homestead declared on property and no deficiency judgment sought, p. 437.

Cited to same effect in Gutzeit v. Pennie, 98 Cal. 328, where property conveyed to third persons and all recourse against estate waived.

**Mortgage Claim Need Not Be Presented** when property set apart as probate homestead and no deficiency claim is made, p. 437.

Cited to same effect in Bull v. Coe, 77 Cal. 63, as to waiver of and failure to present claim against husband's estate where mortgage covered homesteaded separate property of wife. Distinguished in Pitt v. Shipley, 46 Cal. 160, and Harp v. Calahan, 46 Cal. 230, holding presentation necessary where mortgaged property belonged to general assets of estate; Bush v. Adams, 22 Fla. 190, ruling similarly where mortgage was given to secure debt of third person.

#### 45 Cal. 439-445. STOOPS v. WOODS.

**Former Judgment is not Bar** unless real parties are same in both suits, p. 445.

Cited to same effect in Building etc. Association v. Chalmers, 75 Cal. 334, 7 Am. St. Rep. 174, on point that wife's right to homestead cannot be concluded by judgment in former action in which husband alone was party; Bernard v. Merrill, 91 Me. 362, holding father not barred in suit for loss of services of child by prior judgment against child suing by father as next friend.

#### 45 Cal. 446-454. DUPOND v. BARSTOW.

**Act Quieting Titles in San Francisco** relinquished title of United States to lands embraced therein in trust for bona fide holders, p. 450.

Cited to same effect in Baker v. Brickell, 87 Cal. 334, discussing character of title of city as successor to former pueblo.

**Act Quieting Titles in San Francisco** required payment of taxes by or on behalf of person in possession or entitled to possession if ousted, p. 451.

Cited to same effect in Randell v. Austin, 46 Cal. 62, construing acts of 1868 and 1870 as to conveyances of outside lands.

**Act Quieting Titles in San Francisco** granted to legislature right to prescribe terms and conditions of conveyance to beneficiaries, p. 452.

Cited to same effect in Newman v. San Francisco, 92 Cal. 381, discussing effect of noncompliance with order 800 of board of supervisors.

**San Francisco.**—Person not entitled to conveyance cannot question validity of grant to another, p. 454.

Cited in San Francisco etc. Co. v. Hartung, 138 Cal. 228, noted under *Le Roy v. Cunningham*, 44 Cal. 599.

**45 Cal. 455-467. DRAKE v. DUVENICK.**

On collateral attack on judgments all intendments are indulged in support of judgments of courts of superior jurisdiction, p. 462.

Cited to same effect in Butler v. Soule, 124 Cal. 72, noted under Carpentier v. Oakland, 30 Cal. 439; Galvin v. Palmer, 134 Cal. 429, presuming second judgment to have been properly entered when record is silent; Wiggin v. Superior Court, 68 Cal. 400, as to recital that prior judgment was made inadvertently and *ex parte*; Crim v. Kessing, 89 Cal. 484, 23 Am. St. Rep. 494, as to recital of substitution of plaintiff, where order of substitution not entered by clerk; Colton etc. Co. v. Swartz, 99 Cal. 283, as to rendition of second judgment although no proof made of annulment of first; Treadway v. Eastburn, 57 Tex. 214, on point that recital in judgment is conclusive on collateral attack.

**Default Judgment** can be rendered by court without formal entry of default by clerk, p. 462.

Cited to same effect in Herman v. Santee, 103 Cal. 522, 42 Am. St. Rep. 146, where clerk's entry held void because proof of service insufficient; Hibernia etc. Soc. v. Matthai, 116 Cal. 426, although original summons with proof of service lost from files—and holding further as to amendment of record to supply such proof, after entry of judgment.

**Entry of Default.**—Purpose is to limit time for filing of answer which never extends beyond trial and judgment, p. 463.

Cited to same effect in Manville v. Parks, 7 Colo. 137, holding waiver of default by plaintiff not to prejudice defendant; Sieber v. Frink, 7 Colo. 150, allowing filing and answer after expiration of time, where no default entered.

**Judgment Cannot be Attacked Collaterally because of informality of return of service of summons**, p. 463.

Cited to same effect in Sacramento etc. Bank v. Spencer, 53 Cal. 740, as to service of summons alone on one defendant where return silent as to service of complaint and summons on codefendant; Cardwell v. Sabichi, 59 Cal. 493, holding return of service of copy sufficiently definite to authorize default judgment; Keybers v. McComber, 67 Cal. 399, applying principle to default judgment in justice's court where erroneous form of summons used; In re Eichhoff, 101 Cal. 603, sustaining judgment against resident, although no return filed nor recital of service in judgment; and Herman v. Santee, 103 Cal. 523, 42 Am. St. Rep. 146, ruling similarly where amended affidavit of service filed, although first affidavit showed service by unauthorized person; Burke v. Interstate etc. Assn. 25 Mont. 325, noted under Dorente v. Sullivan, 7 Cal. 279; Stoddard etc. Co. v. Mattice, 10 S. Dak. 255, noted under Crane v. Brannan, 3 Cal. 193; Cunningham v. Spokane etc. Co., 20 Wash. 452, 72 Am. St. Rep. 152, quoting Herman v. Santee, 103 Cal. 519. Cited, also, in note on general

subject to *Coit v. Haven*, 79 Am. Dec. 249; *Sanford v. Edwards*, 61 Am. St. Rep. 486.

Want of Jurisdiction differs from irregularity in obtaining jurisdiction, p. 463.

Cited to same effect in *Cardwell v. Sabichi*, 59 Cal. 494, holding default judgment not void on collateral attack for insufficiency of return of service; *Curtis v. Underwood*, 101 Cal. 670, discussing validity of service of notice of probate.

#### 45 Cal. 467-482. **BURKE v. CASSIN.** 13 Am. Rep. 204.

Trademark does not include word in common use indicating name, etc., of article, p. 478.

Cited to same effect in *Smith v. Walker*, 57 Mich. 474, as to designation of quality; *Koehler v. Sanders*, 122 N. Y. 83, as to words "International Baking Co."; *Dunbar v. Glenn*, 42 Wis. 137, 24 Am. Rep. 398, as to geographical names, but sustaining "Bethesda Water." Cited, also, in notes on general subject to *Lea v. Deakin*, 11 Biss. 26; 15 Fed. Cas. 96; *Partridge v. Minck*, 47 Am. Dec. 292.

Label.—Colorable imitation of will be enjoined at instance of one originally using same, p. 481.

Cited to same effect in *Metcalfe v. Brand*, 86 Ky. 353, 9 Am. St. Rep. 294, granting injunction as to label; *Robertson v. Berry*, 50 Md. 598, 33 Am. Rep. 331, ruling similarly as to almanac; *Gilman v. Hunnewell*, 122 Mass. 152, denying injunction for want of such imitation, and holding further as to trademarks; *Conrad v. Brewing Co.*, 8 Mo. App. 283, sustaining action for damages, in nature of deceit; *Skinner v. Oakes*, 10 Mo. App. 54, discussing right of man to use own name as trademark after sale of its use. Cited, also, in note on general subject to *Popham v. Cole*, 23 Am. Rep. 27; *Parlett v. Guggenheimer*, 1 Am. St. Rep. 421, on protection of trademarks.

#### 45 Cal. 482-485. **ALFORD v. BARNUM.**

"Mineral Land" is such as contains metals in quantities sufficient to render it available and valuable for mining purposes, p. 484.

Cited to same effect in *Merrill v. Dixon*, 15 Nev. 407, excluding evidence of designation on township plat as containing quartz; *Davis v. Wiebold*, 139 U. S. 519 (cited in 11 Mont. 336), discussing townsite entries; *United States v. C. P. R. R. Co.*, 93 Fed. 873, holding evidence insufficient to establish land as mineral; *Cleary v. Skiffich*, 28 Colo. 368, millsite cannot be located upon mineral land. Distinguished in *Shreve v. Copper Bell etc. Co.*, 11 Mont. 340, holding definition inapplicable under section 2319 of United States Revised Statutes, and local laws.

License to construct ditch must be pleaded, in action to abate it as nuisance, p. 485.

Cited to same effect in *Dorris v. Sullivan*, 90 Cal. 288, as to license to withdraw water from ditch, and holding, further, as to effect of statute of frauds on such license if verbal; *Cone v. Ivinson*, 4 Wyo. 242, as to pleading of consent to sale.

45 Cal. 485-495. **CUNNINGHAM v. ASHLEY.**

**Judgment Against Administrator** in ejection binds heirs, p. 492.

Approved in *Bell v. Mills*, 123 Fed. 27, under California Code notice of sale of pledge must be given to executor of deceased pledgor.

Cited to same effect in *Bayly v. Muehe*, 65 Cal. 349 (cited in *Hyde v. Heller*, 10 Wash. 602, and *Hearfield v. Bridges*, 75 Fed. Rep. 51, and see 52), on point that heirs of deceased mortgagor are not necessary codefendants with administrator in action to foreclose; and on same point in *Finger v. McCaughey*, 119 Cal. 60, where widow was also administratrix; *Spotts v. Hanley*, 85 Cal. 167, holding, further, that judgment in administrator's favor inures to grantee of sole heir before the judgment; *Meeks v. Vassault*, 3 Saw. 213, 16 Fed. Cas. 1317 (and see *Meeks v. Olpherts*, 100 U. S. 571), as to bar of statute of limitations; *Sharon v. Terry*, 13 Saw. 410, 36 Fed. Rep. 353, discussing right of executor to bring bill of revivor; *Lloyd v. Hall*, 77 Fed. Rep. 368, as to suit against administrator to set aside fraudulent conveyance and enjoining subsequent action by heirs against successful plaintiff therein. Cited, also, in *Walker v. Kronkite*, 40 Fed. Rep. 136, denying right of execution debtor to attack collaterally execution sale.

**Administrator Represents Heirs and Creditors** in actions involving interests of estate, p. 493.

Cited to same effect in *McLeran v. Benton*, 73 Cal. 342, 2 Am. St. Rep. 821 (cited in *Patchett v. Pacific Coast etc. Co.*, 100 Cal. 510), on point that bar of executor by limitation bars heirs, although then minors; *Spotts v. Hanley*, 85 Cal. 167, as to effect of judgment by or against administrator as estoppel; *Dennis v. Bint*, 122 Cal. 44, 68 Am. St. Rep. 22, on point that bar of administrator by limitation bars heirs also, even though minors; *Jenkins v. Jensen*, 24 Utah, 123, where an administrator neglected to bring action within time prescribed, heir of intestate is also barred though he was a minor at accrual of action in favor of administrator; *Hyde v. Heller*, 10 Wash. 602, as to validity of conveyance by administrator.

45 Cal. 495-511. **BOWERS v. CHEROKEE BOB.** S. C. 46 Cal. 279.

**Forcible Entry and Detainer.**—Plaintiff must show actual and peaceable possession, p. 502.

Cited to same effect in *Conroy v. Duane*, 45 Cal. 601, discussing essentials of plaintiff's proof in such actions; *Voll v. Butler*, 49 Cal. 75, holding "scrambling" possession shown insufficient for basis of action;

**Bank v. Taaffe**, 76 Cal. 628, 629, following principle but holding possession sufficient under facts; **Murry v. Burris**, 6 Dak. Ter. 184, allowing testimony by defendant as to nature of plaintiff's possession; **Milligan v. Cuff**, 14 Mont. 373, holding only "scrambling possession" shown; and **Brooks v. Warren**, 5 Utah, 122, on same point. Cited, also, in note on general subject to **Beeler v. Cardwell**, 77 Am. Dec. 552.

**Tenant in Common** may sue alone for forcible entry on the common property, p. 509.

Cited to same effect in **Lewis v. Oesterreicher**, 47 Mo. App. 73, sustaining action by ousted cotenant against the other; and note to **Marshall v. Palmer**, 50 Am. St. Rep. 845, on same point.

**General Citation.**—**Stewart v. Miles**, 80 Mo. App. 29.

**45 Cal. 515-519. JOHNSON v. MOSS.**

**Variance.**—Nonsuit will be granted where contract declared on was not that proved, p. 517.

Cited to same effect in **Sigourney v. Zellerbach**, 55 Cal. 440, on point that pleadings must be sufficient to warrant relief granted; and on same point in **Reed v. Norton**, 99 Cal. 619, both reversing judgments as being inconsistent with complaints; **Owen v. Meade**, 104 Cal. 183, as to admission of evidence of contract other than that alleged; **Elmore v. Elmore**, 114 Cal. 521, discussing defendant's remedies in case of variance, and holding right to nonsuit not waived by failure to object to evidence; dissenting opinion in **Territory v. Rowand**, 8 Mont. 123, main opinion holding variance waived by failure to object to evidence; **McMahon v. Canadian Ry.**, 40 Or. 152, where plaintiff pleaded oral agreement but on trial admitted execution and validity of written contract for same services, different from alleged oral one, nonsuit properly granted; and see dissenting opinion in **South Carolina etc. Co. v. Barrett**, 12 S. C. 178; **Child v. Ptomey**, 17 Mont. 508, sustaining nonsuit under pleadings; **Brace v. Doble**, 3 S. Dak. 419, holding question of variance not presentable after judgment when not raised at trial. Cited, also, in note to **French v. Smith**, 24 Am. Dec. 623, on granting of nonsuit.

**Action for Breach of Contract** will not lie where plaintiff had previously violated it, p. 518.

Distinguished under facts in **James v. Hicks**, 58 Mo. App. 527, confining rule to persons in confidential relations.

**45 Cal. 519-522. CALDERWOOD v. BROOKS.**

**Action to Quiet Title** may be maintained, although possession obtained collusively, p. 521.

Cited to same effect in **Scorpion etc. Co. v. Marsano**, 10 Nev. 378, as to possession acquired by force; and on same point in **Phillippi v. Leet**, 19 Colo. 253.

Notes Cal. Rep.—145.

**45 Cal. 522-527. GREEN v. OPHIR COPPER, SILVER AND GOLD-MINING COMPANY.**

Errors in Instructions will not warrant reversal where verdict would have been same if instructions had been correct, p. 527.

Cited to same effect in Aguirre v. Alexander, 58 Cal. 39; In re Briswarter, 72 Cal. 110; In re Spencer, 96 Cal. 454; and S. C. page 450, as to errors in admission of testimony; Lima v. County Bank, 142 Cal. 248, holding instructions not prejudicial; Bishop v. Stewart, 13 Nev. 44.

Declaration of President of Corporation as to disclaimer of property is admissible against it, p. 527.

Approved in Pacific Livestock Co. v. Gentry, 38 Or. 286, statements of general superintendent of company which was trying to acquire land, that occupant thereof was company's employee, made to occupant's acquaintance during inquiry as to character, are admissible against company in action between it and occupant over title to land; note to Moore v. Bettis, 53 Am. Dec. 775, on admissions by agent.

**45 Cal. 527-541. CHIPLEY v. FARRIS.**

Mexican Grant did not give perfect title unless approved by departmental assembly, p. 538.

Cited to same effect in Taylor v. Escandon, 50 Cal. 429, as to necessity for presentation of such claim for confirmation.

Patent Under Act of 1851 did not require acceptance by patentee, p. 539.

Cited to same effect in Miller v. Ellis, 51 Cal. 74, holding delivery not essential to vesting of title; and on same point in Houghton v. Hardenberg, 53 Cal. 182, sustaining action to compel delivery to patentee by official custodian; Cruz v. Martinez, 53 Cal. 243, on point that title vests on signing of patent and recording in general land office; Eltzroth v. Ryan, 89 Cal. 139, applying rule to other patents, and holding further as to recording and as to proof of lost patent; Le Roy v. Clayton, 2 Saw. 496, 15 Fed. Cas. 359, as to delivery, and holding recording equivalent thereto.

Survey on Which Patent is based controls description in decree of confirmation, p. 530.

Cited to same effect in dissenting opinion in Younger v. Pagles, 60 Cal. 525, as to conflict between survey and juridical possession; People v. San Francisco, 75 Cal. 397, holding patent to San Francisco conclusive under act of 1864 when based on survey (but see dissenting opinion, page 406, and opinions in United Land Association v. Knight, overruling this case, and citing main case, 85 Cal. 465, 484, and concurring opinion in S. C. 142 U. S. 204); De Guyer v. Banning, 91 Cal. 402, and S. C. 167 U. S. 742, holding further such patent conclusive against

claimant under it as to extent of claim; *Valentine v. Sloss*, 103 Cal. 220, where rule declared no longer open for discussion.

**Patent is Conclusive on collateral attack against claimant thereunder as to lands to which he was entitled**, p. 540.

Cited to same effect in *Miller v. Grunsky*, 141 Cal. 457, noted under *Moore v. Wilkinson*, 13 Cal. 478; *United States v. Peralta*, 99 Fed. 631, holding patent conclusive as to location and extent of original Spanish grant; *Cruz v. Martinez*, 53 Cal. 243, as to publication of survey; *Carey v. Brown*, 58 Cal. 185, as to allegation that claim included other or different lands than those patented; and see cases cited under preceding syllabus.

#### 45 Cal. 541-543. JONES v. GILLIS.

**Purchaser at Tax Sale without notice cannot be defeated in ejectment by proof of irregularities in assessment-roll**, p. 543.

Cited to same effect in dissenting opinion in *Mayo v. Haynie*, 50 Cal. 75, main opinion holding deed not conclusive as against one not party to tax suit and who has paid tax; *Raley v. Guinn*, 76 Mo. 273, as to omission of dollar mark in assessment; tax judgment reciting giving of due notice of proceedings. Distinguished in *Martin v. Parsons*, 49 Cal. 99, holding judgment in tax suit not conclusive as to service of defendants when procured by fraud. Cited also, in *Webber v. Clarke*, 74 Cal. 16, on point that sheriff's deed under judgment regular on face constitutes "color of title."

**Tax Suits.—Judgments in cannot be attacked collaterally**, p. 543.

Cited in *Crane v. Cummings*, 137 Cal. 202, noted under *Moore v. Martin*, 38 Cal. 428.

#### 45 Cal. 544-549. SPERRY v. SPAULDING.

**Holder of Note is presumed to have taken it for value, before dishonor and in regular course of business**, p. 549.

Cited to same effect in *Rahm v. Bridge Mfy.*, 16 Kan. 532, as to presumption of holding for value and indorsement before maturity. Cited, also, in note to *Bailey v. Smith*, 84 Am. Dec. 403, on purchase for value; *Bedell v. Herring*, 11 Am. St. Rep. 323, 324, on burden of proof of bona fide ownership.

**Holder of Note must prove affirmatively that he paid value therefor, when alleged to have been fraudulently put into circulation**, p. 549.

Cited to same effect in *Graham v. Larimer*, 83 Cal. 178 (cited in *Shain v. Goodwin*, 46 Fed. Rep. 567), applying rule to plea of illegality of consideration and holding further as to purging thereof; *Hazard v. Spencer*, 17 R. I. 564, where note fraudulently issued by defendant's agent; *Rische v. Planters' etc. Bank*, 84 Tex. 421, where fraudulent

combination made between payee and indorsee so as to preclude defense against acceptance.

**45 Cal. 550-553. HUSTON v. TWIN AND CITY CREEK TURNPIKE ROAD COMPANY.**

Proof of Damages is unnecessary where no issue made upon that point, p. 553.

Cited to same effect in Johnson v. Vance, 86 Cal. 114, where judgment rendered on pleadings.

Denial of Damage in exact sum claimed in complaint raises no issue, p. 553.

Cited to same effect in Conway v. Clinton, 1 Utah, 223, holding instruction as to amount of plaintiff's recovery on such denial, properly refused.

**45 Cal. 553-559. IN RE BULGER.**

Term of Office may be extended or abridged at pleasure of legislature, p. 557.

Cited to same effect in Spring Valley W. W. v. San Francisco, 61 Cal. 7, discussing power of state over its officers and agents; Ford v. Harbor Commissioners, 81 Cal. 27, applying rule to power of harbor commissioners to abolish office of collector appointed under section 2521 of the Political Code; Lane v. Kolb, 92 Ala. 641, as to power to abolish office; State v. Mount, 151 Ind. 701, noted under Christy v. Board, 39 Cal. 3; Sinking Fund Commissioners v. George, 104 Ky. 278, (270) quoting note to People v. Freeman, 13 Am. St. Rep. 130; Heath v. City, 16 Utah, 382, sustaining right of city to abolish offices in police department, under local statutes; State v. Howell, 26 Utah, 61, upholding Session Laws of 1901, page 109, chapter 108, abolishing office of city justice of peace in certain cities; County v. Timme, 32 Neb. 275, as to power to change term and salary when office created by act, but aliter when office created by constitution; State v. Kalb, 50 Wis. 183, as to power to change salary, and holding constitutional inhibition not to apply. Cited, also, in note to People v. Freeman, 13 Am. St. Rep. 129, 130, on legislative powers.

Officers.—Fire Commissioners may be appointed as legislature may direct, p. 559.

Cited in Ex parte Gerino, 143 Cal. 414, noted under People v. Provines, 34 Cal. 541.

**45 Cal. 559-564. HAYES v. MARTIN.**

Statute of Limitations as to Mexican Grant.—Party asserting adverse possession need not show claim in hostility to United States, p. 563.

Cited to same effect in *McManus v. O'Sullivan*, 48 Cal. 16, holding such possession sufficient if hostile merely to particular claim to which it is opposed in proof; *Lord v. Sawyer*, 57 Cal. 67, holding adverse possession sustainable against plaintiff though land held admittedly in subordination to government; *Allen v. McKay*, 120 Cal. 338, as to tide lands, claimed by plaintiff under state patent; *Francoeur v. Newhouse*, 14 Saw. 609, 43 Fed. Rep. 242, as to mineral land included in grant to railroad; *Northern Pacific etc. Co. v. Kranich*, 52 Fed. Rep. 912, as to lands claimed by defendant, a pre-emptioner under United States; *La Crosse v. Cameron*, 80 Fed. Rep. 272, as to easement, title in fee being confessedly elsewhere. Distinguished in *Beale v. Hite*, 35 Or. 180, holding adverse possession not maintainable unless under a claim of title; and to same effect, see *Altschul v. O'Neill*, 35 Or. 214, 216; note to *Schneider v. Hutchinson*, 78 Am. St. Rep. 481, on general subject; *Toltec Ranch Co. v. Babcock*, 24 Utah, 195, where defendant's vendor entered public lands which had been granted to railroad, and defendant inclosed and cultivated same and held in open and notorious possession more than twenty years after certificate of location filed, defendant had title as against railroad's grantee.

**Adverse Possession** may be asserted as to Mexican grant, although proceedings for confirmation then pending, p. 563.

Cited in *Anzar v. Miller*, 90 Cal. 345, as intimating that claimant may acquire new right by patent as to which he is not barred, and holding statute to run only from issuance of patent.

**Adverse Possession** is not defeated by purchase of property at tax sale, p. 654.

Cited to same effect in *Griffith v. Smith*, 27 Neb. 54.

**Adverse Possession** is interrupted by recognition of legal title, p. 564.

Cited to same effect in *Townsend v. Edwards*, 25 Fla. 588, on power that time runs from re-entry and that no interruption shown; *Union etc. Co. v. Dangberg*, 81 Fed. Rep. 91, discussing elements of prescription as to water right and holding none shown; *Oldeg v. Fisk*, 53 Neb. 161, noted under *Cannon v. Stockmon*, 36 Cal. 535.

#### 45 Cal. 564-572. **HOFFMAN v. VALLEJO.**

**Contract with Attorney** by which he is to have certain share of property recovered, or received in compromise, constitutes him equitable owner of that part, p. 572.

Cited to same effect in *Howell v. Budd*, 91 Cal. 351, as to similar agreement on probate proceedings, and holding such attorney a "party" to the proceedings within statute as to disqualification of judge; *Luco v. De Toro*, 91 Cal. 417, as to agreement to procure patent, holding attorney's rights not defeated under facts by employment of another

attorney, and further as to running of statute of limitations against trust created; *Bergen v. Frisbie*, 125 Cal. 169, sustaining contract for contingent fee as to matters pending before Secretary of the Interior; *Potter v. Ajax etc. Co.*, 22 Utah, 294, holding champerty in dealings between plaintiff and his attorney, not assertable by defendant against whom suit is brought on the claim; and on same point, cf, *Croco v. Oregon etc. Co.*, 18 Utah, 322, 324; *Wassell v. Armstrong*, 35 Ark. 275, holding contract to be one for contingent fee merely and not void under federal act of 1853; *Hickox v. Elliott*, 10 Saw. 429, 430, 22 Fed. Rep. 22, 23 (cited in S. C. 11 Saw. 636, 27 Fed. Rep. 838), holding further such contract valid if made in California though relating to lands in Oregon; *Courtright v. Burnes*, 3 McCrary, 84 (and note 68), 13 Fed. Rep. 320, 323, holding further champerty not pleadable as defense in suit as to which such agreement is alleged. Distinguished in *Ford v. Gregson*, 7 Mont. 99, holding contract void because imposing restraint upon compromises and settlements of litigation. Cited, also, in note on general subject to *Thallheimer v. Brinckerhoff*, 15 Am. Dec. 318, 320.

**45 Cal. 573-580. POLHEMUS v. HEIMAN. S. C. 50 Cal. 438.**

Vendee of Personality is liable for quantity received and retained though not all of quantity contracted for, p. 577.

Cited to same effect in *Willamette etc. Co. v. Union etc. Co.*, 94 Cal. 157, discussing vendee's remedies in case of part delivery; *Nicholls v. Reid*, 109 Cal. 633, on point that vendee cannot be required to accept part of quantity contracted for.

**Warranty** Consists of any affirmation made at time of sale as to quality or condition of thing sold, if so intended, p. 578.

Cited to same effect in S. C. 50 Cal. 441, as to sale of wool "in good order," and holding further evidence of custom inadmissible to control such express warranty; *McLennan v. Ohmen*, 75 Cal. 561, holding warranty of fitness shown by fact, and further that question is one of fact; *Felsenthal v. Haws*, 50 Minn. 185, holding warranty of capacity of brick dryer shown by facts; *Accumulator etc. Co. v. Dubuque etc. Co.*, 64 Fed. Rep. 77, holding warranty of character and durability shown; *Cullus v. Wilson*, 2 Tex. Civ. App. 723, ruling similarly as to warranty of soundness. Cited, also, in note to *Emerson v. Brigham*, 6 Am. Dec. 114, on implied warranties.

**Breach of Warranty.**—Buyer's remedies stated and discussed, p. 579.

Cited in *Browning v. McNear*, 145 Cal. 277, determining question of warranty in sale of barley by sample; *Hughes v. Bray*, 60 Cal. 287, on point that he may accept goods and sue for breach; *Hoult v. Baldwin*, 67 Cal. 613, that he may rescind sale by returning or offering to return them; *Snow v. Holmes*, 71 Cal. 149, that he may by cross-complaint demand damages for breach, in action by vendor for purchase

price; Talbot etc. Co. v. Gorman, 103 Mich. 405, discussing such rights and holding no implied warranty of fitness shown; Cosgrove v. Bennett, 32 Minn. 374, on point that breach is not waived by receipt of goods, and further denying implied warranty when machine constructed according to order; Halley v. Folsom, 1 N. Dak. 328, that vendee may accept when in ignorance of defect and afterwards sue for breach without offer to return; Minnesota etc. Co. v. Hanson, 3 N. Dak. 85; that he cannot rescind and return after continued use but may rely on breach as defense to action for price; Northwestern etc. Co. v. Rice, 5 N. Dak. 436, 57 Am. St. Rep. 565, on point that waiver of breach is question of fact for jury; Tacoma etc. Co. v. Bradley, 2 Wash. 606, 26 Am. St. Rep. 894, that vendee may retain goods and set up breach in defense to action for price and holding further burden to be on vendee in such action to prove warranty and its breach; English v. Spokane etc. Co., 57 Fed. Rep. 456, discussing defenses, holding further as to measure of damages for breach, and implied warranty generally; Accumulator Co. v. Dubuque etc. Co., 64 Fed. Rep. 77, when breach pleaded as defense to price, and holding further warranty of character and durability shown.

**45 Cal. 580-584. CONNECTICUT ETC. CO. v. McCORMICK.**

**Mortgage—Consideration.**—Pre-existing debt is sufficient as, p. 582.

Cited in Chapman v. Hughes, 134 Cal. 658, noted under Frey v. Clifford, 44 Cal. 335.

**Wife May Mortgage her property to secure husband's debt,** p. 583.

Cited in Rohrbacher v. Aitken, 145 Cal. 489, note of plaintiff executed to defendant as assignee of three fourths interest in estate of a decedent of which plaintiff's deceased husband and a surviving executor were co-executors, in settlement of husband's shortage as executor, in consideration of settlement of proceedings to revoke letters, is on good consideration; Bank v. De Shorb. 137 Cal. 693, sustaining such mortgage under facts stated.

Wife's mortgage given to secure antecedent debt to mortgagee having no notice of duress by husband by which it is procured, is not void, p. 583.

Approved in Isom v. Rex Crude Oil Co. 147 Cal. 661, complaint seeking to cancel lease of lot for fraud of lessee against assignee of lease is defective in not alleging that assignee had notice of fraud.

**45 Cal. 584-588. HALL v. YOELL.**

**Deed under Execution Sale** is void if executed before termination of redemption period, p. 588.

Cited to same effect in Perham v. Kuper, 61 Cal. 332, where executed on last day of such period.

**45 Cal. 592-594. DOUGLAS v. FULDA.**

**Landlord is Estopped** by judgment against tenant where he was notified of pendency of action and had opportunity to defend, p. 594.

Cited to same effect in *Moser v. Hussey*, 67 Tex. 458, holding further that where landlord has had no notice he may enjoin execution of writ of possession and have case opened for retrial. Distinguished in *Carr v. United States*, 98 U. S. 437, holding United States not bound by judgment against its tenant. Cited, also, in note to *Caperton v. Schmidt*, 85 Am. Dec. 437, on conclusiveness of judgment in ejectment; and to *Oetgen v. Ross*, 95 Am. Dec. 473, on general subject.

**45 Cal. 597-609. CONROY v. DUANE.**

**Forcible Entry.**—Scrambling possession on part of plaintiffs is not sufficient to maintain action, p. 601.

Cited to same effect in *Brooks v. Warren*, 5 Utah, 122 holding action not maintainable under facts; *Torrey v. Derke*, 11 S. Dak. 159, noted under *Owen v. Doty*, 27 Cal. 502, and *Barlow v. Burns*, 40 Cal. 351. Cited, also in note on general subject to *Evill v. Conwell*, 18 Am. Dec. 147.

**Forcible Entry.**—Actual possession is sufficiently shown by sufficient inclosure alone, p. 603.

Cited to same effect in *Smith v. Hicks*, 139 Cal. 219, noted under *Coryell v. Cain*, 16 Cal. 567; *Bullock v. Rouse*, 81 Cal. 595, holding, however, no such inclosure shown as would prevent entry for filing of preemption or homestead claim.

**Forcible Detainer.**—Defendant may be guilty of whether entry was peaceable or not, p. 606.

Cited to same effect in *Eccles v. Union etc. Co.*, 15 Utah, 19, 20, further holding verdict for treble damages proper.

**Forcible Entry.**—Evidence of title is admissible to show good faith of entry, p. 606.

Distinguished in *Boardman v. Thompson*, 3 Mont. 392, holding title not in issue not provable under local statutes. Cited in note on general subject to *Beeler v. Cardwell*, 77 Am. Dec. 553-556.

**45 Cal. 610-613. GROGAN v. VACHE.**

**Deed of Definite Quality of Land** within larger tract but not located, conveys pro tanto an undivided interest therein; aliter when attempt is made to describe property conveyed, p. 613.

Cited to same effect on first point in *Adams v. Hopkins*, 144 Cal. 41, 43, construing various deeds; *Hodges v. Bennett*, 78 Miss. 870, 84 Am. St. Rep. 653, as to deed of "undivided three hundred acres" in a larger tract; *Morehead v. Hall*, 126 N. C. 215, holding undivided one-half interest created under deed construed; *Cullen v. Sprigg*, 83 Cal. 62, as to

grant by city of "lot of land containing sixty acres, lying in block 1111"; and on second in *Jory v. Palace etc. Co.*, 30 Oreg. 200, holding tax deed void for uncertainty of description; *Dwyre v. Speer*, 8 Tex. Civ. App. 91, also holding deed void.

**45 Cal. 613-616. SAGELY v. LIVERMORE.**

Sheriff need not deliver to successor property held under attachment at expiration of term, p. 615.

Cited to same effect in *Perrin v. McMann*, 97 Cal. 54, holding further lien for fees not discharged by tender thereof to successor; *People v. Kendall*, 14 Colo. App. 180, on point that his sureties are liable for his malfeasance with respect to property so held by him beyond his term. Distinguished in *Wood v. Lowden*, 117 Cal. 235, under County Government Act, holding sureties on sheriff's bond for term in which levy made not liable for failure to safely keep the property during second term.

**45 Cal. 616-631. REYNOLDS v. HOSMER.**

Consent of Party will be presumed to order allowing filing of amendments, when record silent, p. 627.

Cited to same effect in *Schmidt v. Oregon etc. Co.*, 28 Oreg. 25, 52 Am. St. Rep. 762, as to entry of decree and dismissing appeal thereupon.

Reversal by Supreme Court operates ipso facto and needs no confirmatory order of lower court, p. 628.

Cited to same effect in *Cowdery v. Bank*, 139 Cal. 304, 305, discussing also the right to restitution thereon; *Wall v. Dodge*, 3 Utah, 170, as to effect of dismissal by supreme court and denying power of lower court to tax costs thereafter.

**Execution Sale.**—Reversal of judgment after sale to plaintiff gives defendant option to set aside sale or sue for value, p. 629.

Cited to same effect in *Smith v. Zent*, 83 Ind. 87, 43 Am. Rep. 62, sustaining action for damages against plaintiff, when sale to third person; *Thompson v. Reasoner*, 122 Ind. 457, holding plaintiff not liable under facts in ditch proceedings under local statutes; *Hubbard v. Ogden*, 22 Kan. 672, setting aside sale of realty made to plaintiff; *Hays v. Griffith*, 85 Ky. 381, holding further, nominal plaintiff alone liable; *Martin v. Victor etc. Co.*, 19 Nev. 199, holding, however, no restitution allowable where judgment merely modified; *Adams v. Odom*, 74 Tex. 212, 15 Am. St. Rep. 831, holding further title of grantee of vendee to fall with reversal, and on same point *Galpin v. Page*, 3 Saw. 127, 9 Fed. Cas. 1139, when sale made to plaintiff's attorney who had conveyed to his co-partner, and *Mullin v. Atherton*, 61 N. H. 22, when plaintiff bought and conveyed to his attorney.

General Demurrer will not reach uncertainty in complaint, p. 630.

Cited to same effect in *Ward v. Clay*, 82 Cal. 505, sustaining complaint on note where note attached as exhibit.

**45 Cal. 631-640. PORTER v. HAIGHT.**

**Public Officers.**—Courts cannot review question whether discretion is properly exercised, p. 640.

Cited to same effect in *San Mateo v. Maloney*, 71 Cal. 208, as to method of collection of taxes by assessor under section 3820 of the Political Code. Distinguished in *Sutro v. Pettit*, 74 Cal. 336, 5 Am. St. Rep. 444, holding bonds invalid when not issued according to statute, no discretion having been given to supervisors as to issuance.

**Public Officer is not Personally Liable** for official acts when done without fraud or malice, p. 639.

Distinguished in *Bailey v. Berkey*, 81 Fed. Rep. 739, 740, holding assessor liable for damages resulting from excessive assessment made maliciously or corruptly. Cited, also, in note on general subject to *Robinson v. Chamberlain*, 90 Am. Dec. 727.

**45 Cal. 640-643. BRADY v. BRONSON.**

**Eminent Domain.**—Title does not pass until payment or tender of damages awarded, p. 643.

Cited in note to *Bloodgood v. Mohawk etc. Co.*, 31 Am. Dec. 374, on general subject.

**45 Cal. 643-647. CITY OF STOCKTON v. CREANOR.**

**Municipal Corporations.**—Power conferred on common council as to contracts for street work cannot be exercised by its committee, p. 646.

Cited to same effect in *Aid Society v. Reis*, 71 Cal. 634, on point that discretion conferred on specific officer must be exercised by him personally. Cited, also, in note to *Flournoy v. Jeffersonville*, 79 Am. Dec. 476, on acts of municipal corporations.

**45 Cal. 647-650. HENDERSON v. McTUCKER. S. C. Daniels v. Henderson**, 49 Cal. 247, discussing effect of main case as estoppel.

**Writ of Assistance.**—Questions as to conflicting rights to land cannot be litigated on motion for writ, p. 650.

Cited to same effect in *Langley v. Voll*, 54 Cal. 438, as to defendants' claim of acquisition of right of possession from purchaser; *Enos v. Cook*, 65 Cal. 178, discussing effect on strangers of order granting writ; *Stanley v. Sullivan*, 71 Wis. 587, 5 Am. St. Rep. 247, as to defendant's claim of homestead exemption. Cited, also, in note on general subject to *Wilson v. Polk*, 51 Am. Dec. 153.

**45 Cal. 650-652. PEOPLE v. BUMBERGER.**

Written Charge must be given in criminal case, p. 652.

Cited to same effect in Territory v. Perea, 1 N. Mex. 632 (627), cited in Territory v. Lopez, 3 N. Mex. 113 (109).

Jury May be Cautioned upon question of defense of insanity, p. 652.

Cited to same effect in People v. Methewer, 132 Cal. 331, noted under People v. Dennis, 39 Cal. 636; People v. Donlon, 135 Cal. 493, quoting People v. Larrabee, 115 Cal. 159; People v. Ferris, 55 Cal. 593, as to similar caution upon plea of intoxication; People v. Larrabee, 115 Cal. 159, as to insanity; and on same plea in People v. McCarthy, 115 Cal. 264, and People v. Allender, 117 Cal. 83; dissenting opinion in Aszman v. State, 123 Ind. 362, main opinion, holding charge improper.

**45 Cal. 654-655. WRIGHT v. SNOWBALL.**

New Trial.—Order denying cannot be reviewed on appeal when no notice of motion given nor waived, p. 654.

Cited to same effect in Dominguez v. Mascotti, 74 Cal. 270, sustaining denial when notice premature and holding further no waiver shown; Street v. Lemon etc. Co., 9 Nev. 253. King v. Pony Gold Min. Co., 28 Mont. 83, notice of intention to move for new trial not necessary part of record on appeal from order denying new trial where no objection to notice is presented to trial court. Declared overruled in Pico v. Cohn, 78 Cal. 387, in so far as it holds that such giving or waiver must be made to appear by the statement, but this point was not passed on in main case.

**45 Cal. 655-656. WAY v. OGLESBY.**

Answer alleging services to have been worth only a certain sum is sufficient denial of allegation that they were worth greater sum, p. 655.

Cited to same effect in Burris v. People's etc. Co., 104 Cal. 253, sustaining denials as to size of ditch, and further holding good generally "any allegation . . . which if found to be true necessarily shows that the allegation of the complaint as to the same matter is untrue."

**45 Cal. 656-659. SHERMAN v. BUICK.**

Title to Sixteenth and Thirty-sixth Sections vested absolutely in state upon their being surveyed, p. 666.

Cited to same effect in Thompson v. True, 48 Cal. 607, as to thirty-sixth section, and holding further as to effect of judgment in land contest as estoppel.

**45 Cal. 672-673. PEOPLE v. COON.**

Variance.—Indictment for larceny of five stock certificates of the

same given number is not supported by proof of larceny of one certificate bearing such number, p. 672.

Cited to same effect in People v. Strassman, 112 Cal. 689, reversing conviction of perjury in qualifying upon bail bond, when it misrecited the crime for which arrest was made. Distinguished in State v. Brew, 4 Wash. 97, 31 Am. St. Rep. 905, holding information for larceny sufficient though not stating separate value of each article stolen.

#### 45 Cal. 673-676. TOWNSEND v. LITTLE.

Action for Unlawful Entry cannot be maintained where defendant enters in good faith and in belief of right to enter, p. 676.

Cited to same effect in Powell v. Lane, 45 Cal. 678, holding action for unlawful entry not maintainable under facts; Phenix etc. Co. v. Lawrence, 55 Cal. 145, holding, however, that entry cannot be made for obtaining of title or color of right and sustaining action under facts. Distinguished in Boardman v. Thompson, 3 Mont. 392, under local statute, holding evidence of title inadmissible in such actions.

#### 45 Cal. 677-678. POWELL v. LANE.

Action for Unlawful Entry cannot be maintained where entry is lawful, peaceable and made in good faith, p. 678.

Cited to same effect in Potter v. Mercer, 53 Cal. 674, holding entry by true owner not forcible under facts; Phenix etc. Co. v. Lawrence, 55 Cal. 145, holding, however, that entry cannot be made for obtaining of title or color of right and sustaining action under facts; Murry v. Burris, 6 Dak. Ter. 183, on point that defendant may show nature of plaintiff's possession. Distinguished in Boardman v. Thompson, 3 Mont. 392, on point that under local statutes evidence of title is improper.

#### 45 Cal. 679-680. PEOPLE v. SUPERVISORS OF KERN COUNTY.

Jurisdiction of County Courts does not extend to issuance of writs of mandate, p. 679.

Cited in Faut v. Mason, 47 Cal. 8, holding power to issue certiorari doubtful, except in aid of appellate jurisdiction.

Mandamus Proceedings are not special cases, p. 679.

Cited to same effect in Rosenbaum v. Bauer, 120 U. S. 462, denying right of circuit court to issue such writs except as ancillary to its judgments.

#### 45 Cal. 680-685. STOCKTON AND LINDEN GRAVEL ROAD CO. v. STOCKTON AND COPPEROPOLIS RAILROAD COMPANY. S. C. 53 Cal. 11.

Title of corporation de facto cannot be inquired into collaterally by trespasser on property, p. 685.

Cited to same effect in Los Angeles etc. Bank v. Spires, 126 Cal. 545, noted under Rondell v. Fay, 32 Cal. 361; Bakersfield etc. Association v. Chester, 55 Cal. 101, as to failure to file articles properly; Society v. Cleveland, 43 Ohio St. 493, holding further that forfeiture of charter on quo warranto proceedings cannot affect rights or liabilities previously acquired by others dealing in good faith with such corporation; Black River etc. Co. v. Holway, 85 Wis. 355, holding that stockholder and director cannot defeat action by corporation on ground that charter was improperly extended; Baltimore etc. Co. v. Church, 137 U. S. 572, on point that failure to properly incorporate cannot defeat action by such corporation for damages for nuisance. Cited, also, in note on general subject to Hildreth v. McIntire, 19 Am. Dec. 67-68.

#### 45 Cal. 692-695. PEOPLE v. SACRAMENTO COUNTY.

"Municipal Corporation" does not include county under section 19 of the Political Code, p. 695.

Cited to same effect in County v. Coburn, 130 Cal. 636, noted under Sharp v. Contra Costa Co., 34 Cal. 284; People v. McFadden, 81 Cal. 498, 15 Am. St. Rep. 73, as to creation of new counties, and construing constitution, section 6, article 11; Powder etc. Co. v. Board, 3 Wyo. 609, as to action to recover back taxes, under local statutes.

#### 45 Cal. 696-699. ESTATE OF BALLENTINE.

Probate Homestead must be set apart on application and court has no discretion in matter, p. 699.

Cited to same effect in Estate of Burton, 63 Cal. 37, notwithstanding assertion of adverse claim of title; In re Davis, 69 Cal. 460, where will ordered sale of property and payment of legacy from proceeds; Tyrrell v. Baldwin, 78 Cal. 476, holding further as to incidents of such homestead; Demartin v. Demartin, 85 Cal. 75, applying rule to insolvency homestead, and holding burden of proof to be on opposing creditors on issue as to excess of value; In re Still, 117 Cal. 513, 514, sustaining homestead to minor child after death of widow notwithstanding claims on her behalf for arrears of family allowance and claims as administratrix.

"May" in public statutes is often used for must or shall, and construed imperatively, p. 699.

Cited to same effect in Hayes v. Los Angeles, 99 Cal. 80, when construed as "shall" under section 3804 of the Political Code. Cited, also, in note on general subject to Malcolm v. Rogers, 15 Am. Dec. 468.



## **VOLUME XLVI.**

By ALBERT RAYMOND.

**Revised to include citations to Volume 147, by CHARLES L. THOMPSON.**

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**46 Cal. 8-17. BRENNAN v. FORD.**

Demurrer Based on Statute of Limitations is sufficient if stating such ground as appearing by the complaint, p. 12.

Cited to same effect in Bank v. Wickersham, 99 Cal. 659, holding, however, reference to code sections on limitation by number, exclusive of argument on other grounds of limitation; and see on same point, Williams v. Bergin, 116 Cal. 59; Hexter v. Clifford, 5 Colo. 173, on point that plea of statute cannot be raised by general demurrer.

Demurrer merely raises question of law as to sufficiency of facts pleaded, p. 13.

Cited to same effect in Rice v. Rice, 13 Oreg. 340, holding demurrer not admission of facts pleaded.

**Statute of Limitations.**—Agreement will be presumed on demurrer to have been in writing where complaint silent, p. 13.

Cited to same effect in Reagan v. Justice's Court, 75 Cal. 255, discussing sufficiency of complaint in said court for money loaned; Broder v. Conklin, 77 Cal. 336, as to agreement creating trust when demurrer based on statute of frauds; and in Nunez v. Morgan, 77 Cal. 432, on same point as to agreement for conveyance of land pleaded in cross-complaint; and Barnard v. Lloyd, 85 Cal. 132, as to agreement for roadway on conveyance of land.

Statute of Limitations will run in case of express trust against vendee out of possession after full performance, p. 14.

Overruled as dictum in Luco v. De Toro, 91 Cal. 421, holding question of possession not conclusive as to repudiation of trust and notice thereof.

**46 Cal. 17-19. STOKES v. GEDDES.**

Purchaser at Tax Sale under judgment regular on face is not affected by extrinsic matters of which he had no actual notice, p. 18.

Cited to same effect in dissenting opinion in Mayo v. Haynie, 50 Cal. 75, main opinion holding tax deed not conclusive evidence of title as

against one who paid tax and was not bound by judgment (and see Martin v. Parsons, 49 Cal. 97, enjoining use of judgment as estoppel where decree falsely recited service of defendants); Bagley v. Sligo etc. Co., 120 Mo. 251, holding such purchaser not prejudiced by decree setting aside the tax judgment. Cited, also, in note to Bunton v. Lyford, 75 Am. Dec. 151, on effect of judgment on bona fide purchasers; Morrill v. Morrill, 23 Am. St. Rep. 118, on collateral attack on judgments; Little Rock etc. Co. v. Wells, 54 Am. St. Rep. 255, on relief in equity from judgments.

Conclusion of Law embraces allegation that "no notice was given . . . as required by law," p. 19.

Distinguished in Hyde v. Redding, 74 Cal. 501, sustaining, in absence of demurrer, allegation that judgment was rendered without jurisdiction.

#### 46 Cal. 19-25. KIMBALL v. ALAMEDA COUNTY.

Board of Supervisors may assess damages on opening of highway, p. 23.

Cited to same effect in Monterey County v. Cushing, 83 Cal. 511, as to power of county to sue in own name in such proceedings under direction of board; Wulzen v. Board, 101 Cal. 28, 40 Am. St. Rep. 28, holding, however, beyond statutory jurisdiction of board an order made in street opening proceedings.

Highways.—Notice of application is waived by appearance at hearing, p. 23.

Cited in Towns v. Klamath Co., 33 Or. 230, as to service of order appointing viewers under local statutes.

#### 46 Cal. 25-27. DUNCAN v. GARDNER.

Certificate of Purchase must be surrendered before issuance of patent can be demanded, p. 26.

Cited to same effect in Cerf v. Reichert, 73 Cal. 362, discussing effect of Statutes of 1871-72, page 587, as to issuance of patent to execution purchaser of state lands; Wright v. Roseberry, 81 Cal. 89, holding, however, effect of certificate as muniment of title not affected by such surrender.

#### 46 Cal. 27-29. MARIANI v. DOUGHERTY.

Damages for Death.—Plaintiff will be granted new trial when verdict is inadequate, p. 28.

Cited in Turner v. Hearst, 137 Cal. 236, holding nominal verdict insufficient in libel case.

**Damages for Death.**—Two hundred dollars held insufficient, and granting of new trial sustained, p. 28.

Cited to same effect in *Taylor v. Howser*, 12 Bush, 468, as to damages for one cent for unlawful shooting of plaintiff. Distinguished in *Berry v. Lake Erie etc. Co.*, 72 Fed. Rep. 490, denying new trial where jury awarded eleven hundred dollars for loss of leg by infant.

**46 Cal. 30-31. MOORE v. BATES.**

Though count excludes all plaintiff's evidence and renders judgment for defendant, trial is had in sense in which court may grant new trial, p. 31.

Approved in *Green v. Duvergey*, 146 Cal. 385, determining what is reviewable on appeal from order denying new trial.

**46 Cal. 31-33. COBURN v. PACIFIC LUMBER AND MILL COMPANY.**

**Ejectment.**—Pendency of condemnation proceedings is no defense, p. 33.

Cited to same effect in *Hull v. Chicago etc. Co.*, 21 Neb. 375, where such proceedings void for want of jurisdiction.

Ex parte order may be set aside without notice to party procuring it, p. 33.

Approved in *Alpers v. Bliss*, 145 Cal. 572, applying rule to ex parte order vacating order permitting filing of cross complaint in partition.

**46 Cal. 33-42. STRANG v. RYAN.**

**New Trial.**—Specification of Insufficiency of evidence to sustain finding of ultimate fact is insufficient, where such facts consist of conclusion from number of probative facts, p. 41.

Cited in majority opinion in *Bell v. Staacke*, 141 Cal. 192, holding specification insufficient.

**Mining Claim.**—Renewal of location held insufficient, p. 41.

Cited in *Beaver etc. Co. v. Mining Co.*, 6 Colo. App. 136, discussing proof of abandonment of location.

**46 Cal. 42-45. FRIERMUTH v. FRIERMUTH.**

**Quantum Meruit.**—Complaint in form of common count is sufficient, p. 45 (43).

Cited in note to *Allen v. Patterson*, 57 Am. Dec. 546, on use of common counts; *Tumlin v. Bass etc. Co.*, 93 Ga. 599, on point that written contract is admissible in such action as evidence of services sued upon; and on same point *Caldwell v. Myers*, 2 S. Dak. 510, holding further as to rule of damages in such action.

Notes Cal. Rep.—146.

**Action against Surviving Partner** lies for services rendered firm in lifetime of both partners and to surviving partner in liquidation, p. 45.

Cited to same effect in Corson v. Berson, 86 Cal. 441, on point that executors of deceased partner need not be joined in action to recover back rent overcharged by lessor firm; Hargadine v. Gibbons, 45 Mo. App. 465, discussing right of survivor to firm choses in action. Cited, also, in note on general subject to Childs v. Hyde, 77 Am. Dec. 114.

**General Citations.**—Ranney-Alton Mercantile Co. v. Hanes, 9 Okla. 476.

**46 Cal. 45-48. PEOPLE v. DEVINE.**

**Additional Jurors** may be summoned where panel legally drawn but not legally summoned, p. 47.

Cited to same effect in People v. Sehorn, 116 Cal. 509, where additional jurors summoned by elisor.

**Testimony at Former Trial** may be given where witness since departed from state, p. 48.

Cited to same effect in Lowe v. State, 86 Ala. 53, where witness temporarily absent from state; Omaha etc. Co. v. Elkins, 39 Neb. 482, discussing conflicting authorities. Distinguished in People v. Chung Ah Chue, 57 Cal. 568, rejecting evidence given on trial of former indictment for same offense; Emerson v. Burnett, 11 Colo. App. 89, admitting such evidence though no diligence was used to obtain depositions of such witnesses; People v. Bird, 132 Cal. 263, noted under People v. Murphy, 45 Cal. 137. Cited, also, in note on general subject to Magill v. Kauffman, 8 Am. Dec. 717; Bergen v. People, 65 Am. Dec. 676; Cline v. State, 61 Am. St. Rep. 887.

**Voluntary Confession** of prisoner is admissible although he was not taken before magistrate within twenty-four hours after arrest, p. 48.

Cited in People v. Miller, 135 Cal. 71, admitting confession accordingly; note to Daniels v. State, 6 Am. St. Rep. 244, on confessions during illegal imprisonment.

**46 Cal. 49-52. DOUGLAS v. DAKIN.**

**Record on Appeal.**—Court will not, on appeal from judgment, review matters not appearing in judgment-roll where not embodied in statement or bill of exceptions, p. 51.

Cited to same effect in Stoddart v. Burge, 53 Cal. 398, as to order dismissing cross-complaint and directing judgment for plaintiff; Strathern v. Dakin, 63 Cal. 480, as to order denying motion to strike out part of answer; and Spence v. Scott, 97 Cal. 181, as to order granting such motion; Gilman v. Bootz, 80 Cal. 565, as to order of dismissal for want of prosecution and subsequent order refusing to vacate former; Pedreno v. Hotchkiss, 95 Cal. 638, as to orders setting aside default

and striking out answer, although incorporated in transcript; *Graham v. Linehan*, 1 Idaho, 781, as to order refusing to enter judgment in particular form.

**Identity of Parties** will be presumed from identity of names, p. 51.

Cited to same effect in *Lee v. Murphy*, 119 Cal. 369, where names of mortgagee and of attesting notary were same; *Estate of Williams*, 128 Cal. 555, as to identity of petitioner for letters and devisee named in will; *Russell v. Lang*, 50 La. Ann. 44, sustaining assessment as being in owner's name; *Stapleton v. Pease*, 2 Mont. 553, as to identity of witness and county recorder; *Rupert v. Penner*, 35 Neb. 598, as to identity of grantor in deed.

#### 46 Cal. 52-53. **PEOPLE v. GATES.**

Adultery alone, without living in state of open and notorious cohabitation, is not punishable under act of 1872, p. 380, p. 52.

Cited to same effect in *White v. White*, 82 Cal. 449, discussing proof of marriage by cohabitation and repute, in action of divorce for adultery; *Ex parte Thomas*, 103 Cal. 497, releasing on habeas corpus defendant convicted of adultery alone; *Brevaldo v. State*, 21 Fla. 795, construing local statutes and discussing admissibility of prior acts of adultery. Distinguished in *State v. Hull*, 18 R. I. 208, holding evidence of notorious character of defendant inadmissible in action for keeping house of ill-fame.

#### 46 Cal. 54. **PEOPLE v. DICKSON.**

**Mandamus** to compel settlement of bill of exceptions not granted where record does not enable supreme court to determine whether bill if settled would tend to show error, p. 54.

Approved in *Gay v. Torrence*, 145 Cal. 147, upholding refusal to incorporate in bill of exceptions affidavit assailing judge for misconduct, based solely on information and belief.

#### 46 Cal. 54-63. **RANDELL v. AUSTIN.**

**Outside Lands.**—Statutes and acts of Congress construed, p. 59.

Cited in *Baker v. Brickell*, 87 Cal. 334, on point that legislature could prescribe conditions for alienation of pueblo lands.

**Outside Lands.**—Tax collector must return to unsuccessful claimant moneys deposited by him for taxes and assessments, p. 62.

Cited to same effect in *Lawrence v. Doolan*, 68 Cal. 311, holding sureties liable for such repayment, and further as to statute of limitations in suit therefor.

#### 46 Cal. 68-70. **RICHARDSON v. HEYDENFELDT.**

**Street Improvements.**—Resolution of intention to do work "where necessary" invalidates entire proceedings, p. 69.

Cited to same effect, holding void like resolutions, in *People v. Clark*, 47 Cal. 457, and holding, further, notice presumed to be in same terms as contract where latter alone pleaded; *Randolph v. Gawley*, 47 Cal. 458, and *People v. Ladd*, 47 Cal. 604, as to repairing and constructing sidewalk; Cited in *Reid v. Clay*, 134 Cal. 212, but sustaining assessment for curbs "where not already laid" between certain streets; *Chase v. Scheerer*, 136 Cal. 251, where superintendent was given power to greatly increase cost of the work; *Himmelmann v. McCreery*, 51 Cal. 563, as to reconstruction of sidewalks; *Brady v. King*, 53 Cal. 45, as to sidewalks, et cetera, and holding defect not curable by validating act; and *Bolton v. Gilleran*, 105 Cal. 247, 45 Am. St. Rep. 34, as to performance of work "according to plans and specifications prepared" by city engineer. Cited, also, in *Treanor v. Houghton*, 103 Cal. 58, 59, holding void the award of separate contracts for one improvement.

**Street Assessments.**—Supervisors cannot delegate to street superintendent power to designate place of improvements, p. 70.

Cited to same effect in *People v. Parks*, 58 Cal. 644, denying right of delegation of legislative powers by legislature to board of drainage commissioners; *Aid Society v. Reis*, 71 Cal. 634, on point that officer must exercise personally discretion vested in him specially. Cited, also, in note to *Mayor v. State*, 74 Am. Dec. 592, on delegation of power to tax; *Flournoy v. Jeffersonville*, 79 Am. Dec. 476, on delegation of municipal powers.

#### 46 Cal. 70-73. MEYER v. TULLY.

Injunction Will Lie to restrain execution on judgment where defendants are entitled to its proper satisfaction of record, p. 73.

Cited to same effect in *Eppinger v. Scott*, 130 Cal. 277, noted under *Carpentier v. Hart*, 5 Cal. 406; *Cox v. Smith*, 10 Oreg. 422, as to execution sale under satisfied judgment where title would be clouded thereby. Cited, also, in note to *Little Rock etc. Co. v. Wells*, 54 Am. St. Rep. 257, on general subject.

#### 46 Cal. 78-79. PEOPLE v. JOHNSTON.

Juror is Disqualified who has fixed opinion as to guilt of accused, p. 79.

Cited in note on general subject to *Smith v. Eames*, 36 Am. Dec. 524, 526.

#### 46 Cal. 79-80. MONRIAL v. BUSH.

Certiorari Will not Lie to correct mere error in proceedings where court has jurisdiction, p. 80.

Cited to same effect in *Phillips v. Welch*, 12 Nev. 170, denying writ to review order in contempt proceedings. Cited, also, in note on general subject to *Duggen v. McGruder*, 12 Am. Dec. 535.

**46 Cal. 82-85. KEISKER v. AYRES.**

**Deposition.**—Striking out of complaint is proper for nonattendance before notary without sufficient excuse, p. 84.

Cited to same effect in Clifford v. Allman, 84 Cal. 533, holding, however, striking out improper where disobedience not willful or intentional.

**Client is Bound by Attorney's Appearance** at hearing of motion, where no objection to validity of notice was made, p. 84.

Cited to same effect in Foley v. Foley, 120 Cal. 39, as to order to show cause, where attorney appeared and resisted same without objection as to want of personal service.

**46 Cal. 85-91. CALIFORNIA PACIFIC RAILROAD COMPANY v. ARMSTRONG.**

**Eminent Domain—Compensation.**—Track built by railroad company under entry where proceedings afterward dismissed, does not belong to owner, and cannot be considered in estimating damages under new proceedings, p. 90.

Cited to same effect in California etc. Co. v. S. P. etc. Co., 67 Cal. 62, where entry was with owner's consent and not trespass; United States v. Smith, 110 Fed. 340, holding public buildings built under license from life tenant not to revert to the remainderman; Albion etc. Co. v. Hesser, 84 Cal. 436, 439, 440 (cited in S. F. etc. Co. v. Taylor, 86 Cal. 248), where structures erected with bona fide intent to commence condemnation proceedings thereafter and overruling United States v. Land, 47 Cal. 517 (cited in Jacksonville etc. Co. v. Adams, 28 Fla. 648), where main case distinguished in case of trespass; Jacksonville etc. Co. v. Adams, 28 Fla. 648, where company not ousted from former possession; Chicago etc. Co. v. Goodwin, 111 Ill. 282, 53 Am. Rep. 623, as to liability to owner in fee where improvements made under license from life tenant before latter's death; Cohen v. St. Louis etc. Co., 34 Kan. 167, 55 Am. Rep. 248, as to track laid with permission of occupant under claim and color of title; North Hudson etc. Co. v. Booraem, 28 N. J. Eq. 455, where entry made under contract to purchase and holding further as to liability of company to contribute to payment of mortgage on premises held by it; Martin v. Tyler, 4 N. Dak. 294, defining "just compensation," and holding further as to manner of payment; Preston v. Railway Co., 70 Tex. 377, on point that materials so used for track do not constitute fixtures, and belong to landowner. Cited, also, in note on general subject to Winona etc. Co. v. Waldron, 88 Am. Dec. 120.

**Eminent Domain—Compensation.**—In railroad cases, general benefits may be set off against damages, p. 91.

Cited in Beveridge v. Lewis, 137 Cal. 624, but held inapplicable under present constitution, but cf. dissenting opinion, pages 627-629.

**46 Cal. 94-97. PEOPLE v. ROBINSON.**

Time for Sentence may be waived by defendant and immediate sentence given, p. 98.

Cited to same effect in People v. Johnson, 88 Cal. 174, holding further, consent presumed where record silent as to objection; Levy v. Magnolia Lodge, 110 Cal. 309, applying principle to waiver by lodge member of right of objection to report of investigating committee; Wiggins v. Tyson, 112 Ga. 750, applying rule to waiver of action by trial court on remittitur by voluntarily entering on term of imprisonment.

**46 Cal. 97-100. MITCHELL v. CROSBY.**

Statutory Construction.—County assessors as used in code includes district assessors where these still remained in office, p. 99.

Cited in Rosborough v. Boardman, 67 Cal. 118, discussing act of 1874, abolishing office of county assessor in Alameda county.

**46 Cal. 102-103. PEOPLE v. BROWN.**

Continuance in Criminal Case should be granted where defendant misled by promise of witness to appear at trial, p. 103.

Cited in People v. Plyler, 121 Cal. 165, noted under People v. Dodge, 28 Cal. 445; Yori v. Cohn, 26 Nev. 225, where defendant relying on promise of material nonresident witness, who was not subpoenaed, that he would be present at trial, fails to take deposition, continuance should be allowed on affidavit that attendance prevented by sickness; State v. O'Neil, 13 Oreg. 185, on point that such continuance is within discretion of court.

**46 Cal. 103-108. KIMBALL v. MACPHERSON.**

Tide Lands on ocean shore are not subject to sale, p. 108.

Cited to same effect in Upham v. Hosking, 62 Cal. 258, holding, however, sale validated by the Statutes of 1871-72, page 587.

**46 Cal. 112-114. EX PARTE BOWEN.**

Habeas Corpus will not be granted for refusal of court to order defendant brought back from prison for retrial, p. 113.

Cited in note on general subject to Owens v. Dawson, 26 Am. Dec. 49.

**46 Cal. 114-120. PEOPLE v. MORTIMER.**

Ex Post Facto Law does not include act changing form of procedure in trial for offenses committed before enactment, p. 118.

Cited to same effect in People v. Campbell, 59 Cal. 246 (cited in State v. Kingsley, 10 Mont. 546), as to use of information where indictment

alone prescribed when crime committed; *Mathis v. State*, 31 Fla. 312, and *South v. State*, 86 Ala. 619, as to change in right of peremptory challenge of jurors; *Murphy v. Commonwealth*, 172 Mass. 269, 70 Am. St. Rep. 271, but holding unconstitutional a statute depriving a prisoner of credits already earned for good behavior; *Beebe v. Birkett*, 108 Mich. 236, as to change in procedure in chancery cases; *State v. Ah Jim*, 9 Mont. 174 (cited in *In re Wright*, 3 Wyo. 484, 31 Am. St. Rep. 100), as to change in number of grand jury; *Marion v. State*, 20 Neb. 249, 57 Am. Rep. 827, as to repeal of law that jury should be judges of law as to crime charged; *McBurney v. Carson*, 99 U. S. 580, applying rule to 17 U. S. Stats. 198. Cited, also, in note on general subject to *People v. Hayes*, 37 Am. St. Rep. 595.

**Continuance may be Denied in criminal case when apparently not asked in good faith**, p. 120.

Cited to same effect in *Barnes v. Barnes*, 95 Cal. 179, holding continuance properly denied under facts; and, ruling similarly, in *Territory v. Perkins*, 2 Mont. 471.

**Bias of Juror is not ground for new trial where first learned and raised after verdict**, p. 120.

Cited to same effect in *State v. Marks*, 15 Nev. 36, holding, further, as to necessary showing on such motion.

#### 46 Cal. 121-124. **PEOPLE v. RUSSELL.**

**Peremptory Challenge.**—Defendant may be required to exercise before procurement of full panel of competent and qualified jurors, p. 122.

Cited to same effect in *People v. Iams*, 57 Cal. 125, extending rule also to challenges for cause; *People v. Riley*, 65 Cal. 108; *People v. Dinsmore*, 102 Cal. 382, holding empanelment irregular, but reversing on other grounds; *State v. Pritchard*, 15 Nev. 91, holding right of peremptory challenge not waived under facts; *People v. Callaghan*, 4 Utah, 63.

**Defendant Testifying in Own Behalf** may be cross-examined as to any matter brought out in direct, p. 123.

Cited to same effect in dissenting opinion in *People v. O'Brien*, 66 Cal. 604, main opinion holding cross-examination improper as being beyond matters in direct; *People v. Sutton*, 73 Cal. 245, and *People v. Ebanks*, 117 Cal. 665, sustaining cross-examination; and *People v. Rozelle*, 78 Cal. 94, ruling similarly and construing section 1323 of the Penal Code (but see *People v. Crowley*, 100 Cal. 481, on last point). Cited, also, in note to *Fries v. Bingler*, 21 Am. Dec. 62, on waiver of privilege of witness; *State v. Duncan*, 38 Am. St. Rep. 896.

#### 46 Cal. 124-135. **VAN VACTOR v. WALKUP.**

**Libel in Ambiguous Language.**—Jury must determine in which sense used, p. 133.

Cited to same effect in *Toniri v. Cevasco*, 114 Cal. 273, holding instructions to contain harmless error as to construction; *Donaghue v. Gaffy*, 54 Conn. 286, holding question to be one of law where words not ambiguous, and holding words stated not to be libel per se; *Thompson v. Powning*, 15 Nev. 212, discussing instructions on subject; *Mitchell v. Sharson*, 51 Fed. Rep. 425, holding certain words not actionable per se. Cited, also, in note on general subject to *Fagin v. Connolly*, 69 Am. Dec. 460.

#### 46 Cal. 135-139. **ANDERSON v. RYDER.**

**Tax Judgment is conclusive as to validity of assessment**, p. 137.

Cited in *New Orleans v. Warner*, 175 U. S. 142, noted under *Mayo v. Foley*, 40 Cal. 281.

**Tax Deed Will Prevail over like deed for same property under sale for taxes of prior year**, p. 138.

Cited to same effect in *Chandler v. Dunn*, 50 Cal. 16; *Keen v. Sheehan*, 154 Mass. 209, sustaining sale at same time and place for taxes of successive years; *Wass v. Smith*, 25 Minn. 605, discussing priorities under such successive sales; and cf. *Judah v. Brothers*, 72 Miss. 625, 631, 632; *Emmons Co. v. Bennett*, 9 N. Dak. 133, holding county not entitled to judgment for prior taxes.

**Tax Deed Is not Void because purchase money not paid for several months after sale**, p. 137.

Cited to same effect in *Maina v. Elliott*, 51 Cal. 10, holding, further, as to period for redemption when deed so delayed.

#### 46 Cal. 141-154. **PEOPLE v. SOUTHWELL.**

**Challenges to Grand Jury Panel are restricted to grounds specified in statute**, p. 146.

Cited to same effect in *People v. Welch*, 49 Cal. 178 (cited in *Bruner v. Superior Court*, 92 Cal. 253), as to objection to trial jury, alleged to have been improperly empaneled. Cited, also, in *Bruner v. Superior Court*, 92 Cal. 252, 267, 268, 269 (but see dissenting opinion 274, 276, 277), as holding no appeal to lie from order overruling objection not included among such challenges and granting prohibition against proceedings of grand jury illegally summoned; dissenting opinion in *Territory v. Pendry*, 9 Mont. 72, construing local act; *State v. Collyer*, 17 Nev. 280, where jury alleged to have been improperly constituted.

**Motion to Set Aside Indictment must be based on ground specified in statute**, p. 147.

Cited to same effect in *People v. Colby*, 54 Cal. 38, construing subdivision 1, section 995 of the Penal Code; and *People v. Hunter*, 54 Cal. 65, both as to objections to formation of grand jury; *People v. Schmidt*, 64

Cal. 261, applying rule also to grounds of demurrer to indictment: *People v. Goldenson*, 76 Cal. 345, as to irregularities in formation of grand jury; *State v. Hyde*, 22 Wash. 555, as to objection that indictment was found on defendant's own evidence before the grand jury, he being unadvised that it would be used against him. Cited, also, in *Bruner v. Superior Court*, noted under last syllabus.

**Indictment may be Properly "Found," although grand jury irregularly empaneled**, p. 148.

Cited to same effect in *People v. Gray*, 61 Cal. 165, holding it properly found.

**Grand Jury** is not illegal because summoned by improper official, p. 150.

Overruled in *Bruner v. Superior Court*, 92 Cal. 262, granting prohibition where grand jury illegally summoned by elisor; but see dissenting opinions 274, 276, 277. Distinguished in *People v. Enwright*, 134 Cal. 529, as to challenge under section 1059, Penal Code.

#### 46 Cal. 154-162. PITTE v. SHIPLEY.

**Statutory Construction.**—Word used in statute will be presumed to bear same meaning throughout, p. 160.

Cited to same effect in *Hoag v. Howard*, 55 Cal. 565, applying rule to word "instrument" as used throughout Civil Code; *Miller v. Dunn*, 72 Cal. 486, 1 Am. St. Rep. 70, as to "law" in constitution; *McClain v. Hutton*, 131 Cal. 143, applying rule to use of same word in findings; *Toedtemeier v. Clackamas Co.*, 34 Or. 72, as to use of words "steam portable" engine, etc.; dissenting opinion in *Salisbury v. Lane*, 7 Idaho, 386, majority holding mines and mineral claims title to which is in private owner, are assessable for taxation; *State v. Van Vlict*, 92 Iowa, 482, as to "penalty" used in liquor laws; *Rhodes v. Weldy*, 46 Ohio St. 243, 15 Am. St. Rep. 592, as to "provision" in statutes as to pretermitted child; *Uhe v. Railway Co.*, 4 S. Dak. 515, as to "given" used with reference to instructions.

**Mortgage Claim** must be presented against estate where property is part of general assets, p. 161.

Cited to same effect in *Harp v. Calahan*, 46 Cal. 233, further denying power of administrator to waive such presentation; dissenting opinion in *Whitmore v. Savings Union*, 50 Cal. 151, main opinion holding statute not applicable to trust deed and that debt not extinguished by nonrepresentation; and see, on same point, *Reid v. Sullivan*, 20 Colo. 501; dissenting opinion in *Hibernia etc. Society v. Hayes*, 56 Cal. 302, holding rule superseded, however, by code; *Adams v. Smith*, 19 Nev. 268, holding administratrix liable for payment of such claim where not presented. Cited, also, in *Toulouse v. Burkett*, 2 Idaho, 175, 176, as not overruling earlier cases cited, and holding presentation unnecessary in

case of vendor's lien. Cited, also, in note to Fallon v. Butler, 81 Am. Dec. 146, on general subject.

**46 Cal. 162-168. SAN DIEGO v. ALLISON.**

Action to Quiet Title cannot be maintained where plaintiff does not prove his title, p. 167.

Cited to same effect in Pennie v. Hildreth, 81 Cal. 132, reversing order sustaining demurrer to general denial to unverified complaint in such action; Nation v. Cameron, 2 Dak. Ter. 384, but not deciding question. Cited, also, in dissenting opinion in Burke v. McDonald, 2 Idaho, 323, on point that such action is equitable in character, and discussing right to jury trial therein; Wolverton v. Nichols, 5 Mont. 91, on point that action cannot be maintained where plaintiff out of possession.

**46 Cal. 169-171. WHITE v. COX.**

Demurrer for Misjoinder of causes of action will lie where several causes of action are so mingled together as to render it impossible to determine precise nature and limits of each, p. 171.

Cited to same effect in Cosgrove v. Fisk, 90 Cal. 76, sustaining demurrer where complaint mingled different causes not all belonging to any one subdivision of section 427 of the Code of Civil Procedure; Meyendorf v. Frohner, 3 Mont. 319, on point that each defense should be complete in itself.

**46 Cal. 171-174. LINDEN v. CASE.**

Claims against Municipal Corporation.—Allowance of does not create liability unless such allowance was proper, p. 174.

Cited to same effect in McCoy v. Briant, 53 Cal. 249, denying injunction against circulation of municipal bonds improperly issued; County v. Spencer, 103 Cal. 502, as to appointment of assistant counsel in criminal cases; Ventura v. Clay, 114 Cal. 246, holding treasurer liable for payment of claim on improper warrant; State v. Washoe, 14 Nev. 70, as to improper allowance and auditing of claims, but denying certiorari to review same. Cited, also, in note on general subject to Commissioners v. Heaston, 55 Am. St. Rep. 209.

Injunction Will Be Denied where acts complained of will have no legal effect, p. 174.

Cited to same effect in Mock v. City, 126 Cal. 343, but enjoining enforcement of ordinance under facts stated; but cf. McBride v. Newlin, 129 Cal. 37, refusing to enjoin board from allowing an alleged illegal claim or auditor or treasurer from acting officially thereon; Johnston v. County, 137 Cal. 210, but enjoining performance of unauthorized contract for construction of ferry; Cohen v. Gray, 70 Cal. 86, as to

threatened proceedings under repealed statute; Merriam v. Board, 72 Cal. 518, 519, 520, as to allowance of claims alleged to be illegal; Stevens v. St. Mary's etc. School, 144 Ill. 351, 352, 36 Am. St. Rep. 446, 447, as to threatened passage by supervisors of ordinance creating void contract. Distinguished in Winn v. Shaw, 87 Cal. 636, granting injunction to taxpayer to prevent withdrawal of funds from treasury to pay illegal claims; Bradford v. San Francisco, 112 Cal. 541, 542, ruling similarly where supervisors attempted to create illegal indebtedness and levy tax therefor. Cited, also, in note to McCord v. Pike, 2 Am. St. Rep. 104, on taxpayer's relief against illegal corporate acts.

**Acts of Supervisors** are invalid and not binding unless authorized by law, p. 174.

Cited to same effect in Sutro v. Pettit, 74 Cal. 337, 5 Am. St. Rep. 445, as to issuance of bonds, holding further order of redemption equally invalid; County v. Spencer, 103 Cal. 501, as to employment of assistant counsel in criminal cases; and Merriam v. Barnum, 116 Cal. 622, as to employment of special counsel in county matters; Lewis v. Colgan, 115 Cal. 537, but held not to state rule for determining what acts unauthorized.

**Auditor** should refuse to draw warrants for illegal claims allowed by supervisors, p. 174.

Cited to same effect in McFarland v. McCowen, 98 Cal. 331, denying, however, power to refuse warrant on ground that services were not actually rendered; and see, on same point, State v. Headlee, 17 Wash. 640; Bingham Co. v. First Nat. Bank, 122 Fed. 22, county warrants void on face, because of omission of recitals, made essential by statute cannot be ratified by county board; Lamberson v. Jefferds, 116 Cal. 494, on point that auditor is not protected by supervisors' allowance of such claim; and on same point, Walton v. McPhetridge, 120 Cal. 444, denying mandamus where claim illegal.

**46 Cal. 175-187. OAKLAND COTTON MANUFACTURING COMPANY v. JENNINGS.** 13 Am. Rep. 209.

**Owner of Vessel** is liable for freightage contracts made by master appointed by him, p. 184.

Cited to same effect in Tomlinson v. Holt, 49 Cal. 312, holding owner liable under facts.

**46 Cal. 187-190. LAWRENCE v. BOOTH.**

**Mandamus** will be granted where there is no room for discretion, p. 190.

Cited in Sullivan v. Gage, 145 Cal. 765, 766, 767, refusing mandamus to compel state board of examiners to audit claim for fees of attorney for receiver improperly allowed by court in action by state to dissolve

corporation when board had rejected claim; San Luis Obispo County v. Gage, 139 Cal. 403, noted under People v. Supervisors, 45 Cal. 395.

**46 Cal. 190-201. MEYERS v. FARQUHARSON.**

Probate Court is not court of equity and cannot foreclose mortgage on decedent's property, p. 200.

Cited in note to Deck v. Gerke, 73 Am. Dec. 560, on probate powers of courts of equity.

**46 Cal. 201-204. HARTLEY v. BROWN.**

Patent for Mexican Grant vests legal title in confirmees, children of deceased petitioner, as against purchaser at sale of administrator of father had before patent issued, p. 203.

Cited in McCauley v. Harvey, 49 Cal. 506, as holding that such purchaser has better right enforceable against heirs in equity; Bouldin v. Phelps, 12 Saw. 315, 30 Fed. Rep. 562, on point that claimant under imperfect Mexican title cannot maintain ejectment against confirmee, although latter's title derived by fraud or otherwise; McDonald v. McCoy, 121 Cal. 67, holding title under patent for Mexican grant to inure to successors of the grantee subsequent to filing of petition for confirmation; and cf. City of Los Angeles v. Pomeroy, 125 Cal. 426, on same point.

**46 Cal. 204-207. CLARK v. DUNHAM.**

**Partnership.**—Judgment of dissolution directing sale of assets and division of proceeds is final judgment, p. 208.

Cited to same effect in Arnold v. Sinclair, 11 Mont. 567, 568, holding finality not affected by fact of reference for accounting, et cetera, after judgment; Sharon v. Sharon, 79 Cal. 703, ruling similarly as to divorce decree, although referee as to community property had not reported; Humphreys v. Stafford, 71 Miss. 141, as to decree on creditor's bill for winding up firm on death of all partners, where payments to be made by receiver were fixed by court. Distinguished in White v. Conway, 66 Cal. 385, holding such judgment not final where liability of copartners was not fixed, but was determinate on deficiency after sale of property. Cited, also, in note to Williams v. Field, 60 Am. Dec. 435, on general subject; Skillman v. Lachman, 83 Am. Dec. 107, on dissolution of mining partnerships.

Judgment not Otherwise "Final" may become so when so treated by parties, p. 208.

Cited to same effect in State v. Commissioners, 22 Nev. 79, where appeal had been taken therefrom.

Final Judgment Bears Interest when for money, even in action for partnership dissolution, p. 208.

Cited in *Barnhart v. Edwards*, 128 Cal. 575, as to interest on judgment in foreclosure suit when findings and decree were amended on appeal. Distinguished in *Moran v. Hagerman*, 69 Fed. Rep. 429, denying interest under local statutes and recalling execution where interest had been included.

**46 Cal. 209-214. GOLDSMITH v. SAWYER.**

Judicial Notice will not extend to rules of board of brokers, p. 212.

Cited in note on general subject to *Lanfear v. Mestier*, 89 Am. Dec. 665; *Temple v. State*, 49 Am. Rep. 206.

**Interest.—Contract for is invalid unless in writing, p. 214.**

Cited in *Tucker v. Randall*, 10 S. Dak. 583, holding conventional rate not recoverable when contract not signed personally or by agent.

**46 Cal. 214-217. McMAHON v. SUPERVISORS.**

Proclamation for Bond Election is invalid unless stating specific object for which money necessary, p. 217.

Cited to same effect in *People v. Counts*, 89 Cal. 21, sustaining proclamation as to building of two wagon roads; *Daniels v. Long*, 111 Mich. 567, holding such invalidity assertable by officer empowered to sign the bonds in mandamus to compel such signature.

**46 Cal. 218-222. STONE v. BUMPUS.**

**Mining Claims.—Mode of working will not be interfered with by court when others are not injured thereby, p. 221.**

Cited in *Mann v. Budlong*, 129 Cal. 579, applying rule to method of performing annual labor under the statute.

**46 Cal. 222-234. HARP v. CALAHAN.**

**Mortgage Claim must be presented against estate where property forms part of its general assets, p. 232.**

Cited to same effect in dissenting opinion in *Whitmore v. Savings Union*, 50 Cal. 151, main opinion holding statute inapplicable to trust deed, and that debt not extinguished by nonpresentation; and see on same point, *Reid v. Sullivan*, 20 Colo. 501; dissenting opinion in *Hibernia etc. Society v. Hayes*, 56 Cal. 302, holding, further, rule abrogated by code; *Bush v. Adams*, 22 Fla. 190, on point that mortgage claim must be presented even where debt secured was another's; *Adams v. Smith*, 19 Nev. 268, holding administratrix liable for payment of such claims when not presented. Distinguished under local statute in *Null v. Jones*, 5 Neb. 503, holding mortgage not barred by nonpresentation, but holder confined to mortgaged property without recourse to general assets.

**Mortgage does not create title, but only a lien, p. 233.**

Cited in Sidney etc. Co. v. So. Ogden etc. Co., 20 Utah, 276, noted under Dutton v. Warschauer, 21 Cal. 609.

**46 Cal. 234-245. HASTINGS v. JACKSON. S. C. PEOPLE v. JACKSON,** 62 Cal. 548, as to further proceedings.

**"Five Hundred Thousand Acre Grant."**—Selection is invalid until land properly surveyed by United States, pp. 239, 244.

Cited to same effect in People v. Jackson, 62 Cal. 553, 554, citing main case also on other points involved; Roberts v. Columbet, 63 Cal. 24, holding, however, location valid as to state and discussing effect of federal act to quiet land titles in California.

**State Lands.**—Valid selection can be made only in manner prescribed by legislature, p. 243.

Cited in Platter v. Elkhart County, 103 Ind. 378, on point that public officers have only powers expressly or impliedly granted. Cited, also, in note on general subject to Terry v. Megerle, 85 Am. Dec. 93.

**Error without Prejudice** is not ground for reversal, p. 245.

Cited to same effect in Stafford v. Hornbuckle, 3 Mont. 489, as to rejection of testimony.

**46 Cal. 245-256. BEE v. SAN FRANCISCO AND HUMBOLDT BAY RAILROAD COMPANY.**

**Admission of Improper Evidence** is not ground for reversal when not considered in rendering judgment, p. 255.

Cited in note on general subject to Winkley v. Foye, 66 Am. Dec. 717.

**In Action by Railroad Superintendent** against company for services, conversations between plaintiff and directors are admissible to show he dissented from amount of salary proposed by directors, p. 255.

Approved in Pacific Livestock Co. v. Gentry, 38 Or. 286, statements of general superintendent of company trying to acquire land that occupant thereof was company's employee, when made during inquiry as to his character are evidence against company in action between it and occupant over title to land.

**46 Cal. 256-259. WHITMAN v. STEIGER.**

**Instructions to Jury.**—Jury should not be instructed to find upon question of fact as to which there was no evidence, p. 257.

Cited in Jones v. Goldtree Bros. Co., 142 Cal. 387, holding instruction erroneous; Lathrop v. Flood, 135 Cal. 461, applying rule in action by husband and wife for damages sustained by wife by acts of physician attending during confinement.

**46 Cal. 259-266. HIGGINS v. HIGGINS.**

Purchase by Husband with community funds and conveyance to wife amounts to gift, and property becomes her separate estate, p. 263.

Cited to same effect in Arkle v. Beedie, 141 Cal. 462, sustaining finding in favor of wife; Hamilton v. Hubbard, 134 Cal. 607, and Sackman v. Thomas, 24 Wash. 689, holding property to be wife's separate property under facts stated; Kane v. Desmond, 63 Cal. 465, as to verbal gift of community personality; Read v. Rahm, 65 Cal. 344, where property conveyed to wife in consideration of debt due community; Morgan v. Lones, 78 Cal. 62, holding, however, property conveyed to wife to be community where no interest to make gift shown; Jackson v. Torrence, 83 Cal. 532, holding, further, wife not estopped under facts shown asserting separate claim; Flournoy v. Flournoy, 86 Cal. 294, 21 Am. St. Rep. 43, holding property to be wife's when bought in her name with money borrowed from husband; Rico v. Brandenstein, 98 Cal. 469, 35 Am. St. Rep. 186, holding invalid, however, wife's gift to husband; Heney v. Peaoli, 109 Cal. 60, discussing effect of sections 163 and 164 of the Civil Code as amended, and holding property to be wife's under facts. Cited, also, in note to Cooke v. Bremond, 86 Am. Dec. 637, 638, 640, on presumption of community character of property, and Ramsdell v. Fuller, 87 Am. Dec. 107, on same subject; Shaw v. Hill, 96 Am. Dec. 423, on general subject.

Consideration of Deed may be shown by extrinsic parol evidence, p. 263.

Cited to same effect in Lake v. Bender, 18 Nev. 385.

Wife May Claim Homestead on husband's undivided interest in land whereon he was living with his family, p. 266.

Cited in note on general subject to Wolf v. Fleischacker, 63 Am. Dec. 124.

**46 Cal. 266-270. SWIFT v. SWIFT.**

Statute of Frauds.—Contract is within, where parties must have contemplated lapse of more than year before there could be any performance, p. 269.

Cited to same effect in Grimmer v. Carlton, 93 Cal. 193, 27 Am. St. Rep. 173, discussing contract dependent on death of party, but not deciding question. Cited, also, in note on general subject to Doyle v. Dixon, 93 Am. Dec. 86, 88.

Agent Cannot Sue in own name to recover principal's money loaned in latter's name, p. 269.

Cited to same effect in Chin Kem You v. Ah Joan, 75 Cal. 128, holding money so loaned, under facts.

**46 Cal. 270-279. POLACK v. SHAFER.**

**Appeal.**—Restitution on reversal is proper where defendant dispossessed under judgment for forcible entry, p. 276.

Cited to same effect in Lipp v. Hunt, 29 Neb. 258, as to like judgment. Cited, also, in note to Reynolds v. Harris, 76 Am. Dec. 467, on general subject.

**Forcible Entry.**—Landlord cannot sue for after tenant has gone into possession, p. 277.

Cited to same effect in Hyde v. Fraher, 25 Mo. App. 416.

**46 Cal. 279-286. BOWERS v. CHEROKEE BOB. S. C. 45 Cal. 495.**

**Motion May be Renewed** after denial, by leave of court, p. 286.

Cited to same effect, conversely, in Reed v. Allison, 54 Cal. 490, holding denial proper where renewed without leave; Kenney v. Kelleher, 63 Cal. 444, holding order permitting renewal discretionary and grantable in chambers; Hitchcock v. McElrath, 69 Cal. 635, holding no abuse of discretion shown under facts where motion for default renewed twice to permit additional proof; Johnston v. Brown, 115 Cal. 697, holding doctrine of res judicata not applicable to motions in pending action; Clopton v. Clopton, 10 N. Dak. 573, as to rehearing of order vacating judgment and holding doctrine of res judicata inapplicable to motions; Wallace v. Lewis, 9 Mont. 403, 17 Am. St. Rep. 265, holding time of making motion not extended by its denial without prejudice.

**46 Cal. 287-289. BRADBURY v. CRONISE.**

**Finding Will Be Disregarded** when contrary to admissions in pleadings, p. 288.

Cited to same effect in White v. Douglass, 71 Cal. 119, holding such finding reversible error unless judgment not affected thereby; Ortega v. Cordero, 88 Cal. 226, as to finding of contract different in date and consideration from that alleged, but disregarding finding on appeal under facts; Fisk v. Cuthbert, 2 Mont. 599, on point that defendant cannot on appeal controvert answer or change position taken at trial.

**Answer is insufficient if in form of negative pregnant**, p. 288.

Cited in Rock Springs etc. Co. v. Salt Lake etc. Assn., 7 Utah, 161, 162, noted under Woodworth v. Knowlton, 22 Cal. 164.

**46 Cal. 289-293. DEFFELIZ v. PICO.**

**Execution Sale of Homestead** is void, and passes no title, p. 292.

Cited in note on general subject to Kendall v. Clark, 70 Am. Dec. 692; Blue v. Blue, 87 Am. Dec. 273, 279; Currier v. Sutherland, 20 Am. Rep. 151; Pipkin v. Williams, 38 Am. St. Rep. 247.

**46 Cal. 299-302. KUHN v. RUMPP.**

If Deed Absolute on Its Face is given as security for debt, equity will declare it a mortgage and allow grantor to redeem by paying debt both as to original grantee and purchasers from him with knowledge, p. 301.

Approved in Price v. Ward, 26 Nev. 393, where defendant who held mortgage on land and afterward took deed absolute as security sold land to plaintiff, latter was not innocent purchaser where mortgage had been satisfied of record at time of conveyance to him.

**46 Cal. 302-304. PEOPLE v. STRONG.**

Criminal Trial.—Court may allow closing argument to be made by associate private counsel, p. 303.

Cited to same effect in People v. Murphy, 47 Cal. 105; but denied in dissenting opinion in Territory v. Calton, 5 Utah, 464, main opinion, however, following rule.

Error in Instructions will not cause reversal where testimony not in record, unless erroneous under every conceivable state of facts, p. 304.

Cited to same effect in People v. Wong Fook Sam, 146 Cal. 115, applying rule in prosecution for perjury; Walker v. Superior Court, 135 Cal. 374, noted under People v. Donahue, 45 Cal. 321; People v. Mendenhall, 135 Cal. 347, noted under People v. Torres, 38 Cal. 141; People v. Smith, 57 Cal. 132, holding instruction properly refused as abstract when no testimony applicable to it appeared; and People v. Bourke, 66 Cal. 456, and State v. Loveless, 17 Nev. 428, on same point, where no evidence in record.

Attempt to Escape, after knowledge of charge, is circumstance to be considered in determining guilt, p. 303.

Cited to same effect in People v. Welsh, 63 Cal. 168, admitting evidence of conduct, flight, and recapture of prisoner immediately after arrest.

**46 Cal. 304-320. ESTATE OF SCHROEDER.**

Judgment against Estates.—Provision as to filing certified transcript among estate records is merely directory, p. 315.

Distinguished in Chaquette v. Ortet, 60 Cal. 601, holding filing of such transcript unnecessary in case of decree in action for accounting between administrator and sureties of deceased predecessor.

Probate Claim.—Statute of limitations will not run against judgment on claim, pending administration, p. 316.

Cited to same effect in Wise v. Williams, 72 Cal. 548, as to allowed claim; and on same point in In re Arguello, 85 Cal. 153, as to such creditor's right to petition for order of sale.

Notes Cal. Rep.—147.

**Judgment May be Amended** from records, for clerical errors and misprisions, p. 316.

Cited to same effect in Estate of Willard, 139 Cal. 504, amending decree settling probate account; Fay v. Stubenrauch, 141 Cal. 575, sustaining power to correct clerical misprision as to name of party; Kirby v. Superior Court, 68 Cal. 606, denying, however, power to amend complaint after affirmance of order sustaining demurrer; Barton v. South Jordan etc. Inst., 10 Utah, 350, as to amendment of complaint in name of defendant after judgment. Cited, also, in note on general subject to Rew v. Barker, 14 Am. Dec. 518.

**Judgment against Administrator** is, as to heirs, *prima facie* proof of indebtedness, p. 317.

Cited to same effect in Estate of Swain, 67 Cal. 642, applying rule to allowance of claims, and on same point Yeatman v. Yeatman, 35 Neb. 425, holding order allowance conclusive as against collateral attack. Cited, also, in note on general subject to Moore v. Hillebrant, 65 Am. Dec. 121-127.

**46 Cal. 320-323. ATHERTON v. FOWLER.** S. C. 28 Cal. 605; 37 Cal. 100; 46 Cal. 327; and Page v. Fowler, 39 Cal. 412.

**Modification of Judgment** will be ordered on appeal when justice can be done, without remand for new trial, p. 321.

Cited to same effect in Fox v. Hale etc. Co., 122 Cal. 222, noted under De Costa v. Massachusetts etc. Co., 17 Cal. 613; Eames v. Haver, 111 Cal. 405, where remittance offered and payment of costs on appeal would compensate adverse party for all possible injury from errors in instructions; Gans v. Woolfolk, 2 Mont. 466, where order granting nonsuit as to two causes of action was erroneous as to one.

**Interest on Verdict** should not be allowed to entry of judgment when delayed, p. 326.

Cited in Fremont etc. Co. v. Root, 49 Neb. 915, allowing interest, however, where delay caused by pendency of defendants' motion for new trial.

**46 Cal. 323-328. ATHERTON v. FOWLER.**

**New Trial** may be Denied on appeal conditionally on remission by plaintiff of part of damages claimed to be excessive, p. 327.

Cited to same effect in Davis v. Southern Pacific Co., 98 Cal. 18, Affirming such conditional denial by trial court.

**46 Cal. 328-332. JOHNSON v. WHITE.**

**Sales of Personality.**—Title does not pass until payment if so agreed, p. 330.

Cited to same effect in *Keck v. State*, 12 Ind. App. 125, as to conditional sale where price payable in installments.

**46 Cal. 332-342. HAYDEN v. HAYDEN.**

**Amendments to Pleadings** should be allowed liberally in furtherance of justice, p. 337.

Cited to same effect in *Tribune etc. Co. v. Hamill*, 2 Colo. App. 261, as to amendment of complaint where cause of action not changed; and on same point in *McKeighan v. Hopkins*, 19 Neb. 36, and *Carmichael v. Dolen*, 25 Neb. 338, allowing amendments of respective complaints; *Martin v. Luger*, 8 N. Dak. 223, noted under *Smith v. Yreka Water Co.*, 14 Cal. 201.

Cited, also, in note on general subject to *Stevenson v. Mudgett*, 34 Am. Dec. 158.

**Judgment Obtained by Fraud** will be set aside in equity, p. 340.

Cited to same effect in *Steen v. March*, 132 Cal. 617, noted under *Allen v. Currey*, 41 Cal. 321; *Lang Syne etc. Co. v. Ross*, 20 Nev. 138, 19 Am. St. Rep. 243, holding further action not barred; *Irvine v. Leyh*, 124 Mo. 366, denying relief, however, where fraud not collateral or extrinsic to matter involved. Cited, also, in note to *Little Rock etc. Co. v. Wells*, 54 Am. St. Rep. 236, on general subject.

**46 Cal. 342-346. DE WITT v. DUNCAN.**

**Power to Lay Out Streets** is legislative and not judicial, p. 345.

Cited to same effect in *Quinchard v. Board*, 113 Cal. 669, as to improvement of existing street, and denying certiorari thereon; *City Council v. Townsend*, 84 Ala. 484, discussing rule for damages awardable under such statutes.

"**Special Proceeding**" includes proceedings to lay out street where power properly conferred on court by legislature, p. 345.

Cited in *Bixler's Appeal*, 59 Cal. 555, discussing appealability of order in swamp land proceedings.

**46 Cal. 346-354. OGBURN v. CONNOR.** 13 Am. Rep. 213.

**Easement for Flow of Water**.—Owner of higher land has natural easement to have water therefrom flow over adjacent lower land, p. 351.

Cited to same effect and affirmed on principle of stare decisis, in *McDaniel v. Cummings*, 83 Cal. 517, 519, 520, 521 (but see, contra, *Nininger v. Norwood*, 72 Ala. 283, 47 Am. Rep. 415), holding rule inapplicable, however, as to flood waters (as to which see *Philadelphia etc. Co. v. Davis*, 68 Md. 289, 6 Am. St. Rep. 442), and denying injunction against construction of levee against same by lower owner; and on

same point *Gray v. McWilliams*, 98 Cal. 162, 164, 35 Am. St. Rep. 167, 168, 169, discussing general rules as to such easement, and its limitations (and see *Rudel v. Los Angeles*, 118 Cal. 288, distinguishing main case); *Wood v. Moulton*, 146 Cal. 319, owner of higher land has no right for own relief to injury of lower owner to divert storm waters onto lower lands nor to cause waters on own lands to accumulate in ditches to precipitate them on neighbor's lands in large quantities or in different form from that which they would naturally have taken; *Cushing v. Pires*, 124 Cal. 665, denying right of owner to run surface or storm water on another's land; *Sanguinetti v. Pock*, 136 Cal. 469, 472, 473, denying right of lower owner to interrupt such flow; *Los Angeles etc. Association v. Los Angeles*, 103 Cal. 467, also stating such rules, but holding them inapplicable to city lots and on same point, *Mayor v. Sykes*, 94 Ga. 33, 47 Am. St. Rep. 134, holding main case to state rule of civil, and not common, law, and *Barkley v. Wilcox*, 86 N. Y. 145, 40 Am. Rep. 522, following latter rule; *Wharton v. Stevens*, 84 Iowa, 114, 35 Am. St. Rep. 301, granting mandatory injunction for removal of obstructions in ditch by which surface water sought outlet; *Philadelphia etc. Co. v. Davis*, 68 Md. 289, 6 Am. St. Rep. 442, holding lower owner obliged to provide proper outlet for water; *Boyd v. Conklin*, 54 Mich. 591, 52 Am. Rep. 837, holding higher owner not liable for removal of dam built by lower, which flooded upper lands; *Ramsdale v. Foote*, 55 Wis. 560, sustaining complaint for nuisance by building of dam by lower owner to throw back water. Distinguished in *Little Rock etc. Co. v. Chapman*, 39 Ark. 477, 43 Am. Rep. 285, under local statutes, but holding railroad company liable for so constructing roadway as to throw back waters naturally drained from upper lands; and see on last point *Drake v. Chicago etc. Co.*, 63 Iowa, 305, holding company liable under like facts, although owner has received compensation for condemnation of land for right of way. Cited, also, in note on general subject to *Martin v. Jett*, 32 Am. Dec. 124; *Beard v. Murphy*, 86 Am. Dec. 697; *Gannon v. Hargadon*, 87 Am. Dec. 627; *Butler v. Peck*, 88 Am. Dec. 457; *Cairo etc. Co. v. Stevens*, 38 Am. Rep. 144; *Boynton v. Longley*, 3 Am. St. Rep. 788; *Rowe v. St. Paul etc. Co.*, 16 Am. St. Rep. 710; and *Wells v. New Haven etc. Co.*, 21 Am. St. Rep. 426, as to bar by limitation of action for nuisance.

**Additional Findings**, when called for, may be filed after judgment entered, p. 354.

Cited to same effect in *Hayes v. Wetherbee*, 60 Cal. 399, where filed before judgment, with recital that through inadvertence some issues had been omitted; *Thompson v. Connecticut etc. Co.*, 139 Ind. 353, as to amendment of special findings before judgment; *North v. Peters*, 138 U. S. 283, following Dakota statute, when filed on motion for new trial and after judgment.

**46 Cal. 354-355. PEOPLE v. HAGGERTY.**

**Arson is Committed** where part of building is charred so as to destroy fibers of wood, p. 355.

Cited to same effect in *People v. Simpson*, 50 Cal. 306, where wooden partition burned through at one place; *Woolsey v. State*, 30 Tex. App. 349, but ruling aliter when merely scorched; *State v. Spiegel*, 111 Iowa, 705, sustaining instructions given; note on general subject to *Macy v. State*, 81 Am. Dec. 67.

**46 Cal. 355-357. PEOPLE v. KELLY.**

**Misconduct of Jury** does not include their being left in room accessible to strangers and in absence of officer in charge, p. 357.

Cited to same effect in dissenting opinion in *People v. Thornton*, 74 Cal. 487, main opinion granting new trial under facts for reception of evidence out of court (Penal Code, sec. 1181); *State v. Bailey*, 32 Kan. 94, holding misconduct shown by facts, but sustaining denial of new trial therefor; *Territory v. Hart*, 7 Mont. 506, as to temporary separation of jury. Cited, also, in note on general subject to *Bradbury v. Cony*, 16 Am. Rep. 456.

**Separation of Jury is Misconduct**, when done after delivering sealed verdict to sheriff; but error is waived where done with defendant's consent, p. 357.

Cited to same effect in *State v. Anderson*, 41 Minn. 105, reversing conviction when no waiver. Distinguished in *Territory v. Hexster*, 3 Mont. 207, sustaining verdict where separation occurred thereafter, but stating jury in main case to have separated before verdict found. Cited, also, in note on general subject to *McKinney v. People*, 43 Am. Dec. 86, 87.

**46 Cal. 361-379. GATES v. SALMON.**

**Law of Case**.—Prior decision of supreme court in case becomes its law, p. 371.

Cited to same effect in *Daniels v. Andes etc. Co.*, 2 Mont. 502, as to ruling on sufficiency of complaint; and *Palmer v. Murray*, 8 Mont. 183, on same point; *Venard v. Greene*, 4 Utah, 458, on point that judgment entered in accordance with prior opinion will not be disturbed. Cited, also, in note on general subject to *Gee's Admr. v. Williamson*, 27 Am. Dec. 634.

**Appeal from Judgment** does not bring up sufficiency of evidence to support findings, p. 372.

Cited to same effect in *Allport v. Kelley*, 2 Mont. 345, where no appeal taken from order denying new trial; *Chumasero v. Vial*, 3 Mont. 379, where no such motion made.

**Married Woman's Agreement for Partition** is invalid when not in writing in form required for her alienation, p. 374.

Distinguished in *Berry v. Seawall*, 65 Fed. Rep. 764, sustaining such agreement under facts; citing main case, also, page 760, as holding that such agreement is within statute of frauds; *Berry v. Seawell*, 65 Fed. 750, sustaining such agreement under facts.

**Partition by Agreement** is invalid when not concurred in by all the cotenants, p. 374.

Cited to same effect in *Hill v. Den*, 54 Cal. 23, holding agreement void under facts; *Center v. Davis*, 113 Cal. 309, 54 Am. St. Rep. 353, ruling similarly and holding validity not established by subsequent acts stated, *Pacific Bank v. Hannah*, 90 Fed. 77, noted under *Sutter v. San Francisco*, 36 Cal. 112; note to *Tomlin v. Hilyard*, 92 Am. Dec. 124, 127, on parol partition.

**Judgment in Partition** cannot be attacked by claimants under one cotenant for errors as to interests of others, p. 375.

Cited to same effect in *Simmons v. Spratt*, 26 Fla. 463, on point that stranger to common title cannot question rights and interests of cotenants *inter se*.

**Deed by Tenant in Common** will convey only his own undivided interest in the property, p. 377.

Cited and discussed in *Emeric v. Alvarado*, 90 Cal. 457, as to rights of grantee on partition.

**Pleading of Ultimate Facts.**—Allegations as to character of conveyance held to be merely evidentiary, p. 378.

Cited to same effect in *McCaughhey v. Schuette*, 117 Cal. 225, holding complaint in ejectment insufficient as stating evidence and being argumentative.

#### 46 Cal. 385-387. **MASON v. AUSTIN.**

**New Trial should be Granted** by trial court, for insufficiency of evidence where trial court believes evidence preponderates against verdict, p. 387.

Cited to same effect in *Green v. Soule*, 145 Cal. 102, applying rule in action against contractor for personal injuries caused by falling into sewer trench; *Bates v. Howard*, 105 Cal. 179, sustaining power of trial court to grant new trial where evidence conflicting if findings opposed to weight of evidence, *Magnusson v. Linwell*, 9 N. Dak. 156, noted under *Hawkins v. Reichert*, 28 Cal. 539.

**Appeal from Order Granting New Trial** will not authorize consideration of sufficiency of complaint or answer, p. 387.

Cited to same effect in *Onderdonk v. San Francisco*, 75 Cal. 539; *Wheeler v. Kassabaum*, 76 Cal. 92, as to order denying new trial;

**Krantz v. Rio Grande etc. Co.**, 13 Utah, 3, holding further as to law of case on decision sustaining sufficiency of complaint. Distinguished in **Alpers v. Hunt**, 86 Cal. 82, 21 Am. St. Rep. 19, where new trial granted for error in denying motion for nonsuit based on insufficiency of complaint; **Ross v. Wait**, 2 S. Dak. 640, as to errors in admission of testimony, based on insufficiency of complaint.

**46 Cal. 389-392. WOODS v. SAWTELLE.**

Application to Purchase State Lands is invalid unless in conformity to statute, p. 391.

Cited to same effect in **McCoy v. Byrd**, 65 Cal. 93, holding insufficient an affidavit under Political Code, section 3443; **Millidge v. Hyde**, 67 Cal. 7, and **McEntee v. Cook**, 76 Cal. 189, ruling similarly as to application under section 3500; **McKenzie v. Brandon**, 71 Cal. 211, ruling similarly as to application for part of thirty-sixth section.

**State Lands.**—Approval of application by surveyor general will not raise presumption of conformity with statute, p. 391.

Cited to same effect in **Jacobs v. Walker**, 76 Cal. 177, on point that certificate of purchase is not conclusive of holder's right.

**Land Contest.**—Pleadings respectively must state directly all facts relied upon to show better right, p. 392.

Cited to same effect in **Christman v. Brainard**, 51 Cal. 536, holding defendant not entitled to judgment unless answer, together with complaint, states facts showing his right to purchase; **Lane v. Pferdner**, 56 Cal. 124, on point that burden of proof is on defendant to establish his own right, even if complaint contains negative allegations: **Gilson v. Robinson**, 68 Cal. 543 (cited in **Prentice v. Miller**, 82 Cal. 573), holding answer insufficient as to proceedings under Stats. 1867-68, page 507; **Anthony v. Jillson**, 83 Cal. 300, applying rule to answer in action to determine right to patent to mineral land; **Cronin v. Bear Creek etc. Min. Co.**, 3 Idaho, 618, complaint in action under United States Revised Statutes, section 2326, to contest application for mining patent must show that plaintiff filed adverse claim within time prescribed by section 2325, and brought action within time thereafter allowed by section 2326; **Shively v. Pennoyer**, 27 Oreg. 37, applying principle to alternative writ of mandate in land contest under local practice.

**45 Cal. 392-398. VOORMAN v. VOIGHT.**

Evidence Proper as to One Defendant is admissible against co-defendant when objection not specific, p. 397.

Cited in **State v. Soule**, 14 Nev. 456, holding erroneous the admission of evidence generally, when admissible only as against one defendant. Distinguished in **Murray v. Silver City etc. Co.**, 3 N. Mex. 419 (341),

holding right to object to evidence outside issues not waived by failure to object when offered.

**General Objection to Evidence** is properly overruled when it is admissible for any purpose whatever, p. 397.

Cited to same effect in *Rush v. French*, 1 Ariz. Ter. 127, discussing question generally.

**Action on Contract.**—Plaintiff need show only substantial compliance, p. 398.

Cited to same effect in *Griffith v. Happberger*, 86 Cal. 613, as to substantial compliance which was accepted and approved.

#### 46 Cal. 398-407. **KIRK v. RHOADS.**

Statute adopting another may also adopt its subsequent modifications, p. 403.

Cited in *Ramish v. Hartwell*, 126 Cal. 447, noted under Spring Valley W. W. v. San Francisco, 22 Cal. 434.

**Election Contest.**—Statement of grounds may be verified in form prescribed for pleadings, p. 403.

Approved in *McQardle v. Barstow*, 145 Cal. 136, following rule. Distinguished in *Johnson v. Allen*, 55 N. J. L. 401, holding affidavit in such form insufficient under local statutes.

**Vote will not be Rejected** where ballot defective in particular not under elector's control, p. 405.

Cited to same effect in *Murphy v. San Luis Obispo*, 119 Cal. 632, holding bond election invalid, however, where ballots not printed in conformity to ordinance; *State v. Bernholtz*, 106 Iowa, 160, as to change of ballot headings by certain of the municipal officers; *Morris v. Board*, 49 W. Va. 256, as to converse of proposition stated; *Kellogg v. Hickman*, 12 Colo. 263, 276, where color of ballot paper was improper, but see, contra, *State v. McKinnon*, 8 Oreg. 500, (cited in *Cook v. Fisher*, 100 Iowa, 34); *State v. Saxon*, 30 Fla. 675, 677, 679, 32 Am. St. Rep. 50, 51, 64 holding name of party printed on ticket not to be a "designation" under statutory prohibition; *Parvin v. Wimberg*, 130 Ind. 566, 30 Am. St. Rep. 258 (cited in *Taylor v. Bleakley*, 55 Kan. 10, 49 Am. St. Rep. 236), as to converse of rule, rejecting ballot (under Australian system) not stamped in proper place, and see *Bechtel v. Albin*, 134 Ind. 204, holding such improper stamping to be a "distinguishing mark"; *State v. Phillips*, 63 Tex. 393, 51 Am. Rep. 647 (cited in *State v. Saxon*, supra), holding diamond shaped ballot not to be a "device"; *State v. Metzger*, 28 Kan. 396, as to bond election, where "the" omitted in ballots; dissenting opinion in *Slaymaker v. Phillips*, 5 Wyo. 478, main opinion rejecting ballots on theory that statute is mandatory.

**General Citation.**—*Moody v. Davis*, 13 S. D. 92.

**46 Cal. 409-415. MALONE v. HAWLEY.**

**Master's Liability for Defective Machinery.—Essentials of liability stated, p. 413.**

Cited in *Samuelson v. Cleveland etc. Co.*, 49 Mich. 170, 43 Am. Rep. 459, on point that plaintiff must prove that defendant had, or ought to have had, knowledge of the defect; *Southern Pacific Co. v. Johnson*, 64 Fed. Rep. 958, stating general rules, but holding plaintiff barred by contributory negligence. Cited, also, in note on general subject to *Buzzell v. Laconia etc. Co.*, 77 Am. Dec. 223; *Malone v. Hathaway*, 21 Am. Rep. 579; *Lake Shore etc. Co. v. Fitzpatrick*, 31 Ohio St. 486, affirming verdict in favor of plaintiff under facts and holding questions to be for jury.

**Master and Servant—Defective Machinery.—Evidence is admissible of prior falling of the apparatus by which injury complained of was caused, p. 413.**

Cited to same effect in *Smith v. Whittier*, 95 Cal. 292, holding evidence admissible of facts showing notice to employer of defects in elevator. *O'Hara v. Collins Co.*, 84 Minn. 438, sustaining granting of new trial to plaintiff for newly discovered evidence in this regard.

**Damages for Personal Injuries.—Elements of computation stated, p. 414.**

Cited in *Green v. Southern Pac. Co.*, 122 Cal. 565, holding evidence as to poverty of heir inadmissible; *Townsend v. Paola*, 41 Kan. 595, on point that plaintiff recovers for permanent loss of earning power, including loss sustained and that likely to be sustained thereafter.

**46 Cal. 415-520. SAVINGS AND LOAN SOCIETY v. AUSTIN.**

**State Board of Equalization.—Provisions of Political Code as to creation and powers are constitutional, p. 473, 476.**

Cited to same effect, under local acts in *Spalding v. Hill*, 86 Ky. 662; *Ames v. People*, 28 Colo. 93, as overruled by *Houghton v. Austin*, 47 Cal. 646. Cited, also, in concurring opinion in *Houghton v. Austin*, 47 Cal. 651 (as to which see *Board of Equalization Cases*, 49 Ark. 526, 527, sustaining local acts), referring to dissenting opinion in main case; and overruled in same case, refusing to follow main case on principle of stare decisis (page 666), and holding sections 3696 and 3693 unconstitutional; and see *McCabe v. Carpenter*, 102 Cal. 474, 475, affirming last case and holding unconstitutional the delegation of legislative power to county superintendent of schools to establish rate of taxation. Cited, also, in concurring opinion *Wells etc. Co. v. Board*, 56 Cal. 204, 205, discussing history of legislation as to such board.

**Consolidation Act of San Francisco is subordinate to general provisions of Political Code as to taxation, p. 481.**

Cited to same effect in *People v. Reis*, 76 Cal. 276, as to interest on delinquent taxes. Distinguished in *People v. Clunie*, 70 Cal. 506, holding charter of Sacramento to govern as to municipal taxes.

**Taxation of Solvent Debts** is valid where these are secured by mortgage, p. 483.

Cited to same effect in *People v. Austin*, 46 Cal. 522, holding such taxes not recoverable back, and further that tax collector cannot withhold these from treasury because such suit threatened; *People v. Ashbury*, 46 Cal. 527, holding further as to auditor's duties in relation to such taxes when delinquent; *Boyd v. Selma*, 96 Ala. 149, holding such credits included under "personal property," and further as to situs thereof for taxation purposes; *Lamar v. Palmer*, 18 Fla. 150, holding such taxation not "double"; *State v. Bank*, 17 Nev. 154, holding further as to taxation of bank deposit. Cited, also, in note on general subject to *People v. Worthington*, 74 Am. Dec. 93; *Vaughan v. Murfreesboro*, 60 Am. Rep. 416; and in *Morrison v. Manchester*, 58 N. H. 552, discussing taxation of mortgaged property to mortgagor in possession.

**Taxation of Solvent Debts** is valid even where these are secured, p. 483.

Cited to same effect in concurring opinion in *People v. Hibernia Bank*, 51 Cal. 254, 21 Am. Rep. 712. Cited, also, in *Hewitt v. Dean*, 91 Cal. 13, discussing rationale of provisions of new constitution upon taxation of mortgage debts. Cited, also, in *Morrison v. Manchester*, 58 N. H. 552, holding mortgaged property assessable to mortgagor in possession.

**Injunction will not be Granted** to restrain sale for illegal taxes except to avoid multiplicity of suits or prevent irreparable injury or cloud on title, p. 488.

Cited to same effect in *C. P. R. R. Co. v. Corcoran*, 48 Cal. 70, holding injunction improper under facts; *Dean v. Davis*, 51 Cal. 412, as to assessment by reclamation district; concurring opinion in *Lent v. Tillson*, 72 Cal. 435.

**Tax Sale will not be Enjoined** except to avoid multiplicity of suits, irreparable injury, or cloud on real estate, p. 488.

Cited to same effect in *Byrne v. Drain*, 127 Cal. 668, denying injunction in street assessment case when deed would be void; *Schaffner v. Young*, 10 N. Dak. 252, denying writ in case of levy on personality; *Farrington v. Investment Co.*, 1 N. Dak. 118, *Macomb v. Lake County*, 9 S. Dak. 471, enjoining sales under facts stated. Cited, also, in note on general subject to *Holland v. Mayor*, 69 Am. Dec. 199.

46 Cal. 520-522. **PEOPLE v. AUSTIN.**

**Tax Collector** cannot withhold from treasury moneys paid on legal

taxation, on ground of their payment under protest as invalid, and suit threatened for their recovery, p. 522.

Cited to same effect in *San Francisco v. Ford*, 52 Cal. 201, extending rule to cases where tax was illegal and suits already commenced for their return.

#### 46 Cal. 523-530. PEOPLE v. ASHBURY.

**Taxation.**—Solvent debts are subject to, p. 527.

Cited to same effect in *State v. Bank*, 17 Nev. 156, as to mortgage debts and holding further as to taxation of bank deposits. Cited, also, in note on general subject to *People v. Worthington*, 74 Am. Dec. 93.

**Supervisors cannot Cancel Taxes** other than those contained in Inst furnished by auditor, p. 527.

Cited to same effect in *People v. Board*, 50 Cal. 284, denying certiorari as to refusal to reduce assessment by striking certain property therefrom. Cited, also, in *Fuller v. Morrison County*, 36 Minn. 311, on point that legislature may compel municipal corporation to pay claim equitably but not legally due.

#### 46 Cal. 530-534. THORNE v. HAMMOND.

**Specification of Particulars** of insufficiency of evidence is insufficient when not applying specifically to a fact found, p. 534.

Cited to same effect in *Anthony v. Jillson*, 83 Cal. 299, holding specification insufficient when merely amounting to general proposition of law. Distinguished in *San Luis etc. Co. v. Estrada*, 117 Cal. 184, holding general specification sufficient in case of entire lack of evidence to sustain the findings; *De Molera v. Martin*, 120 Cal. 550, discussing rule generally; *Wasatch Irr. Co. v. Fulton*, 23 Utah, 470, findings of fact not disturbed on appeal for insufficiency of evidence where objections do not specify in what particulars evidence is insufficient. Cited, also, in *United States v. Choctaw etc. Co.*, 3 Oklahoma, 465, discussing contents of record on appeal; and see *Lumber Company v. Pennington*, 2 Dak. Ter. 475.

**Vendor and Vendee.**—Equitable defense of specific performance held not available to vendee under facts, p. 534.

Cited to same effect in *Woodard v. Hennegan*, 128 Cal. 302, noted under *Love v. Watkins*, 40 Cal. 587; *Whittier v. Stege*, 61 Cal. 241, admitting evidence for vendors, plaintiffs in ejectment of demand and refusal of possession; *Hicks v. Lovell*, 64 Cal. 20, 49 Am. Rep. 682, holding ejectment maintainable by vendor against vendee in possession who has repudiated contract and refused to vacate.

**46 Cal. 535-540. MILLER v. MYLES.**

Ouster of Cotenant is shown by denial in answer in ejectment of his title and right of entry, p. 538.

Cited to same effect in Plass v. Plass, 121 Cal. 133, holding ouster admitted by the pleadings; Greer v. Tripp, 56 Cal. 212, holding, further, no adverse possession shown; Pheian v. Smith, 100 Cal. 167, holding ouster further shown by facts; La Riviere v. Riviere, 77 Mo. 517, where answer was general denial; and on same point, Gilchrist v. Middleton, 107 N. C. 683; Grant v. Paddock, 30 Oreg. 315, where answer alleged adverse possession. Cited, also, in note on general subject to Gillaspie v. Osburn, 13 Am. Dec. 141.

**Adverse Possession.**—Cotenant's possession will not be considered adverse to his cotenant out of possession unless latter has notice of its hostility, p. 539.

Cited to same effect in Faubel v. McFarland, 144 Cal. 720, and Price v. Hall, 140 Ind. 316, holding ouster not shown under facts stated; Aguirre v. Alexander, 58 Cal. 28, holding instructions contradictory as to this point; and see, also, Watts v. Owens, 62 Wis. 525, following last case; Unger v. Mooney, 63 Cal. 591, 49 Am. Rep. 103, holding such adverse possession shown by facts, and stating general rules therefor; dissenting opinion in Tully v. Tully, 71 Cal. 346, main opinion holding no cotenancy to have existed; and see on last point, distinguishing main case, Frick v. Sinon, 75 Cal. 341, 7 Am. St. Rep. 179; Oglesby v. Hollister, 76 Cal. 141, 9 Am. St. Rep. 181, holding such adverse possession shown by facts, and Gage v. Downey, 94 Cal. 253, holding aliter on facts.

**Ejectment—Damages.**—Value of use and occupation is recoverable as, p. 539.

Cited to same effect in Martin v. Durand, 63 Cal. 43, sustaining judgment therefor; Haggin v. Lorentz, 13 Mont. 411, on point that general allegation of damages is sufficient on appeal from judgment.

**46 Cal. 540-545. PEOPLE v. HAMILTON.**

**Rape.**—Conviction will be reversed when based on uncorroborated and improbable testimony of prosecutrix, p. 542.

Cited to same effect in People v. Ardag, 51 Cal. 372, reversing conviction; People v. Castro, 60 Cal. 118, and Gazley v. State, 17 Tex. App. 277, ruling similarly; Lind v. Closs, 88 Cal. 13, applying rule to civil action by husband; People v. Kaiser, 119 Cal. 468, holding evidence, however, sufficient to sustain conviction in incest case; dissenting opinion in State v. Depoister, 21 Nev. 119, main opinion sustaining conviction, on facts. Cited, also, in note on general subject to Smith v. State, 80 Am. Dec. 367.

**Conviction will be Reversed where preponderance of evidence against verdict is so great as to warrant inference of passion or prejudice on part of jury, p. 543.**

Cited to same effect in *People v. Durrant*, 116 Cal. 207, holding case, however, not within this exception.

**46 Cal. 545-546. HARASZTHY v. HORTON.**

**Bill of Exceptions on Order** is insufficient when containing only minutes of clerk signed by judge, p. 546.

Cited to same effect in *United States v. Choctaw etc. Co.*, 3 Oklahoma, 465, holding bill insufficient; and see *Lumber Co. v. Pennington*, 2 Dak. Ter. 475.

**46 Cal. 547-549. THREADWELL v. HOLLOWAY.**

**Discharge in Bankruptcy** does not embrace factor's liability to principal for proceeds of sale on commission, p. 548.

Cited to same effect in *Mayberry v. Cook*, 121 Cal. 591, as to commission merchants and holding fiduciary character not affected by statement of account between the parties; *Bank v. Rucker*, 138 Cal. 610, applying rule to claim for moneys borrowed under false pretenses and retained; *Herrlich v. McDonald*, 80 Cal. 482, as to moneys realized by dealer in stocks from the sale of stock purchased with funds entrusted to her therefor; *Woolsey v. Cade*, 54 Ala. 384, 25 Am. Rep. 713; holding contra, however, following federal decisions under act of 1841, and *Chipley v. Frierson*, 18 Fla. 641, and *Zeperink v. Card*, 3 McCrary, 550, 11 Fed. Rep. 296, ruling similarly; and see, also, *Hennequin v. Clews*, 111 U. S. 680, affirming such decisions as to conversion of pledged securities; *Barber v. Sterling*, 68 N. Y. 273, holding defendant, however, not a factor, and debt embraced by discharge; *Flanagan v. Pearson*, 42 Tex. 5. 19 Am. Rep. 43, as to attorney's conversion of client's money; *Meador v. Sharpe*, 54 Ga. 126, as to factor's conversion; *Herman v. Lynch*, 26 Kan. 440, as to conversion of moneys received for purpose of buying exchange. Cited, also, in notes on general subject to *Wolcott v. Hodge*, 77 Am. Dec. 385; *Scott v. Porter*, 39 Am. Rep. 722.

**46 Cal. 549-553. LOW v. LEWIS.**

**Taxation**.—Property of city is not subject to, p. 552.

Cited to same effect in *Doyle v. Austin*, 47 Cal. 361, as to assessments for local improvements and sustaining exemption of such property; *Springville v. Johnson*, 10 Utah, 355, construing local statute. Cited, also, in note on general subject to *Board v. Ottawa*, 33 Am. St. Rep. 404, 405.

**City Slip Property**.—Validity of deed to assignee of original purchaser cannot be questioned by stranger to title, p. 553.

Cited to same effect in Galvin v. Palmer, 113 Cal. 53, as to validity of patent to part of military reservation. Cited, also, in Baker v. Brickell, 87 Cal. 334, discussing character of title to pueblo lands by city as its successor.

**46 Cal. 553-556. WILLIAMS v. CORCORAN.**

"Tax" includes charge imposed upon assessed value of all property in district, although for local improvement, p. 555.

Cited to same effect in Holley v. County, 106 Cal. 426, discussing difference between "tax" and "assessment." Distinguished in Zable v. Louisville etc. Home, 92 Ky. 93, construing "exemption from taxation" under local act.

**Assessment is Void when not made by assessor elected for district taxed, p. 556.**

Cited to same effect in People v. White, 47 Cal. 617, and People v. Stockton etc. Co., 49 Cal. 421, as to assessment of school district made by county assessor; Smith v. Farrelly, 52 Cal. 80, as to assessment by county assessor of special district formed for bridge construction taxation.

**Taxes Paid under Void Assessment cannot be recovered back as paid under duress, when paid on threatened sale upon delinquency, p. 556.**

Cited to same effect in Byrne v. Drain, 127 Cal. 668, noted under Savings etc. Soc. v. Austin, 46 Cal. 415; Smith v. Farrelly, 52 Cal. 81, conversely, and allowing recovery when paid under protest after publication of delinquent list; and DeFremery v. Austin, 53 Cal. 382, on same point; Merrill v. Austin, 53 Cal. 380, when paid before delinquency, although under protest. Distinguished in Mackay v. San Francisco, 113 Cal. 401, holding whole of penalty not recoverable back where illegal part of tax separable from legal part and none was paid nor tendered; Sonoma County Tax Case, 8 Saw. 318; 13 Fed. Rep. 793, where tax deed would have created no cloud; Spring Valley Water Worke v. Bartlett, 8 Saw. 568, 16 Fed. Rep. 625, on point that injunction will not be granted against passage of ordinance void upon its face.

**46 Cal. 557-559. HUTCHINGS v. EBELE.**

**Default is admission of all material allegations of complaint, p. 559.**

Cited to same effect in Weese v. Barker, 7 Colo. 181, as to allegations of possession and ouster in action of ejectment.

**Foreclosure Decree acts estopped of matters litigated, p. 559.**

Cited in Spaulding v. Howard, 121 Cal. 198, holding defendant estopped as to matters stated.

**46 Cal. 560-564. KING v. HANEY. S. C. 13 Am. Rep. 217.**

**Motion to Strike Out Evidence** because of incompetency of witness is made too late if after cross-examination of witness generally, p. 563.

Cited to same effect in People v. Salorse, 62 Cal. 145, on point that objection to admissibility of deposition is waived if not made at its introduction.

**46 Cal. 564-573. ESTATE OF MINOR.**

**Administrator's Commissions** cannot be allowed until settlement of final account and estate is ready for distribution, p. 572.

Cited to same effect in Estate of Barton, 55 Cal. 90, as to commissions of outgoing administrator upon change in administration; In re Dewar's Estate, 10 Mont. 439, holding fees regulated by law at time of such distribution, although different at time of appointment.

**Administrator** should be allowed necessary counsel fees incurred in good faith in estate litigation, p. 572.

Cited in note to Fletcher v. American etc. Co., 78 Am. St. Rep. 201, 205, on general subject.

**Administrator's Account** may be ordered to be restated by creditors in manner specified, on failure of administrator himself to do so, p. 568.

Cited in In re Sanderson, 74 Cal. 216, on point that "order settling account" includes order allowing it except in specified particulars although account is not restated.

**46 Cal. 575-576. O'NEIL v. DOUGHERTY.**

**Insolvency**.—Appeal may be prosecuted in name of insolvent or his assignee, where appellant has become insolvent since taking appeal, p. 576.

Cited to same effect in Suman v. Archibald, 116 Cal. 42, holding appellant not excused from filing brief by reason of insolvency since transcript filed; Flanagan v. Pearson, 42 Tex. 7, 19 Am. Rep. 44, sustaining affirmance of judgment pending such proceedings, they not having been suggested in appellate court; Box v. Kelso, 5 Wash. 363, on point that action may be prosecuted to final judgment in name of original plaintiffs, notwithstanding their assignment for benefit of creditors pending the action. Distinguished in Taylor v. Elliott, 53 Ind. 442, dismissing appeal taken in name of deceased party, after his death, and without substitution.

**46 Cal. 576-580. SHERMAN v. MITCHELL.**

**Order Granting New Trial Conditionally** on payment of certain costs, takes effect on compliance therewith, p. 578.

Cited in *Brooks v. Railway Co.*, 110 Cal. 176, discussing validity of such order.

**New Trial Should be Granted** by trial judge when evidence insufficient to sustain verdict, although there is conflict, p. 579.

Cited to same effect in *Curtiss v. Starr*, 85 Cal. 377, and *McCauley v. Tyler*, 11 Mont. 52, applying rule to case tried by court; *Bjormann v. Fort Bragg etc. Co.*, 92 Cal. 501, and *Domico v. Casassa*, 101 Cal. 414, holding further such order not reversed except for manifest abuse of discretion; *In re Carriger*, 104 Cal. 83, holding reversal granted only in extreme cases; *Bates v. Howard*, 105 Cal. 179.

#### 46 Cal. 580-581. **HIGUERRA v. BERNAL.**

**Order Granting New Trial**, when evidence conflicts, will not be reversed, p. 581.

Cited to same effect in *Bates v. Howard*, 105 Cal. 179, holding appellate rule as to conflict not to apply to trial court.

#### 46 Cal. 582-589. **NORTHAM v. GORDON.**

**Contract**.—Mere offer does not constitute, unless it is accepted, p. 588.

Cited to same effect in *Spinney v. Downing*, 108 Cal. 670, holding, further, mere voluntary compliance not sufficient as acceptance; and on same point, *Morrill v. Tehama etc. Co.*, 10 Nev. 136, discussing reciprocal and concurrent promises and conditions.

#### 46 Cal. 589-600. **BUCKNALL v. STORY.** 13 Am. Rep. 220.

**Taxes Cannot be Recovered Back** because assessment void, when paid, although under protest, to avoid threatened sale, invalidity appearing on face of assessment, p. 596.

Cited to same effect in *Williams v. Corcoran*, 46 Cal. 556, where paid before assessment became delinquent; and on same point, *Bank v. Chalfant*, 52 Cal. 171, where, in addition, official had no power to make sale threatened; and on same point, *Sowles v. Soule*, 59 Vt. 135; *Baker v. Carillo*, 52 Cal. 475; *Wills v. Austin*, 53 Cal. 178, *Phelan v. San Francisco*, 120 Cal. 5; *Detroit v. Martin*, 34 Mich. 178; 22 Am. Rep. 518; and *Sonoma County Tax Case*, 8 Saw. 313, 314, 13 Fed. Rep. 790, 791, where sale would not have cast cloud on property; but see, contra, *Montgomery v. Cowlitz Co.*, 14 Wash. 233, where deed held to create cloud; *Maxwell v. San Luis Obispo*, 71 Cal. 489, where illegal license paid to avoid threatened civil and criminal proceedings; *Cooper v. Chamberlin*, 78 Cal. 453, where property held not assessed because not described; *Dear v. Varnum*, 80 Cal. 89, holding character of payment not altered by making of protest; and on same point, *Prichard v. Sweeney*, 109 Ala. 658; *Ladd v. Southern etc. Co.*, 53 Tex. 192; and

**Rutledge v. Price Co.**, 66 Wis. 40; **Holt v. Thomas**, 105 Cal. 277, applying rule to payment of illegal stock assessment under threat of litigation; **Gill v. Oakland**, 124 Cal. 343, 344, but allowing recovery under facts stated; **Justice v. Robinson**, 142 Cal. 201, on point that protest alone does not render payment involuntary; but cf. **Hoke v. City**, 107 Ga. 419, denying recovery though payment was made to prevent a levy; **El Paso Co. v. Colorado Springs Co.**, 15 Colo. App. 281, applying rule where taxes paid by check by one having contract interest in land and check not being paid, lands advertised for sale and owner paid taxes with his own check; **Board v. Armstrong**, 91 Ind. 534, construing local act and holding assessment not wrongful under facts; **Newcomb v. Davenport**, 86 Iowa, 294, where assessment merely irregular; **Spring Valley W. W. v. Bartlett**, 8 Saw. 568, 16 Fed. Rep. 625, refusing to enjoin passage of ordinance void upon its face. Cited, also, in note to **Hatter v. Greenlee**, 26 Am. Dec. 378, on duress; and on general subject, **Mayor v. Lefferman**, 45 Am. Dec. 160, 165.

**Street Assessments.**—Errors in proceedings can be attacked only by appeal to board, p. 600.

Cited to same effect to **Girvin v. Simon**, 116 Cal. 611, holding, further, evidence inadmissible to show nonperformance of work according to contract, in action on assessment, no appeal having been taken.

#### 46 Cal. 601-603. **GOODRICH v. VAN LANDIGHAM.**

**Forcible Entry.**—Actual Possession of land sufficient for such action may exist without fencing or residence, p. 603.

Cited to same effect in **Webber v. Clarke**, 74 Cal. 15 (cited in **Gildehaus v. Whiting**, 39 Kan. 713), holding pasturage of cattle during proper season sufficient for adverse possession; **Bullock v. Rouse**, 81 Cal. 595, holding building of fences insufficient to show actual possession sufficient to defeat right under homestead entry thereon; **Giddings v. Land etc. Co.**, 83 Cal. 99, discussing essentials of plaintiff's proof in such actions; **Nearing v. Coop**, 6 N. Dak. 348, holding possession established under facts stated. Cited, also, in note on general subject to **Evill v. Conwell**, 18 Am. Dec. 148.

**Specification of Particulars** of insufficiency of evidence in forcible entry case held insufficient to present question of character of plaintiff's possession, p. 603.

Cited in **Tappendorff v. Downing**, 76 Cal. 170, as to issue of adverse possession, but not deciding question.

#### 46 Cal. 609-636. **PEARSON v. PEARSON.**

**Instrument is Introduced in Evidence** when so treated and considered by parties, although not formally offered, p. 628.

Cited to same effect in **Wright v. Roseberry**, 81 Cal. 93.  
Notes Cal. Rep.—148.

**Decree of Distribution** is void when order to show cause thereon not properly published, p. 635.

Cited to same effect in *In re Tracey*, 136 Cal. 390, noted under *Jordan v. Gibbin*, 12 Cal. 100; *Robinson v. Fair*, 128 U. S. 89, holding, however, publication sufficient

**Pretermitted Child** takes as though parent died intestate, p. 624.

Cited to same effect in *In re Grider*, 81 Cal. 575, holding such child to inherit with widow as tenant in common of all estate subject to administration; *Smith v. Olmstead*, 88 Cal. 586, 22 Am. St. Rep. 338, holding, further, provisions of will inoperative as to share to which child so succeeds. Distinguished under local statutes and doubted in *Newman v. Waterman*, 63, Wis. 619, 624, 53 Am. Rep. 313, 317, holding such child bound by decree establishing will where he has appeared and resisted its making. Cited, also, in note to *Wilson v. Fosket*, 39 Am. Dec. 744, on general subject.

**Recitals in Will** are admissible to show relationship of devisees to testator, p. 619.

Cited in *Russell v. Langford*, 135 Cal. 359, admitting such evidence; *Estate of Heaton*, 135 Cal. 386, 387, on point that declarations of decedent are admissible to show daughter's illegitimacy. Distinguished in *Estate of James*, 124 Cal. 661, holding declarations of testator as to his nonmarriage inadmissible; *Estate of Stevens*, 83 Cal. 329, 17 Am. St. Rep. 257, discussing admissibility of evidence dehors will to show intentional omission of child.

**Decree of Distribution** is void as to heir over whom no jurisdiction obtained, p. 635.

Cited to same effect in *Estate of De Leon*, 102 Cal. 542, where heir not in esse when decree made.

#### 46 Cal. 637-638. **WOOD v. WREDE.**

**Mechanic's Lien** can be maintained only by substantial observance of statutory provisions, p. 638.

Cited to same effect in *Hooper v. Flood*, 54 Cal. 221, *Wagner v. Hansen*, 103 Cal. 107, and *Madera etc. Co. v. Kendall*, 120 Cal. 184, holding notice insufficient as to statement of terms of contract, et cetera; *Malone v. Big Flat etc. Co.*, 76 Cal. 585, ruling aliter as to statement of name of employer. Distinguished in *Colo. Iron Works v. Riekenberg*, 4 Idaho, 266, materialman who contracts directly with owner and has no privity of interest with contractor for construction is an original contractor, and is allowed sixty days to file lien.

#### 46 Cal. 638-640. **McLAUGHLIN v. HART.**

**Foreclosure of Homestead Mortgage—Marshaling.**—On foreclosure of

senior mortgage covering homestead and other property, junior mortgagees of such other property cannot insist that homestead be sold, if remainder will pay senior mortgage, p. 639.

Cited to same effect in Frick Co. v. Ketels, 42 Kan. 532, 16 Am. St. Rep. 508, holding mortgagor entitled to compel mortgagee to resort to property other than homestead, although other creditors thereby deprived of security; Miller v. McCarty, 47 Minn. 324, 28 Am. St. Rep. 377, on same point, holding mortgagor's right, however waived under facts; McCreery v. Schaffer, 26 Neb. 179, discussing conflict of authorities and following rule stated; Abbott v. Powell, 6 Saw. 93, 1 Fed. Cas. 25, holding rule inapplicable, however, where homestead declared after execution of both mortgages.

#### 46 Cal. 640-641. **BERNAL v. WADE.**

**Appeal.**—Remittitur will be recalled where filing of petition for re-hearing inadvertently delayed, p. 641.

Cited in Trumpler v. Trumpler, 123 Cal. 253, noted under Rowland v. Kreyenhagen, 24 Cal. 52; note on general subject to Legg v. Overbagh, 21 Am. Dec. 121.

#### 46 Cal. 641-642. **SANCHEZ v. LOUREYRO.**

**Forcible Entry.**—Evidence of title is inadmissible on behalf of plaintiff to show right of possession, p. 642.

Cited to same effect in McGrew v. Lamb, 31 Wash. 488, following rule; Dennis v. Wood, 48 Cal. 364, rejecting plaintiff's muniments of title introduced to rebut those of defendant when latter introduced merely to show good faith in entry; Lachman v. Barnett, 16 Nev. 155, holding, further, error in admission not cured by instruction that neither title nor right of possession was involved. Cited, also, in note on general subject to Beeler v. Cardwell, 77 Am. Dec. 553.

#### 46 Cal. 643. **HANCOCK v. THOM.**

**Practice.**—Proceedings are to be determined according to statute in force when had, p. 643.

Cited to same effect in Poujade v. Ryan, 21 Nev. 451, as to form of statement on motion for new trial.

**Affidavits on Motion for New Trial** cannot be considered unless included in statement or otherwise identified, p. 643.

Cited to same effect in Mining Co. v. Weinstein, 7 Mont. 351, as to order, but holding same sufficiently authenticated under local statutes.

#### 46 Cal. 644-649. **MURRAY v. DAKE.**

**Fraud.**—Equity will prevent fraudulent use of instrument for pur-

pose not contemplated at execution, although executed without fraud or mistake, p. 648.

Cited to same effect in Martin v. Parsons, 49 Cal. 100, as to prevention of use as estoppel of judgment wrongfully obtained; Isenhoot v. Chamberlain, 59 Cal. 637, 639, admitting evidence to add conditions to lease when omitted therefrom through plaintiff's (lessor's) misrepresentations; Brison v. Brison, 75 Cal. 531, 7 Am. St. Rep. 194, as to deed obtained by husband from wife through misrepresentations, but considering rule only as to cases of confidential relationship; and on same point in Hays v. Gloster, 88 Cal. 565, where deed obtained from one mentally incompetent, through misrepresentations as to its purpose; Eva v. McMahon, 77 Cal. 472, as to erroneous description inserted in deed under parol agreement that same was not to be operative; dissenting opinion, Tracy v. Iron Works, 29 Mo. App. 362, main opinion rejecting parol evidence to contradicting cases; McDonald v. Yungbluth, 46 Fed. Rep. 838, specifically enforcing contract for sale of land, though oral, where deed made pursuant thereto fraudulently omitted part of property to be conveyed. Distinguished under facts in Bryant v. Swetland, 48 Ohio St. 206, discussing bar of cause of action to reform instrument for mistake, when set up by answer; Hall v. First Nat. Bank, 173 Mass. 19, 73 Am. St. Rep. 256, holding parol agreement not to enforce note not assertable in law or equity.

#### 46 Cal. 650-651. COLUMBET v. PACHECO.

**Second Appeal may be Taken**, if within proper time, when first was ineffectual, p. 650.

Cited to same effect in Vordermark v. Wilkinson, 147 Ind. 59, as to successive appeals by minors, under local statutes.

**Notice of Appeal**, before amendment of 1874, must be served and filed, and undertaking filed, on same day, p. 650.

Cited to same effect in Dinan v. Stewart, 48 Cal. 568, where notice filed two days before service; Harlan v. Pratt, 50 Cal. 95, where served two days before filing, both denying motions to dismiss such appeals; People v. Ah Yute, 56 Cal. 120, holding proper service and filing shown by indorsements on notice.

**Service of Notice of Appeal** is intended to operate as notice of filing of undertaking, p. 651.

Cited to same effect in Dutertre v. Superior Court, 48 Cal. 537, sustaining, however, filing of undertaking eleven days before service of notice, in justice's court appeal.

#### 46 Cal. 651-654. BLISS v. KINGDOM.

**Appeal**.—Notice and undertaking must be served and filed contemporaneously, p. 651.

Cited to same effect in Willoughby v. Brown, 4 Colo. 122, disregarding, however, lapse of five minutes between service and filing.

**46 Cal. 654-656. ROGERS v. DRUFFEL.**

**Judgment Lien Expires** unless sale made during its existence, p. 655.

Cited to same effect in Eby v. Foster, 61 Cal. 287, discussing validity of homestead where no sale so made; Sanders v. Russell, 86 Cal. 121, 21 Am. St. Rep. 28, holding further, as to necessity of presentation of claim on judgment against deceased husband to reach homestead on common property; Beaton v. Reid, 111 Cal. 486, holding further judgment lien not extended by levy of execution, and construing Civil Code, sections 1240, 1241; and on same point, Newell v. Dart, 28 Minn. 250, holding no extension by filing of creditor's bill; and Spicer v. Gambill, 93 N. C. 382, as to mere levy of execution; Smith v. Schwartz, 21 Utah, 136, 137, and Savings etc. Co. v. Bear Val. etc. Co., 89 Fed. 39, 40, noted under Dewey v. Latson, 6 Cal. 131; dissenting opinion in Brown v. Hopkins, 101 Wis. 505, noted under Isaac v. Swift, 10 Cal. 71.

**Judgment Lien Commences** from time of docketing of judgment, p. 656.

Cited to same effect in Eby v. Foster, 61 Cal. 287, cited ante.

**46 Cal. 656-661. WILKINS v. McCUE.**

**Injunction against Diverting Water.**—Complaint held to be similar to that in Fabian v. Collins, 3 Mont. 225, where action held maintainable.

**Prescriptive Right as to water** is not maintainable as against government, p. 661.

Cited in note to Schneider v. Hutchinson, 76 Am. St. Rep. 484, on general subject.

**46 Cal. 661-663. PENNYBECKER v. McDUGAL.**

**Replevin Will not Lie** for crops from land held adversely to true owner, the plaintiff, p. 662.

Cited to same effect in Smith v. Cunningham, 67 Cal. 263, holding, further, such crops not attachable as property of such owner; Heilbron v. Heinlen, 72 Cal. 374, discussing admissibility of evidence in action by tenant of trespass quare clausum; McConnaughy v. Wiley, 13 Saw. 184, 33 Fed. Rep. 453, holding, however, owner's title thereto not attackable by mere trespasser or intruder who has cut same. Cited, also, in note to King v. Mason, 89 Am. Dec. 429, on collateral trial of title to land.

**46 Cal. 663-667. BERNAL v. WADE.**

**Conflict of Evidence** will cause affirmance of judgment, even where such conflict "intestinal," p. 666.

Cited to same effect, discussing such conflict under facts, in *McLellan v. Bank*, 87 Cal. 574, and *Brock v. Pearson*, 87 Cal. 585.

**46 Cal. 667-672. CENTRAL PACIFIC RAILROAD COMPANY v. PLACER COUNTY.**

Certiorari Will Be Granted only to review question of jurisdiction of respondent therein, p. 670.

Cited to same effect, denying writ, in *Buckley v. Superior Court*, 96 Cal. 120, as to dismissal by superior court, of appeal regularly taken to it; *Sherer v. Superior Court*, 96 Cal. 654, as to action of such court in striking out answer on such appeal, although held to be erroneous; *Johnston v. Board*, 104 Cal. 394, 395, as to erroneous finding by supervisors on road proceedings, where matter within their jurisdiction; *Phillips v. Welch*, 12 Nev. 170, as to punishment for contempt where court had jurisdiction; *Garnsey v. County Court*, 33 Or. 207, noted under *People v. Dwinelle*, 29 Cal. 632; note on general subject to *Duggen v. McGruder*, 12 Am. Dec. 535.

## **VOLUME XLVII.**

**By WILLIAM FOSTER.**

**Revised to include citations to Volume 147, by CHARLES L. THOMPSON.**

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**47 Cal. 3-6. SCHWARTZ v. SKINNER.**

**Replevin or Trover.**—Judgment for plaintiff ordered in a suit between cotenants, in the form of replevin, but containing essential allegations of trover, p. 6

Distinguished in Balch v. Jones, 61 Cal. 236, holding, in a suit of claim and delivery between cotenants of a mare and colts, that replevin would not lie at all between cotenants, and trover did not in the present case because the interests were indivisible; and holding the principal case not an authority to the contrary, because "there the complaint was held to be a good complaint in trover, and the defendant's counsel admitted that trover would lie." Distinguished, also, in Hill v. Seager, 3 Utah, 380, an action of replevin for a horse, saying that the principal case was brought to recover "a certain specified part of a property susceptible of division, but it is unsatisfactory in any view that may be taken of it is an authority in this case"; and referring with approval to Hewlett v. Owens, 50 Cal. 474, where it was held that a tenant in common could not maintain replevin against his cotenant.

**47 Cal. 7-9. FAUT v. MASON.**

Certiorari lies only where there is no appeal nor any plain, speedy and adequate remedy, p. 8.

Cited in Valentine v. Police Court, 141 Cal. 617, noted under Bennett v. Wallace, 43 Cal. 25; Wilcox v. Oakland, 49 Cal. 31, holding that county courts can grant the writ only in aid of their appellate jurisdiction; Stuttmeister v. Superior Court, 71 Cal. 323, holding that the writ will not lie to review an appealable probate order; Noble v. Superior Court, 109 Cal. 527, holding that the writ does not lie to review an appealable order in insolvency.

**47 Cal. 9-15. DOUGHERTY v. HENARIE.**

Respondent on Appeal cannot review the findings of the court which he claims were to his prejudice, p. 13.

Affirmed in Dennis v. Caughlin, 22 Nev. 453; 58 Am. St. Rep. 762. Approved in Betz v. People's Building etc. Assn., 23 Utah, 605, where plaintiff does not appeal he cannot obtain review of ruling against him, though he excepted when ruling made.

**Tax Sale**, followed by a proper conveyance, transfers the title discharged of prior tax liens, p. 14.

Affirmed in Chandler v. Dunn, 50 Cal. 16, holding that "the title acquired under a tax sale for taxes of a subsequent year must prevail over a title founded on a sale for the taxes of a previous year"; State v. Camp, 79 Minn. 345, denying right of state to sell for prior tax liens after conveying its interest under its purchase under subsequent taxes.

#### 47 Cal. 15-18. HARNEY v. HELLER.

**Resolution of Intention** of supervisors regarding street improvement need not describe the work with any more exactness than it is described by the law itself, p. 17.

Cited in Deady v. Townsend, 57 Cal. 300, holding a resolution of intention sufficiently certain; and Fitzhugh v. Ashworth, 119 Cal. 400, holding that expenses of a city engineer, under an abandoned resolution of intention, could not be included as "incidental expenses" in a later resolution regarding the same work, Schwiesau v. Mahon, 128 Cal. 118, noted under Emery v. San Francisco Gas Co., 28 Cal. 376; Brown v. Drain, 112 Fed. 591, sustaining regularity of proceedings under Vrooman act and its amendments.

#### 47 Cal. 18-20. SMITH v. CHRISTIAN.

**Specifications of Errors** in statement on motion for new trial. It is not an error of law that the evidence is insufficient to justify a particular finding of fact, pp. 19-20.

Affirmed in Heilbron v. Centerville Co., 76 Cal. 10. Cited in Jackson v. Hamm, 14 Colo. 60, holding that sufficiency of the evidence to justify a judgment could not be considered on an appeal, where the errors assigned were in rulings on motions to dismiss and for nonsuit, in neither of which was the sufficiency of the evidence or the merits of plaintiff's claim questioned; Bardwell v. Anderson, 18 Mont. 530, holding that specifications of errors of law were really only of errors of fact; Cunningham v. Scott, 4 Utah, 449, to the point that it is not an error of law that the evidence does not justify a finding of fact; Van Pelt v. Park, 18 Utah, 147, noted under Treat v. Forsyth, 40 Cal. 488. Affirmed in Mader v. Taylor, 15 Utah, 164.

#### 47 Cal. 20-21. JONES v. SPEARS.

**Replevin Demand** need not be proved when admitted in pleadings, p. 20.

Cited in *Latta v. Tutton*, 122 Cal. 283, 68 Am. St. Rep. 34, holding it so admitted by failure to deny and defendant's claim of ownership.

**Admissions.**—Verdict contrary to will be reserved, p. 20.

Cited in *Murphy v. Coppieters*, 136 Cal. 320, noted under *McCreery v. Everding*, 44 Cal. 284.

#### 47 Cal. 21-31. CLINK v. THURSTON.

Judgment need not be signed by judge or clerk, p. 29.

Cited in *Estate of Cook*, 77 Cal. 227, 11 Am. St. Rep. 272, holding that signature by the judge gives a judgment "no additional solemnity or validity." Affirmed, as to judge's signature, in *Crim v. Kessing*, 89 Cal. 489; 23 Am. St. Rep. 497.

**Estoppel** by former judgment need not be specially pleaded where no opportunity has been given, p. 29.

Cited in *Wixson v. Devine*, 67 Cal. 346, holding that as there is no replication in code pleading, the estoppel of a former judgment could not be pleaded; *Riverside Co. v. Jensen*, 108 Cal. 147, holding that as a former judgment could not properly be pleaded in the complaint, evidence of it was admissible; *Arnold v. Hart*, 176 Ill. 445, applying rule of estoppel *in pais*. Affirmed in *Young v. Brehe*, 19 Nev. 383; 3 Am. St. Rep. 894; and in dissenting opinion in *Edwards v. Carson Co.*, 21 Nev. 501. Cited in *Fanning v. Insurance Co.*, 37 Ohio St. 347, holding that an estoppel that might have been pleaded could not be proved; and note on this point in 27 Am. St. Rep. 345, 346.

**Res Adjudicata.**—Former judgment as to title to land, between same parties on same question, is conclusive, p. 31.

Affirmed in *420 Co. v. Bullion Co.*, 3 Saw. 651.

#### 47 Cal. 32-39. TERRY v. HAMMONDS.

Final Judgment on Demurrer can be pleaded in bar of later suit between same parties, if demurrer went to the merits, and cause of action is the same, p. 35.

Cited in *Newhall v. Hatch*, 134 Cal. 272, but holding judgment not a bar when causes of action were different (but cf. dissenting opinion, page 277); and cf. *Swanson v. Gt. N. etc. Co.*, 73 Minn. 107, ruling similarly when second complaint stated good cause of action; *Los Angeles v. Mellus*, 58 Cal. 20, holding that judgment on a verdict was a bar to a later suit for the same cause of action; same case in 59 Cal. 453, holding that judgment on demurrer, for defects in the complaint, was no bar to a later suit on a good complaint for the same cause of action; *Kirsch v. Kirsch*, 113 Cal. 61, holding that where a demurrer was sustained with leave to amend, and the judgment thereon was for costs, no bar or estoppel was raised; *State v. Board of Commlrs.*, 12

Nev. 20, holding that proceedings on certiorari were not barred by rulings in a former action of the same nature but containing different averments; North Muskegon v. Clark, 62 Fed. Rep. 697, holding that judgment on demurrer, for a defective complaint, was no bar to a later suit in which the defects had been remedied; and Gallup v. Lichler, 4 Colo. App. 299, holding a judgment on demurrer no bar to a second suit for a different cause of action.

**Married Woman** may contract for services to be rendered in protection and preservation of her separate estate, p. 35.

Cited in Brenham v. Davidson, 51 Cal. 356, to the point that a wife, with her husband's consent, could agree that her share of the money received from sale of land in which she had an interest should be applied to a claim of the vendee against the husband; Leonis v. Lazarovitch, 55 Cal. 58, holding that as a wife had power to convey land only as prescribed by the codes, a court of equity had no power to reform a deed by her in which the description was defective; and notes on married women in 72 Am. Dec. 513; 78 Am. Dec. 227; 85 Am. Dec. 145; 51 Am. Rep. 480.

#### 47 Cal. 40-42. **DONNELLY v. TILLMAN.**

**Street Assessment.**—Publication of notice of award of contract must be ordered by board of supervisors, p. 41.

Cited in Chase v. Treasurer, 122 Cal. 545, 546, noted under Hewes v. Reis, 40 Cal. 255; Cal. Imp. Co. v. Moran, 128 Cal. 378, holding publication insufficient if made in paper other than that designated for the particular matter; Ellis v. Witmer, 134 Cal. 251, noted under Meuser v. Risdon, 36 Cal. 239; Himmelmann v. Townsend, 49 Cal. 151, holding that in an action to recover street assessments the complaint must allege that publication of notice of award was ordered by the board; Himmelmann v. Satterlee, 49 Cal. 387, holding that publication of such notice by the clerk of the board without their direction was illegal; Reis v. Graff, 51 Cal. 90, holding that where publication of notice was not ordered by the board, the defect was not relieved by a curative act of the legislature passed at a later date, for the act was not retroactive; Napa v. Easterby, 61 Cal. 517, holding that where a city charter required the trustees to "cause to be published" all ordinances, "this means that the board shall order the publication."

#### 47 Cal. 42-47. **HIMMELMAN v. CARPENTIER.**

**Street Assessment.**—Contractor's lien is not lost by failure to render judgment within two years after recording of assessment, p. 46. Assessment is prima facie evidence of right to recover, p. 47.

Affirmed on both points in Dorland v. McGlynn, 47 Cal. 50.

**47 Cal. 47-51. DORLAND v. McGLYNN.**

**Street Assessment.**—Where an appeal lies to board of supervisors, "that is the only remedy," p. 51.

Affirmed in Jennings v. Le Breton, 80 Cal. 11, as to remedy for failure of contractor to complete the work, and error of superintendent in prematurely accepting it; McVerry v. Boyd, 89 Cal. 310, as to remedy for wrong apportionment of expense; McSherry v. Wood, 102 Cal. 651, as to remedy for irregularity in assessment; Girvin v. Simon, 116 Cal. 611, as to performance by contractor.

**47 Cal. 52-56. SERRANO v. RAWSON.**

**Plat of Survey,** in a patent for land, is often entitled to as much, and perhaps to more, weight than the courses and distances, p. 55.

Cited in Miller v. Grunsky, 141, Cal. 451, 453, construing state patent, by reference to map of government survey; Black v. Sprague, 54 Cal. 271, holding an instruction erroneous that ignored the plat on a question of location of statutes in a survey; Chapman v. Polack, 70 Cal. 495, holding that the line indicated on the official plat was the true division line between quarter sections of government land.

**Courses and Distances** yield to a controlling monument, p. 56.

Cited in Wise v. Burton, 73 Cal. 171, holding that a house was a controlling monument in field-notes and map of survey; Castro v. Barry, 79 Cal. 448, holding that a call in a deed, "down the said slough," controlled an erroneous course.

**47 Cal. 56-58. GETT v. McMANUS.**

**Landlord** is entitled to all improvements made by tenant as required by the lease unless lease provides otherwise, p. 57.

Cited in Boyd v. Douglass, 72 Vt. 451, as to buildings so erected, and Tunis etc. Co. v. Dennis etc. Co., 97 Va. 686, as to lumber kilns.

**47 Cal. 58-60. KELLY v. LARKIN.**

**New Code as Affecting Pending Suits**, p. 59.

Cited in Macy v. Davila, 48 Cal. 647, holding that where notice of intention to move for a new trial was served before the code took effect, "the proceedings upon the motion are to be determined by the Practice Act"; Hodgdon v. Griffin, 56 Cal. 611, holding that where judgment was rendered ten months before the codes took effect, notice of motion for new trial given over four years thereafter was too late; Kimpton v. Jubilee etc. Co., 22 Mont. 108, as to filing of statements on appeal under change of code provisions.

**Motion for New Trial**, under Practice Act, was not a right, but a remedy, p. 59.

Cited in *Townley v. Adams*, 118 Cal. 384, holding that where the court sets aside a verdict on its own motion, "it must be made to appear that the jury plainly, palpably, grossly disregarded either the evidence or the instructions of the court."

#### 47 Cal. 60-61. CLEMENTS v. STANTON.

**Declaration of Homestead**, made by wife alone, may be acknowledged by her in form prescribed for person other than married women, p. 61.

Cited in *Beck v. Soward*, 76 Cal. 531, holding that since the passage of section 1186 of the Civil Code, a married woman must acknowledge a declaration of homestead "in the same manner as she is required to acknowledge a grant of real property."

#### 47 Cal. 62-64. ESLINGER v. ESLINGER.

**Divorce for Extreme Cruelty**.—Three-fourths of community property awarded to wife, p. 64.

Cited in *Gorman v. Gorman*, 134 Cal. 379, 380, holding manner of division within discretion of trial court; *Strozynsky v. Strozynski*, 97 Cal. 191, where the court awarded the wife all the community property; *Reid v. Reid*, 112 Cal. 278, ordering the community property equally divided where extreme cruelty was not proven, and the divorce was granted for desertion by the wife; and note to 86 Am. Dec. 631.

#### 47 Cal. 65-67. PICO v. COLEMAN.

**Subsequent Acts of Parties** may control construction of deed, p. 67.

Cited in *Hill v. McKay*, 94 Cal. 20, applying the rule to a logging contract.

**Construction of Deed** must follow intention of parties viewed in light of surrounding circumstances, p. 67.

Cited in concurring opinion in *Miller v. Grunsky*, 141 Cal. 453, construing state patent.

#### 47 Cal. 67-69. WIDBUR v. WASHBURN.

**Description in Deed** held sufficient, p. 69.

Cited in *Cleveland v. Choate*, 77 Cal. 78, allowing parol evidence in proof of location of land, because map referred to was inaccurate.

#### 47 Cal. 70-71. TEMPLETON v. TWELFTH DISTRICT COURT.

**Interlocutory Order** in proceedings on eminent domain may be vacated later, p. 70.

Affirmed in *People v. District Court*, 11 Colo. 150.

**47 Cal. 73-76. ELLIS v. WHITE.**

Homestead may be selected by unmarried woman with illegitimate child, p. 75.

Cited in notes to 45 Am. Dec. 254; 61 Am. Dec. 592; and 5 Am. St. Rep. 45, 70 Am. St. Rep. 113.

**47 Cal. 77-79. HART v. COOPER.**

Counterclaim in District Court, for less than three hundred dollars, allowed, p. 78.

Cited in and explained in Freeman v. Seitz, 126 Cal. 295 (and see, also, page 294), quoting Griswold v. Pieratt, 110 Cal. 259. Distinguished in Griswold v. Pieratt, 110 Cal. 266, holding that where defendant alleges in his answer that plaintiff's is wholly unfounded, he cannot also set up a counterclaim on a different contract, unless it amounts to three hundred dollars.

**47 Cal. 79-80. CAMETO v. DUPUY.**

Declaration of Homestead, filed on premises held in joint tenancy, is invalid, p. 80.

Affirmed, as to land held by tenancy in common, in First Nat. Bank v. De la Guerra, 61 Cal. 111; Fitzgerald v. Fernandez, 71 Cal. 508; Estate of Carriger, 107 Cal. 620; Rosenthal v. Merced Bank, 110 Cal. 202. Cited in note on this point in 63 Am. Dec. 124.

**47 Cal. 81-82. PEOPLE v. SUPERVISORS OF KERN COUNTY.**

Writ of Prohibition cannot issue against board of supervisors unless their proceedings are absolutely without or in excess of jurisdiction, p. 81.

Cited, evidently by mistake, in Wilcox v. Oakland, 49 Cal. 31, as holding that county courts cannot issue mandamus; Kalloch v. Superior Court, 56 Cal. 231, holding that the writ issues against a court only where proceedings are in excess of jurisdiction; Day v. Superior Court, 61 Cal. 490, holding that the writ issues where a court "is entertaining a proceeding of which it has no jurisdiction, or if having jurisdiction, it is assuming to exercise an unauthorized power over property not subject to its jurisdiction, or which is within the jurisdiction of another tribunal"; Wiggin v. Superior Court, 68 Cal. 402, holding that the writ does not issue against a court acting within its jurisdiction; State v. Withrow, 133 Mo. 523, holding that the writ lies against a court when acting without or in excess of jurisdiction; State v. Laughlin, 9 Mo. App. 487, to the point that the writ lies "to restrain an inferior tribunal from doing some act in excess of its jurisdiction"; and note on this point in 12 Am. Dec. 606.

**47 Cal. 82-85. SHARP v. MILLER.**

**Redemption from Execution Sale.**—If judgment debtor redeems, he need only pay sheriff's vendee purchase money with interest; if redemption is by creditor holding later lien, he must pay all prior liens held by vendee, p. 85.

Cited in dissenting opinion in Parke v. Hush, 29 Minn. 439, a majority of the court holding that under the statute a creditor redeeming need not pay the lien of a vendee at a later execution sale; Lloyd v. Hoo Sue, 5 Saw. 76, holding that the assignee in bankruptcy of the judgment debtor may redeem without discharging the unsatisfied balance of the judgment.

**47 Cal. 86. SWIFT v. CANOVAN.**

**Order Extending Time to answer** need not be filed or served, p. 86.

Affirmed in Elliot v. Whitmore, 10 Utah, 258.

**47 Cal. 87-90. COX v. WESTERN PACIFIC COMPANY.**

**Mechanic's Lien** of contractor on entire contract must be filed upon whole work; but if he is prevented by owner from completing contract, he is entitled to fair compensation for work performed, p. 89.

Cited in Cox v. McLaughlin, 63 Cal. 205, to the point that averment and proof of prevention are essential to a recovery where the contract has not been performed or rescinded; Cox v. McLaughlin, 76 Cal. 62, 9 Am. St. Rep. 164, holding that where prevention was averred, the complaint could be amended so as to allow a claim for a quantum meruit; Farmers Co. v. Canada Co., 127 Ind. 259, holding that when the claimant of a lien has complied with the statute his right is complete, and subsequent considerations affect only the mode of procedure; Eclipse Co. v. Nichols, 1 Utah, 259, in dissenting opinion, a majority of the court holding that a lien runs for the statutory time from the completion of the building, not from the completion of the particular work for which the lien is claimed; and note in 19 Am. Dec. 277, on quantum meruit.

**Misjoinder of causes of action** must be objected to specially by demurrer or answer, p. 90.

Cited in Witkowski v. Hern, 82 Cal. 607, holding that an objection to misjoinder was waived by answering. Affirmed in Marriott v. Clise, 12 Colo. 566.

**47 Cal. 91-93. WILSON v. SUPERVISORS.**

**Exemption from Taxation**, of certain property within a district, is unconstitutional, p. 93.

Cited in Board of Commissioners v. Owen, 7 Colo. 469, holding it un-

towns from county Ann. 1375, holding the taxpayer, cannot find similar statute in state and like persons; Ann. 753, holding that a tax is a public exaction.

court orders sheriff to serve special venue within county. Ann. 509, holding that a trial for gross abuse of discretion.

b. 96.  
holding that a charge of perjury embracing the law as

accused, and that he was not tried of guilt of accused,  
an instruction erroneous. Ann. 12, holding that an instruction on the affairs of the greatest importance is necessary to say to the jury. Ann. 12, holding an instruction that the doubt must be based on the entire testimony. Ann. 12, holding that an instruction on the law as it stands outside the testimony in the case is not necessary. Ann. 12, holding that an instruction on the law as it stands outside the testimony in the case is not necessary.

or continuance, where the witness fails to appear the testimony, p.

not specify his county,

Cited in *People v. Ebanks*, 117 Cal. 656, holding that where an information was signed by the district attorney "of the said county of San Diego," it was not necessary to add "state of California," for the court took judicial notice of the fact that the county was in the state.

**Preponderance of Evidence** will not be considered on appeal from judgment in criminal case, p. 101.

Cited in *People v. Tapia*, 131 Cal. 651, noted under *People v. Baker*, 39 Cal. 686; *People v. Lum Yit*, 83 Cal. 134, to the point that the trial court must grant a new trial if the evidence does not sustain the verdict; to same effect in *People v. Flood*, 102 Cal. 333, and *People v. Knutte*, 111 Cal. 456.

#### 47 Cal. 101-102. **PEOPLE v. MARTIN.**

**Indictment for Murder** held sufficient, p. 102.

Cited in *People v. Hong Ah Duck*, 61 Cal. 390, holding that an information for murder need not state the means of death; to same effect in *People v. Hyndman*, 99 Cal. 3; *People v. Davis*, 73 Cal. 357, holding that the indictment need not state the weapon that was used, and it is sufficient to charge that defendant did the act "feloniously, willfully, and of his malice aforethought"; *Territory v. Bannigan*, 1 Dak. Ter. 443, holding that "malice aforethought" was sufficiently charged; *Walker v. State*, 14 Tex. App. 627, holding that it was enough if the murder was alleged to have been committed by means and in manner to the grand jurors unknown; and note on this point in 3 Am. St. Rep. 282.

#### 47 Cal. 103-106. **PEOPLE v. MURPHY.**

**Larceny of Cattle**.—Fact that defendant cut off ears and brand may be considered by jury, p. 105.

Affirmed in *State v. Loveless*, 17 Nev. 427.

Error in instructions will be presumed injurious in criminal case, p. 105.

Cited in *People v. Richards*, 136 Cal. 129, reversing verdict where evidence did not appear in record; *Miller v. Durst*, 14 S. Dak. 593, where plaintiff introduces justice of peace to show prior adjudication of claim pleaded by defendant as counterclaim, and justice testifies to filing of claim as counterclaim in his court, error to refuse cross-examination as to whether he considered counterclaim in determining cause.

#### 47 Cal. 106-108. **PEOPLE v. WEAVER.**

**Indictment charging assault and murder** held not to charge two offenses, p. 108.

Cited in note on this point in 58 Am. Dec. 247.

... looked for, his absence

Question of jurisdiction, &c.

has no jurisdiction to  
session, presided over

ling v. Wagner, 4 Wyo. 26, approving 5 Mont. 599, *supra*, and holding that a judge could postpone rendering judgment in a case until after he had begun holding a term in another county.

**Violation of Invalid Order** is not contempt, p. 111.

Affirmed in State v. Horner, 16 Mo. App. 193; State v. Langhorne, 12 Wash. 595; Swinburn v. Smith, 15 W. Va. 500; State v. Harper's Ferry Co., 16 W. Va. 877; Ruhl v. Ruhl, 24 W. Va. 283. Cited in State v. District Court, 21 Mont. 160, 69 Am. St. Rep. 648, as to interference with receiver appointed under void order; State v. Downing, 40 Or. 321, if it is admitted that order directing judgment debtor to appear for examination in supplemental proceedings is voidable, that will not relieve him from contempt for failure to comply therewith, where court had jurisdiction of proceedings in their inception.

#### 47 Cal. 112-113. **PEOPLE v. MARTIN.**

**Assault** with intent to do bodily harm is a simple assault, p. 112.

Cited in Territory v. Conrad, 1 Dak. Ter. 355, holding that after verdict for simple assault defendant could not be punished for a felony.

**Order Sustaining Demurrer to Indictment** is not appealable, where demurster questions grade of offense, p. 113.

Cited in note on interlocutory and final judgments in 60 Am. Dec. 438.

#### 47 Cal. 113-121; 17 Am. Rep. 401. **PEOPLE v. STANLEY.**

**Increasing Punishment for Second Offense** does not put accused twice in jeopardy, p. 116.

Cited in People v. Coleman, 145 Cal. 612, 613, upholding Penal Code sections 666, 988, relating to prior convictions; People v. Lewis, 64 Cal. 404, to the point that "the defense of once in jeopardy is untenable under the settled law of this state"; People v. Eppinger, 109 Cal. 297, holding that where a prior conviction was charged, it was error for jury to render general verdict of guilty, but they should have found specifically upon the issues. Affirmed in Maguire v. Maryland, 47 Md. 496; Commonwealth v. Marchand, 155 Mass. 9; State v. Moore, 121 Mo. 519, 42 Am. St. Rep. 544; State v. Adams, 64 N. H. 442; Blackburn v. State, 50 Ohio St. 438. Cited in Moore v. Missouri, 159 U. S. 677, holding that a state statute increasing punishment upon third conviction was not a violation of the fourteenth amendment of the federal constitution; In re Miller, 110 Mich. 677, holding constitutional a statute that denied to convicts imprisoned for a second offense a reduction of imprisonment for good conduct; In re Miller, 110 Mich. 677, 64 Am. St. Rep. 377 (and note, pages 378, 380, 382), sustaining statute denying reduction of credits in case of second imprisonment; note 42 Am. St. Rep. 547.

ice are not evidence  
the res gestae, p. 118.  
273, admitted certain  
that evidence of at-  
for a limited pur-  
ask the court to limit  
for some other pur-  
153, 35 Am. Rep. 71,  
uilt arose from flight  
holding an instruction  
63 Cal. 168, holding  
e not as part of the  
the act indicating the  
the point that flight  
by the jury; People  
usion, or silence of a  
in, was not evidence  
State v. Callahan, 47  
accomplice on an im-  
his veracity; State v.  
declarations of a co-  
ent after the common-  
H. 220, holding that  
scape is for the jury;  
a coconspirator inad-  
conspiracy; State v.  
nt's motive in giving  
he jury to determine;  
ate, 19 Tex. App. 162,  
McKenzie v. State,  
that flight of a co-  
; Hickory v. United  
ernation that flight of  
coconspirators in 95

may be made at any

on page 81, the defend-  
State v. Peel, 23 Mont.  
after waiver of a prior

**47 Cal. 125-126. PEOPLE v. KELLEY.**

Evidence of Defendant, given voluntarily by him on preliminary examination may be used against him on his trial, p. 125.

Affirmed in People v. O'Brien, 66 Cal. 605; State v. Mullins, 101 Mo. 519; State v. Rover, 13 Nev. 21; United States v. Kirkwood, 5 Utah, 128; State v. Glass, 50 Wis. 222, 36 Am. Rep. 847. Cited in People v. Reggel, 8 Utah, 28, on point that defendant may be indicted on his voluntary admissions before grand jury; Steele v. State, 76 Miss. 394, admitting evidence given in preliminary examination; Wilson v. United States, 162 U. S. 623, holding that statements of defendant before a United States commissioner might be used against him at the trial; Lyons v. People, 137 Ill. 617, holding that evidence as to defendant's testimony before a coroner's jury may be given at his trial; and note on confessions under oath in 41 Am. St. Rep. 522-524.

**47 Cal. 127-129. EX PARTE SIMPSON.**

Police Court of San Francisco, under statute of 1872, has same jurisdiction as justices of the peace in criminal cases, p. 128.

Cited in Green v. Superior Court, 78 Cal. 558, holding that the police court of San Francisco has exclusive jurisdiction of the misdemeanor of conspiracy; People v. McNulty, 93 Cal. 444, apparently by mistake, to the point that a judgment stating an offense as "murder" was sufficient.

**Government of Cities.**—Title 3, part 4, of the Political Code, on this subject, "is not declared to be applicable to any existing city or city and county," p. 128.

Cited in San Francisco v. Kiernan, 98 Cal. 617, holding that section 4372 of the Political Code, as to condemnation of property by a city, being within title 3, part 4, did not repeal the act of 1863 on the same subject. Distinguished in Los Angeles v. Teed, 112 Cal. 325, holding that the rule of the principal case does not apply to sections 4445 to 4449 of the Political Code, as to city bonds, for those sections "were added to the code long after that decision, and it is manifest from their terms that they were intended to apply to all cities."

**47 Cal. 129-131. EX PARTE HARROLD.**

**Public Offense.**—Section 176, of the Penal Code, as to wilful omission of duty by public officer, refers to an act to be performed by him in his official capacity, p. 130.

Cited in Ex parte Maier, 103 Cal. 479, 42 Am. St. Rep. 130, to the point that if a complaint does not charge a public offense, the accused is entitled to discharge on habeas corpus, holding that a complaint under section 626 of the Penal Code, for selling deer meat brought from Texas, stated a public offense. Cited in note in 40 Am. St. Rep. 713, on criminal liability of officers.

**IMMEDIATE PUNISHMENT** for contempt

**Tendant, and insanity**

People v. Messersmith, 61 Cal. 384; People v. McNulty, 93 U.S. 100, 103, which renders a man incapable of criminal intent, and People v. Boswell v. State, 26 Fla. 22, holding that insanity must be entertained as a reasonable doubt of sanity, resulting in acquittal; State v. Lewis, 20 Nev. 352, 354, holding that until it is overcome by clear and convincing evidence, defendant's insanity to the time of the offense is to be presumed. Cited in 36 Am. Dec. 407,

very purpose," p. 138. Prohibition, holding that discretion, to have filled the grand jury box, yet jurors from the body

case may be enforced

stated; *Seaman v. Ascherman*, 51 Wis. 682, 37 Am. Rep. 851, decreeing specific performance by the lessee of a verbal agreement for a lease, partly performed by the lessor; note on part performance in 53 Am. Dec. 541; and note on parol lease in 17 Am. St. Rep. 757.

**47 Cal. 142-144. MAYER v. CHILD.**

**Statute of Frauds.**—Verbal contract for sale of mining stock is void where there was no delivery, payment, or note of agreement, p. 144.

Distinguished in *McCarthy v. Pope*, 52 Cal. 565, holding that the statute was no defense to suit by assignor of parol contract for sale of land to recover on the assignment, where owner of the land had conveyed it to the assignee and the latter had received an advantage therefrom.

**47 Cal. 144-145. COHN v. KEMBER.**

**Publication of Summons.**—Statute must be strictly followed, p. 145.

Cited in *In re Tracey*, 136 Cal. 390, noted under *Jordan v. Giblin*, 12 Cal. 100; *Roosevelt v. Land etc. Co.*, 108 Wis. 658, noted under *Forbes v. Hyde*, 31 Cal. 342; *Palmer v. McMaster*, 8 Mont. 193, holding that where the judgment roll failed to show any affidavit or order of publication, it was fatally defective.

**47 Cal. 146-147. MILLER v. FULTON.**

**Equitable Defense in Ejectment** “should contain in substance the elements of a bill in equity,” p. 147.

Affirmed in *Kentfield v. Hayes*, 57 Cal. 411, holding that an equitable defense of fraud in issuance of a patent “raised no material issue”; *Arguello v. Bours*, 67 Cal. 450, holding that if defendant by lapse of time or for other reason “may have lost his right to an equitable decree, he will still be entitled to rely on his perfect equity as a defense to an action brought to deprive him of the possession.” Cited in *Dorris v. Sullivan*, 90 Cal. 286, holding that in a suit for damages for diversion of water, defendant could not avail himself of a defense that he was entitled to specific performance of a partly performed verbal contract, because he had not “affirmatively pleaded facts sufficient to entitle him to a specific performance.” Affirmed in *Ming v. Foote*, 9 Mont. 223.

**47 Cal. 147-150. QUINN v. KENNEY.**

**Redemptioner from Tax Sale**, who is one of several cotenants, can redeem only his share of the land, under statute of 1868, p. 150.

Cited in *Eldridge v. Wright*, 55 Cal. 541, in dissenting opinion, a majority of the court holding that under sections 702, and 703, of

... of one cotenant had  
... on foreclosure against  
... '67, on redemption by

... v. BEAL.

... debts owned by grantor,

... that the intention of

... title of pledgor further  
... d balance of proceeds,

... holding that where the  
... took a deed from  
... debt and dismissed the  
... mortgage might have  
... that they had taken title  
... limitation of his rights, but  
... treat them as having  
... value of the property,  
... "as it stands." Cited in Haber v.  
... establishment of non-negotiable  
... effect to an authority  
... obligation in his own  
... to apply the proceeds  
... pledge for any sur-  
... Dec. 733, 734, and 51

... claim of attorney for

... on appeal from refusal

... 539, to the point that  
... considered on such motion.

... Distinguished in Al-

... holding that on appeal

from an order granting new trial, it was proper to review denial of motion for nonsuit on the ground that the complaint was contrary to public policy. Affirmed in *Evans v. Paige*, 102 Cal. 134, holding that on an appeal from refusal of new trial, denial of motion for judgment on pleadings could not be reviewed, because the motion "is in fact nothing more than a demurrer to the complaint . . . and we are of the opinion that such ruling can only be reviewed upon an appeal from the judgment." Cited in *Ross v. Wait*, 2 S. Dak. 640, holding that a ruling on an objection to evidence, because the complaint does not state a cause of action, is reviewable on motion for new trial; *Krantz v. Rio Grande Co.*, 13 Utah, 3, holding that sufficiency of a complaint could not be reviewed on appeal from a judgment entered pursuant to a mandate of the appellate court, "because it is in effect an appeal from our own judgment."

**Affidavit for Continuance must show due diligence**, p. 163.

Cited in note on this point in 74 Am. Dec. 145.

#### 47 Cal. 165-166. POTTER v. FROMENT.

**Special Damages** from pollution of a stream cannot be proved unless alleged, p. 166.

Cited in *Hobbs v. Amador Co.*, 66 Cal. 163, to the point that "no person, natural or artificial, has a right directly or indirectly to cover his neighbor's land with mining debris, sand, and gravel, or other material, so as to render it valueless"; *Treadwell v. Whittier*, 80 Cal. 580, 13 Am. St. Rep. 180, holding in a suit for damages for personal injury that although it was not alleged that plaintiff was rendered less capable of attending to his business, yet it was proper for the court to instruct that the fact could be considered by the jury in assessing damages. Affirmed in *Parker v. Bond*, 5 Mont. 11 as to damages from an injunction.

#### 47 Cal. 167-168. GRAZIDAL v. BASTANCHURE.

**Bill of Exceptions** is necessary on appeal from order setting aside default, p. 167.

Affirmed in *Guthrie v. Phelan*, 2 Idaho, 93, as to an order overruling demurrer.

#### 47 Cal. 168-170. MEEKS v. KIRBY.

**Ejectment by Grantee of Heir** does not lie pending administration of estate of ancestor, p. 170.

Affirmed as to a devisee in *McCrea v. Haraszthy*, 51 Cal. 151. Cited in *Plass v. Plass*, 121 Cal. 133, noted under *Meeks v. Hahn*, 20 Cal. 620; *Traweek v. Kelly*, 60 Miss. 656, holding that where, after discharge of executors, the heirs sued on a judgment recovered by the executors

invitations would run  
one of them was  
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war, the claim of  
*McGinnis v. Dodson*, 4 Mont.  
a deceased tenant  
*Graham v. Crown Point Co.*,  
creditors of an estate  
heirs might bring  
supported the view  
object and intent of  
Cited in *Dunn v.*  
under a foreign will,  
Meeks v.  
90 of the Probate  
years from date of a  
were not under any  
of the act; Thorpe  
1452 of the Code  
suit against an ex-  
court will not take  
where a state court

...but date named there-

... holding that under section 10-10-103, S. Dak. 439, hold-  
... unprinted aliunde; Thum v.  
... life insurance policy

... facts, p. 178. Murphy v. Superior Court, 19 Cal. 2d 408, quoting Gill v. Superior Court, 100 Cal. 279, on point. Plaintiff's attorney, in his brief, states that plaintiff was not prejudiced by the omission of the defenses in the answer. "The question is whether or not the building, it is of the opinion of the court, is fit for the purpose of making of it or not"; "the court has no knowledge of the acts supporting the

judgment cannot be questioned on appeal "without bringing up the evidence in a statement or bill of exceptions"; *Perry v. Quackenbush*, 105 Cal. 306, holding that if, on an appeal from the judgment, "from a consideration of the probative facts this court should determine that they did not justify the finding of the ultimate fact, it would determine that the evidence was insufficient to justify the decision," which cannot be done except after motion for new trial; *Rankin v. Newman*, 107 Cal. 608, holding that where there is no express finding, but a finding logically necessary to support the judgment is conclusively implied, it cannot be qualified by any finding or averment of probative matter; *Toulouse v. Burkett*, 2 Idaho, 173, to the point that findings contrary to evidence can be reviewed only by motion for new trial; *Kahn v. Central Co.*, 2 Utah, 379, to the point that ultimate facts are the opposite of probative.

Deposition taken before amendment of answer is admissible when issues have not been changed, p. 179.

Cited in *Salmer v. Lathrop*, 10 S. Dak. 220, applying rule in case of addition of new formal plaintiffs.

Statute of Frauds does not invalidate oral partnership agreement partly performed, p. 179.

Cited in *Bates v. Babcock*, 95 Cal. 488, 29 Am. St. Rep. 141, holding that after an oral partnership agreement for purchase of land "has been executed by making the conveyance in accordance with such agreement, it cannot be objected that such conveyance could not have been compelled on account of the statute of frauds."

Partnership between Lessor and Lessee, created after making lease, is a separate and distinct contract, p. 179.

Affirmed in *Pico v. Cuyas*, 47 Cal. 180, 48 Cal. 642.

#### 47 Cal. 181-183. READ v. CARUTHERS.

Federal Pre-emptioner may Attack State Patent for swamp lands by showing that the lands were not swamp, p. 182.

Distinguished in *Dreyfus v. Badger*, 108 Cal. 67, holding that where a grantee of school lands under a state patent brought ejectment against a pre-emptioner claiming under federal laws, the latter could not attack the state patent collaterally by showing that the land was "suitable for cultivation," because the patent was conclusive as to the "conditions and characteristics of the land."

#### 47 Cal. 183-187. BEAUDRY v. FELCH.

Judgment on Pleadings.—If a good defense was not pleaded, it cannot be relied on in support of an injunction against collection of the judgment, p. 186.

that in a statutory  
case university lands,  
under judgment on the

all purchase price ob-

m. St. Rep. 42, hold-  
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, 631.

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under Hewes v. Reis,  
nder Meuser v. Ris-  
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assessment, subse-  
, 61 Cal. 517, hold-  
of trustees to "cause  
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motion, to county  
ain the case if ends  
discretion of lower  
in case of abuse, p.

holding order changing  
ents of new county  
convenience of witnesses and  
Southern Pacific Co.,  
counter-motion to re-  
time that defend-  
v. Cowell, 56 Cal.  
discretion in refusing  
county of his residence,  
uses resided in that  
Cal. 77, holding that

under section 396 of the Code of Civil Procedure, neither party can move for a change for convenience of witnesses until after the answer is filed, or because a fair trial cannot be had until after an attempt and failure to empanel a jury. Cited in *Avila v. Meherin*, 68 Cal. 479, holding that the lower court did not abuse its discretion in refusing to change the venue on defendant's affidavit that a fair and impartial trial could not be had and for convenience of witnesses; *Clanton v. Ruffner*, 78 Cal. 269, holding that there was no abuse of discretion in the lower court refusing to return the case to the county where it was brought, on plaintiff's motion, for convenience of witnesses, after it had been removed on defendant's motion to the county of his residence, and the preponderance of witnesses was not decisive of the question; *Stockton Works v. Houser*, 103 Cal. 380, holding that the lower court did not abuse its discretion in denying plaintiff's motion to change the venue for convenience of witnesses. Disapproved in *Smail v. Gilruth*, 8 S. Dak. 290, saying that "in the later decisions in that state Hanchett v. Finch seems in effect, though not in terms, to have been overruled." citing in support of this statement, 65 Cal. 321, 79 Cal. 30, and 97 Cal. 637, none of which cite the principal case; and holding that defendant has an absolute right to have the venue changed to the county of his residence, and his motion cannot be defeated by proof that the convenience of witnesses requires the case to be retained. Cited in note on this point in 74 Am. Dec. 243.

#### 47 Cal. 194-205. REED v. CLARK.

**Damages for Breach of Promise to marry; great latitude is permitted in the introduction of evidence, p. 199.**

Cited in *Liebrandt v. Sorg*, 133 Cal. 572, as to evidence tending to show humiliation of plaintiff's feelings; *Kennedy v. Rodgers*, 2 Kan. App. 768, holding that damages may include injury to feelings, mortification, and harm to plaintiff's prospects; *Kelley v. Highfield*, 15 Oreg. 282, holding evidence admissible of defendant's declarations tending to wound plaintiff's feelings. Disapproved in *Osmun v. Winters*, 25 Oreg. 271, holding evidence inadmissible of plaintiff's preparations for marriage, saying that "the tendency of the modern decisions is to apply the same rule of evidence in cases of this nature as in other cases, and it has even been held that evidence of preparation for the marriage are inadmissible." Cited in note to 63 Am. Dec. 545.

**Court's Expression of Opinion, as to what facts have been proven, is not error, p. 200.**

Cited in *People v. McLean*, 84 Cal. 483, holding that remarks of the court, in ruling on defendant's motion for discharge at the close of the evidence for the prosecution, were not error; and in *State v. Moran*, 15 Oreg. 265, to the point that the preliminary question, of whether an alleged confession was made voluntarily, was for the court.

plaintiff wantonly attacked defendant by the jury in ag-

gery v. Highfield, 15 App. 79, sustaining Fed. 640, on this point.

Plaintiff's attorney elicited on question of

plaintiff's wealth; note 39, and Olson v. Sol-  
omon, 66, holding cer-  
tainly his wealth; note

plaintiff's wealth; note 39, and Olson v. Sol-  
omon, 66, holding cer-  
tainly his wealth; note

plaintiff's wealth; note 39, and Olson v. Sol-  
omon, 66, holding cer-  
tainly his wealth; note

KERN COUNTY.

Plaintiff's attorney declined because "the  
plaintiff's wealth; note 39, and Olson v. Sol-  
omon, 66, holding cer-  
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plaintiff's wealth; note 39, and Olson v. Sol-  
omon, 66, holding cer-  
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plaintiff's wealth; note 39, and Olson v. Sol-  
omon, 66, holding cer-  
tainly his wealth; note

plaintiff's wealth; note 39, and Olson v. Sol-  
omon, 66, holding cer-  
tainly his wealth; note

105 Cal. 257), holding that a complaint for libel stated a cause of action in averments of how the words used were understood; *Petsch v. Dispatch Co.*, 40 Minn. 295, holding that meaning of the words "city hall ring," as understood by author and readers, was properly averred in the complaint; to same effect, as to other words, in *Glatz v. Thein*, 47 Minn. 280, and *Brennan v. Tracy*, 2 Mo. App. 544; *Spurlock v. Lombard Co.*, 59 Mo. App. 231, holding that an advertisement of foreclosure sale under deed of trust was not a libel, for it did not necessarily imply that the trustee was insolvent or untrustworthy; *Behre v. National Co.*, 100 Ga. 215, holding that an advertisement that an agent was "no longer connected" with a company, furnished as matter of law ground for a libel suit, when the complaint averred the sense in which the words were used and understood.

47 Cal. 213-222. **RUTENBERG v. MAIN.**

**Statute of Frauds.**—Memorandum of sale of land need only be signed by vendor or his agent, and agent's power to sign may be verbal, p. 219.

Cited in *Cannon v. Handley*, 72 Cal. 144, holding that delivery of a deed in escrow, signed by the vendor, is sufficient memorandum of the sale; *McDonald v. Huff*, 77 Cal. 282, holding that a deed in escrow was binding on the vendor without the signature of the vendee "or any contract in writing from him"; *Roehl v. Haumesser*, 114 Ind. 318, holding that the agent's authority to sign the memorandum "may be proved by parol, or, in other words, it may be proved by the same class of evidence necessary to establish agency in other cases, that is, by proof of express authority or by subsequent ratification." Distinguished in *Lambert v. Gerner*, 142 Cal. 403, holding principal not bound by acts of soi-disant agent under facts stated.

**Sale of Land by Agent.**—While a mere broker has only power to find a satisfactory purchaser, yet if language and circumstances show that agency is intended to be more extensive, the court will so find, p. 219.

Cited in *Armstrong v. Lowe*, 76 Cal. 617, holding that a broker employed to sell had no authority to execute a contract to convey; to same effect in *Grant v. Ede*, 85 Cal. 420; 20 Am. St. Rep. 238; *Smith v. Schiele*, 93 Cal. 149, holding that a real estate broker, employed "solely to sell" was entitled to his commissions upon finding a purchaser; *Delano v. Jacoby*, 96 Cal. 279, 31 Am. St. Rep. 204, holding that a power of attorney to sell land, under the circumstances, included the power to execute a deed, and in any event the vendor was estopped from questioning the power because he had ratified the acts of his attorney; *Malone v. McCullough*, 15 Colo. 486, holding that where an agent's power to sell land is verbal, "it must be clearly expressed and satisfactorily established"; *Cobban v. Hecklen*, 27 Mont. 257, authority of

Required to be in writing. Oreg. 453, holding that a writ of garnishment on finding a purgatory note. Wash. 365.

Waiver of service of process is deemed waived; and if it is shown that one should have been served.

Waiver of service of process to the point that the defendant has specially pleaded by answer that he is joinder of defendants against one of them for the whole amount of the debt. Atlantic Co., 110 Cal. 461, 466, holding that joinder; Conklin v. Conklin, 102 Cal. 450, holding that only of several parts of the cause of action can be joined if they had been separately pleaded; to same effect, 100 Cal. 450, holding that in a suit for a sum of money, the joinder of the plaintiff and defendant alone was valid.

#### WAIVER OF SERVICE OF PROCESS IN COLO COUNTY.

Waiver of service of process assumed in absence of defendant, holding that where the defendant had incorporated the corporation into his business the corporation was not a sufficient plaintiff had power to sue it.

Waiver of service of process valid, because application was made before the principal case was filed.

Waiver of service of process not defective in substance, holding that the assessment in a recent case could not be reviewed on certiorari, holding that if it appears that the trial court has been guilty of the negligence of the parties or of the law for an unreasonable time, the writ of certiorari may be granted after the expiration of the time within which an appeal

or writ of error must be taken; and note on this point in 12 Am. Dec. 530.

Reclamation Statute of 1868 includes lands held under Mexican title, pp. 231-233.

Cited in *People v. Hagar*, 52 Cal. 183, holding, in a suit to recover the assessment due by the plaintiff in the principal case, that an averment in the answer that the lands were held under title derived from a Mexican grant "was properly stricken out"; *Hagar v. Reclamation District*, 111 U. S. 706, holding that the construction of the state statute in the principal case must be followed by the federal courts, no federal question being involved.

Power of Legislature to compel local improvements, at expense of those benefited, is constitutional, p. 234.

Cited in *People v. Lynch*, 51 Cal. 24, 21 Am. Rep. 684, holding that the power of assessment for street improvement "cannot be directly employed by the legislature within the limits of an incorporated city," and saying that it was held in the principal case that "outside of such municipalities the legislature might authorize the employment of the power by local boards"; *Dean v. Davis*, 51 Cal. 411, holding, in a suit to enjoin the collection of an assessment by a levee district, that the existence of the district as a "public corporation" could not be collaterally attacked, and that the district was invested by the legislature with corporate rights, under the power to compel local improvements; *Reclamation District v. Hagar*, 66 Cal. 57, saying of the principal case: "We are not disposed to say that case is not correct" in holding that the district was a corporation and its assessment was valid; *Lamb v. Reclamation District*, 73 Cal. 133, 2 Am. St. Rep. 781, holding it unnecessary to discuss whether the right to reclaim swamp land is exercised under eminent domain or the police power, because a reclamation district is not liable for consequential damage to crops from overflow of a river, alleged to be caused by the building of a levee; *Turlock District v. Williams*, 76 Cal. 368, 370, holding that irrigation districts "have all the elements of corporations formed to accomplish a public use and purpose," and they can lawfully make assessments. Dissenting opinion in *Estate of Jessup*, 81 Cal. 486, as to when a statute is unconstitutional, a majority of the court holding, on page 470, that section 45 of the Code of Civil Procedure, regarding hearings by the supreme court, is unconstitutional; *In re Madera District*, 92 Cal. 311, 327, 27 Am. St. Rep. 115, 128, holding the Wright Irrigation Act constitutional, and a legitimate exercise of the power of the legislature, acting for the public good, to adapt its laws to the peculiar wants of a district, even though the whole state be not benefited thereby; *Wulzen v. Supervisors of San Francisco*, 101 Cal. 20, 40 Am. St. Rep. 23, holding that an assessment for street extension is in principle "in most respects subject to like considerations with cases of taxation," and that the

and appointing commissioners to exercise their jurisdiction; Landowner's right to sustaining condemnation proceedings, *Morrison v. Morey*, 146 U.S. 100, 103; Construction of levees, under power of eminent domain, *Lewis Co. v. Gordon*, 20 U.S. 329, 332; Construction of sewers for public convenience, *State v. Bremerton*, 122 U.S. 222, holding that a state has power to regulate a public ditch was within its power of police; The power of police is more comprehensive than the power of eminent domain; Statutory exemption of land from taxation between the state and a local government; Statutory legislature is dependent upon the state for the exemption; Reel-land, a statute creating a levee district, giving it the power of taxation to land alone, except that the tax is to be by acre instead of by the acre; The power of taxation, because the object of the statute is to reclaim land, and to give the power to reclaim land, and to give the power to tax the land; Cited in *McFadden v. Missouri*, 100 U.S. 371, 372; Constitutional requiring occurrence of a taxable assessment to be collected by tax collector; Power of state government of taxes, because of the power of taxation; Reclamation District 101, *State v. McFadden*, 100 U.S. 371, 372, holding that the power of taxation does not extend to an assessment by a reclamation district; *Notes* and notes on this point, *Dec. 522*; *Am. Dec.* 80 Am. Dec.

... movement of great mag-

371, holding that the  
of desert lands, is for

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...ing a defective applica-  
tion, 56 Cal 223, and Peo-

**47 Cal. 242-248. JONES v. MARKS.**

**Power of Attorney** authorized lease, but not sale, pp. 247, 248.

Affirmed, as to conveyance of land, in Wilcoxson v. Miller, 49 Cal. 196. Referred to in Hunter v. Sacramento Co., 7 Saw. 501, 11 Fed. Rep. 16, 17, as not questioning the fact that the power of attorney conferred no authority to sell land. Cited in notes, on power of attorney to convey land, in 17 Am. Dec. 59, and 68 Am. Dec. 237.

**Actual Possession of Land**, under equitable title, is notice to subsequent purchaser, p. 249.

Cited in Story v. Black, 5 Mont. 52, 51 Am. Rep. 44, holding that a plaintiff who levies an attachment on land is charged with notice of the rights and equities of the occupant.

**47 Cal. 249-251. McDERMOTT v. MITCHELL.**

**Unverified Answer**, drawn by attorney, is not evidence against defendant in another case, p. 251.

Cited in Duff v. Duff, 71 Cal. 525, holding that a petition for administration, signed by an attorney, was not evidence against the petitioner as to description of real estate therein; Kamm v. Bank of California, 74 Cal. 197, holding that where a complaint was verified by plaintiff's attorney, it was admissible against plaintiff in a later suit, as evidence "of the fact of suit brought and of the nature of the action."

**47 Cal. 252-259. LICK v. OWEN.**

**Libel**.—A publication, holding plaintiff up to the public as an object of ridicule, is libelous, p. 257.

Cited in Schomberg v. Walker, 132 Cal. 226, 227, holding publication a libel per se and reversing judgment for defendant; Tonini v. Cevasco, 114 Cal. 273, holding that language whose "natural effect was to expose plaintiff to obloquy," was libelous.

**Malice in Law** is a legal conclusion which cannot be rebutted; defendant may show absence of actual malice, in mitigation, but amount of damages is for the jury, p. 258.

Cited in Leonard v. McPherson, 146 Cal. 620, upholding complaint for libel alleging publication by defendants of letter purporting to have been written by plaintiff to wife of one of defendants charging her with boycotting plaintiff's hotel and threatening boycott on her business; Childers v. San Jose Co., 105 Cal. 288, 45 Am. St. Rep. 42, holding that "malice in fact is only material in libel as establishing a right to recover exemplary damages or to defeat defendant's plea that a publication is privileged"; Taylor v. Hearst, 107 Cal. 270, 272, to the point that proof of mitigating circumstances "is not sufficient to

... recovering such  
... of the publication,"  
... libelous words to be  
... the same effect in  
... World etc. Co., 59  
... damages at least when  
... 431, on damages in

REPLICA OF A DEED  
... right to possession at  
... would entitle him to

Sullivan v. Dunphy,  
Santa Barbara, 144 Cal.  
holding a right to possession; Tarpey v.  
claiming a fee-simple  
right to possession; Maul-  
ney, to the point that  
material in the answer.

Although it might be proof

by the court, p. 264.  
110 Cal. 176, holding  
terms as a condition  
cept in case of abuse.

who had been ousted  
right of recovery was

Riding that if a claim  
statute of March, 1868,  
dispensable to consti-  
McLeran v. Benton,  
recover from the in-  
ordinance.

place of posts and wires

Cited in *Spotts v. Hanley*, 85 Cal. 166, to point that possession must be subjection of land to dominion of occupant, to exclusion of others.

**Statute of Limitations.**—Plea should refer to special section relied upon, p. 293.

Cited in *Spanish Fork v. Hopper*, 7 Utah, 238; *Whittaker v. Greenwood*, 17 Utah, 37, and *Fullerton v. Bailey*, 17 Utah, 92, holding general plea of statute insufficient.

**47 Cal. 294-348. SILL v. REESE.**

**Statement by Counsel**, of limited purpose for which evidence is offered, does not estop him from drawing other deductions from it in argument, p. 340.

Referred to in *Sears v. Starbird*, 75 Cal. 92, 7 Am. St. Rep. 123; and cited in the same case, 78 Cal. 230, holding that "in the absence of an express understanding between counsel and the court, that evidence is to be limited to a particular matter the court will be authorized to consider it for any purpose for which it is competent and relevant to the issues."

**Motion to Strike Out** answer of witness to question must specify the objection, p. 341.

Affirmed in *Henry v. Southern Pacific Co.*, 50 Cal. 181; *People v. Eckman*, 72 Cal. 585; *Jacksonville Co. v. Peninsular Co.*, 27 Fla. 105; *Ortiz v. State*, 30 Fla. 270.

Contemporaneous charge in book of accounts is admissible as a link in the chain of events, p. 342.

Cited in *Reid v. Reid*, 73 Cal. 209, holding that stenographer's notes are not evidence of what a witness said, and part of res gestae; and note on res gestae in 95 Am. Dec. 52. Distinguished in *Stidger v. McPhee*, 15 Colo. App. 256, where transaction evidenced by book entry is not in issue, but is introduced merely to fix by inference date of transaction in dispute, it was error to admit books to prove date of a sale on evidence of foreman that entry made from slip furnished by salesman and that firm never made entry till goods delivered where salesman not produced.

**Evidence as to Handwriting.**—If a witness has "proper knowledge of the handwriting of the person whose writing is in dispute, he may declare his belief in regard to the genuineness," p. 343.

Cited in *Burdell v. Taylor*, 89 Cal. 616, where the successor of a county surveyor was held competent to testify to the latter's handwriting.

**Exception to Oral Charge** of court to jury must specifically point the objection, p. 348.

Affirmed in *Ryder v. Edgar*, 54 Cal. 130; *Rogers v. Mahoney*, 62

*Frost v. Grizzly Bluff* in the same construction "considered  
as a general exception." But, in the absence of  
any such language, it is held without a general except-  
ion. *Id.* at 358, 52 Am. St. Rep.  
102. The same rule is followed in the ample instructions given  
in *Struby Co. v. Wallowa Bank*, 100 P. 2d 350, because the principal  
rule, of course, has been agreed upon by the parties and  
is to be followed. A general exception  
is not made on this point in 85

*W. S. v. C. H.* in a debt contracted  
prior to the filing of the petition, the action continues, after  
the filing of the petition. *Id.* at 350.

It is also held that the exemp-  
tion does not extend to the receiver's re-  
ceivables in *Wallowa Bank v.*  
*Sorrels v. Self*, 56 Mo. App. 652; but in *Struby Co.*  
*Church*, 42 Or. 272,  
it is held that the exemption  
extends to the receiver's cer-  
tificate of title. It is held in *Sorrels v. Self*,  
however, that the exemp-  
tion does not extend to the patentee; *Watson v.*  
*Brandhoefer v.* *Clark v.* *Oklahoma*, 241;  
and note that the exemption  
does not remove the  
lien on the buyer's homestead be-  
cause the removal would mate-  
rially impair the property. *St. Rep.* 158, hold-  
ing that the buyer's homestead be-  
comes subject to the lien but has a lien on the  
homestead which may be removed if the removal would mate-  
rially impair the property. *Okla.* 241; and note  
that the exemption

**47 Cal. 351-353. DAVIDSON v. JORDAN.**

**False Representations** by seller of a mine are no defense to buyer's note, when seller only quoted information received from others, having no reason to believe it untrue, p. 353.

Affirmed, as to sale of newspaper, in *Hanscom v. Drullard*, 79 Cal. 238.

**47 Cal. 353-361. PEOPLE EX REL. DOYLE v. AUSTIN.**

**Street Assessment** is not a tax, p. 358.

Cited in *San Francisco v. Linda Vista District*, 108 Cal. 194, holding a city not exempted from assessment of its pueblo lands for purposes of an irrigation district; *Mayor v. Klein*, 89 Ala. 467, holding that constitutional and statutory provisions regarding taxation have no application to street assessments; *Atlanta v. First Church*, 86 Ga. 741, holding a church not exempt from a street assessment, the policy of the state being to favor churches, "favor them highly, but to leave no favor whatever to implication"; and note to 16 Am. St. Rep. 371, on distinction between taxes and assessments.

**Federal, State, and City property** is "not subject to taxation for revenue purposes," p. 360.

Cited in *Van Brocklin v. Tennessee*, 117 U. S. 166, holding that lands bought by the Federal government at a tax sale, and later sold by the government or redeemed by the former owner, are exempt from taxation while so held by the United States; note on exemption of charitable institutions in 17 Am. Rep. 162; and note on exemption of public property in 33 Am. St. Rep. 400, 403, 404, 406.

**47 Cal. 361-364. PEOPLE v. COGHILL.**

**Majority of commissioners to assess swamp lands cannot act, where statute requires joint action**, p. 363.

Affirmed in *People v. Hagar*, 49 Cal. 232. Cited in *Harris v. Supervisors*, 49 Cal. 665, holding that where the commissioners made a void assessment, supervisors had no power to order another, because the district trustees had not complied with the statute. Affirmed in *People v. Ahern*, 52 Cal. 211. Cited in *In re Settlement*, 51 Neb. 120, but holding act of majority valid where statute is silent; *State v. Smith*, 57 Neb. 47, holding invalid a nomination by minority of county committee where others have had no notice of the meeting; and to same effect in *Thompson v. West*, 59 Neb. 688, as to action of majority of board of trustees of church in absence of such notice. Distinguished in *Swamp District v. Gwynn*, 70 Cal. 567, 570, holding that under a later statute the commissioners need not jointly view the land. Cited in *People v. Hecht*, 105 Cal. 627, 45 Am. St. Rep. 100, holding that a majority of a board of freeholders may act; *Lower Reclam. District v. Phillips*, 108 Cal. 322,

district could be attacked as being shown to be irregular. Cited holding that under the circumstances a corporation could act. Cited at where three commissioners for street improvement, giving statutory notices to claimants, acting opinion in Martin holding that where a reso- license was revoked by the city, to resume the mayor was in his absence; First Nat. Bank holding that a majority of the railway could act; and

general for services as

g that the secretary of board of examiners; to controller: Lewis v. examiners have power for his pay is inserted b. 244, holding that the adjutant general; Cornell commissioner extra com- v. Roddle, 12 S. Dak. secretary of state on opinion in *Kollock v.* city surveyor un- N. 383, holding that the as reporter; and Blair improperly drawn by the

Court, by guardian of incompetent, for proceeds does not estop

holding that an attorney general may sue his wife, even though the wife has no right to sue him, if he has squandered the homestead on his land and has given an acknowledgment to the

deed were unnecessary; Merced Bank v. Rosenthal, 99 Cal. 49, holding that where an agreement, contemporaneous with deed of homestead, made the transaction a mortgage, husband and wife must execute and acknowledge the agreement; Matthews v. Davis, 102 Cal. 207, holding that an acknowledged agreement by husband and wife to convey the homestead upon condition could not be specifically enforced; California Fruit Co. v. Anderson, 79 Fed. Rep. 406, holding that there must be a consideration for conveyance or encumbrance of the homestead by the wife; and note to 85 Am. Dec. 171, on equitable estoppel.

#### 47 Cal. 378-388. PRATOLONGO v. LARCO.

Striking Out Finding of referee, and substituting another by the court disapproved, but as it referred only to computation of interest, appellant was not prejudiced, p. 383.

Cited in Hayes v. Wetherbee, 60 Cal. 399, to the point that the trial court may make additional findings; to same effect in Thompson v. Connecticut Mutual Co., 139 Ind. 352, and North v. Peters, 138 U. S. 283; Lynch v. Coviglio, 17 Utah, 109, applying rule of nonprejudicial error to amendment of findings and judgment.

Interest.—Account current, charging interest at specified rate, is a contract in writing, under the statute, for payment of that rate, p. 384.

Affirmed in Van Fleet v. Sledge, 45 Fed. Rep. 751.

#### 47 Cal. 388-407. PEOPLE v. BROTHERTON.

Order of Proof in a conspiracy case rests in discretion of the court, p. 400.

Affirmed in State v. Jackson, 82 N. C. 568; Baker v. State, 7 Tex. App. 613; Cox v. State, 8 Tex. App. 301. Cited in note on this point in 3 Am. St. Rep. 489.

Expert.—Witness may testify as to result of his putting acid on a check, though he is not an expert, p. 403.

Cited in Eisfield v. Dill, 71 Iowa, 445, holding that a county auditor, teacher of penmanship, and attorneys, all familiar with old writings, may testify as to genuineness of an old document.

Technical Error in ruling on evidence, not shown to have injured defendant, is not ground for new trial, p. 405.

Affirmed in People v. Nelson, 56 Cal. 82, as to an instruction on ownership of stolen property. Cited in People v. Glaze, 139 Cal. 162, as to admission of evidence in murder case; People v. Reggel, 8 Utah, 25, applying rule to excessive fine, when amendable on appeal. Case is cited also in State v. Mason, 24 Mont. 344, discussing review of instructions when record does not contain evidence; dissenting opinion in People v. Campbell, 59 Cal. 256, a majority of the court holding that evi-

excluded, for they  
People v. Barnhart, 59  
held verdict of burglary  
was prejudicial error;  
al error in clerk's  
defendant; People  
had been erroneously admitted  
People v. Gay, 2 Dak. Ter.  
People v. Hopt, 4 Utah 257.  
Technical objections  
not prejudiced; and

"no reasonable doubt," p. 407.  
People v. Jackson, 190 U.S. 102.

separately and its  
People v. Johnson, 190 U.S. 411.

that the omission  
of the figures in the  
People v. Central Pacific  
cannot be assessed  
People v. 408, to the point  
to same effect in

People v. 415.  
in filing transcript  
People v. 416.  
and transcript, on  
People v. 417.

#### COMPANY.

on appeal or motion

People v. 418.  
People v. 419.  
People v. 420.  
People v. 421.  
People v. 422.  
People v. 423.  
People v. 424.  
People v. 425.  
People v. 426.  
People v. 427.  
People v. 428.  
People v. 429.  
People v. 430.  
People v. 431.  
People v. 432.

**Neither Notice of Motion for New Trial nor affidavits in support thereof are necessary in statement on motion for new trial, p. 428.**

Approved in *King v. Pony Gold Min. Co.*, 28 Mont. 85, notice of intention to move for new trial not necessary part of record on appeal from order denying new trial unless some objection presented to notice in trial court which it is desired to have reviewed.

Surprise at testimony offered at trial is not ground for new trial, where no motion for continuance was made at the time, p. 430.

Affirmed in *Heath v. Scott*, 65 Cal. 552.

**Ownership.—Averment in complaint on a fire policy, that loss was of "the property of this plaintiff," is sufficient, p. 531.**

Cited in *Turner v. White*, 73 Cal. 300, holding from the context that an averment of ownership of land, in a complaint to cancel a deed for fraud, was of a conclusion of law and not of an ultimate fact; *Heeser v. Miller*, 77 Cal. 193, holding that, in an action to quiet title, an averment that plaintiff was the owner and seised in fee was of an ultimate fact; to same effect in *Souter v. Meguire*, 78 Cal. 544; *Jones v. Memmott*, 7 Utah, 343, applying rule in discussion of complaint in ejectment.

**Complaint on Fire Policy.—Defect in averment as to loss from an excepted cause held too slight to be considered, p. 431.**

Cited in *Blasingame v. Home Ins. Co.*, 75 Cal. 634, holding that failure to allege that the loss did not occur from an excepted cause was immaterial, for it is unnecessary to insert "allegations for the purpose of meeting or cutting off a defense"; *Emery v. Svea Ins. Co.*, 88 Cal. 302, holding that an allegation that plaintiff duly performed all conditions of the policy was sufficient; *Aetna Ins. Co. v. Kitchens*, 81 Ind. 98, holding that an averment that the insured "fulfilled" the conditions of the policy was sufficient.

#### 47 Cal. 432-436. SHOEMAKE v. CHALFANT.

**Homestead after Divorce ceases to be exempt from execution, p. 435.**

Cited in *Shinn v. Macpherson*, 58 Cal. 599, holding that a partner could not wrongfully use partnership funds to pay off a mortgage on his wife's homestead; dissenting opinion in *In re Wilson*, 123 Fed. 24, majority holding under California laws use of funds by insolvent to discharge lien on homestead is not fraudulent, and does not give bankruptcy trustee right to subject homestead to lien for amount so diverted from creditors; *Bahn v. Starcke*, 89 Tex. 208, 59 Am. St. Rep. 44, holding that a homestead decreed to a wife after divorce ceased to be exempt; *Arp v. Jacobs*, 3 Wyo. 496, holding that by a decree of divorce the husband lost all homestead rights, though he continued to live on the premises; and note to 12 Am. St. Rep. 686, on conveyance of homestead.

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order calling special  
Cal. 339, ruling simi-  
19, section 25; dis-  
majority of the court  
Francisco had power to  
Supervisors of Los  
to canvass election  
should not conform to the

until the next au-

ing that as the code  
office of lieutenant  
the unexpired term;  
governor has no power  
Simon, 20 Oreg. 374,  
because the statute  
former incumbent could  
State v. Gardner,  
the governor to fill  
elected later, because  
extended note in 13

**47 Cal. 447-450. PEOPLE v. BROWN.**

**Assault to Rape.**—Resistance of the woman assaulted held sufficient, p. 450.

Cited in Lind v. Closs, 88 Cal. 13, ordering new trial in suit for damages by husband for assault on wife, because wife's testimony was improbable; People v. Fleming, 94 Cal. 312, holding that the testimony of the woman assaulted did not sufficiently show guilty intent of defendant; Hollis v. State, 27 Fla. 392, holding evidence of resistance insufficient; Brown v. People, 36 Mich. 206, holding that if the woman "yielded," she did not sufficiently resist; Mathews v. State, 19 Neb. 334, holding resistance not sufficiently proven; Reynolds v. State, 27 Neb. 93, 20 Am. St. Rep. 661, holding that consent, "no matter how tardily given," negatives presumption of rape; and State v. Depoister, 21 Nev. 119, in dissenting opinion, a majority of the court upholding a conviction.

**47 Cal. 453-456. QUIRK v. FALK.**

**Sheriff's Deed.**—Party relying on it must also produce judgment and execution on which it is founded, p. 455.

Affirmed in Schuyler v. Broughton, 65 Cal. 253; Archbishop v. Shipman, 69 Cal. 592; Bullard v. McArdle, 98 Cal. 357, 35 Am. St. Rep. 177.

**Water Ditch** held not to be appurtenant to a mining claim, p. 456.

Cited in Mitchell v. Amador Canal Co., 75 Cal. 492, holding that foreclosure of mortgage on one ditch did not include another ditch not appurtenant to the first; McShane v. Carter, 80 Cal. 316, holding that the term "mining ground" included an appurtenant ditch.

**47 Cal. 456-457. PEOPLE v. CLARK.**

**Street Assessment.**—Resolution of intention to perform work "where necessary" is invalid, for supervisors cannot delegate such power, p. 457.

Affirmed in Randolph v. Gawley, 47 Cal. 458; People v. Ladd, 47 Cal. 604; Brady v. King, 53 Cal. 45. Cited in Treanor v. Houghton, 103 Cal. 58, holding that a city council has no power to award separate contracts for "performance of a single improvement"; Lufkin v. Galveston, 56 Tex. 534, holding that a city council cannot delegate to a health officer power to designate what lots shall be filled in; and note in 74 Am. Dec. 572, on delegation of power to tax.

**47 Cal. 458. RANDOLPH v. GAWLEY.**

**Street Assessment.**—Same point as 47 Cal. 456.

Cited in Lufkin v. Galveston, 56 Tex. 535, and note to 74 Am. Dec. 572, for which see note to 47 Cal. 456, ante.

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v. Willard, 48 Cal.  
buttal of lessee's de-  
84 Cal. 23, to the  
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Restano, 39 Cal. 68.  
t v. Hungelburger, 9  
eemed possession of  
tenancy; Tyler v.  
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Cited in Tullis v.  
bury v. Magraff, 33  
139, on this point.

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147 Cal. 762, where  
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33, holding that errors  
corrected by the ju-  
301, 398, 401, where a  
er the principal case  
ent had committed  
56 Cal. 287, 288, in  
ing to question the  
Buckley v. Howe, 86

Cal. 600, refusing to declare that a patent was held in trust, the alleged beneficiary having failed to show a right to attack the patent; *Shanklin v. McNamara*, 87 Cal. 378, holding that the award of a patent was a nullity, because the lands were swamp and within a Mexican grant, and the land department cannot "award that to one person which by an act of Congress has been granted to another"; *Sparks v. Brown*, 2 Wash. Ter. 432, holding that the findings of fact of the secretary of the interior in a land case cannot be reviewed in a court of equity except for fraud or mistake.

#### 47 Cal. 474-477. **HOLLOWAY v. GALLIAC.**

Tenant in possession when lease is made cannot defeat landlord's title unless he connects himself with a better one, p. 477.

Cited in *Dixon v. Stewart*, 113 N. C. 415, holding tenant estopped to deny landlord's title; also in the following cases, for which see note, ante, to 47 Cal. 459, viz., *Oneto v. Restano*, 89 Cal. 68; *Parrot v. Hangelburger*, 9 Mont. 534; *Tyler v. Davis*, 61 Tex. 677; note to 13 Am. Dec. 71.

#### 47 Cal. 477-481. **PILLSBURY v. BROWN.**

Misdemeanor under City Ordinance.—District attorney is not entitled to his statutory fee for conviction, p. 479.

Cited in *Chafin v. Waukesha Co.*, 62 Wis. 468, holding that services of a justice in trying misdemeanors under a village ordinance must be paid by the village, not by the county; to same effect, as to sheriff's fees, in *Nickell v. Waukesha Co.*, 62 Wis. 472.

#### 47 Cal. 481-483. **McNEADY v. HYDE.**

Equitable Relief by injunction, in ejectment, though improperly granted, does not justify reversal of judgment in the action at law, p. 483.

Cited in *Tatro v. Tatro*, 18 Neb. 400, 53 Am. Rep. 823, holding that as distinctions between law and equity are abolished by the code, a court in decreeing alimony after divorce may include dower rights therein.

#### 47 Cal. 484-485. **HUSTON v. WALKER.**

Executory Contract by Pre-emptor of public lands, made before proof and payment, to convey to another after issuance of patent, is void and cannot be enforced, p. 485.

Cited in *Thompson v. Doaksum*, 68 Cal. 598, holding void an agreement by a pre-emptor to divide the land with Indians whose ancestors had lived on it since 1492, and saying that if the Indians had any right it should have been asserted in the land department. Distinguished in *O'Hanlon v. Denvir*, 81 Cal. 63, 15 Am. St. Rep. 21, holding that im-

...right owners, may be  
consideration for a prom-  
Cal. 415, refusing  
in due season who had violated  
Complaints from them.

...-itor under a quit-

v. Sawyer, 57 Cal.  
under Franklin v.

*Scutellaria* *lanceolata*, Linné, must be  
the species intended by Linnaeus, *ibid.* p. 508.

Pacific Co. v. Central  
and in Raisch v. Board  
was the only ade-  
quate proof of the de-  
sir for supplies fur-  
411, granting writ  
er fine in highway  
affirming issuance  
statement on mo-  
463, 465, ordering  
under a second at-  
and; People v. Spiers,  
justice of the peace,  
notes to 70 Am. Dec.

designate fund on

to compel register  
Eby v. School Trus-  
t, 193 U.S. 63, 64, 65.  
composition of a taxpayer,  
notwithstanding that the  
lot, for the

question was "incidental merely"; *Metz v. Schweitzer*, 8 Utah, 188, noted under *People v. Bell*, 4 Cal. 177.

Failure to insert the eight-hour clause in a county contract does not avoid it, p. 509.

Cited in *Savings Bank v. Burns*, 104 Cal. 481, holding that a borrower from a bank could not defeat her contract by alleging that the loan to her was contrary to a statute, for the purpose of the statute was to protect the bank; *Vermont Loan etc. Co. v. Hoffman*, 5 Idaho, 385, fact plaintiff engaged in loaning money at interest failed to take out license as required by law is not defense to suit on notes secured by mortgage; notes on illegal contracts in 8 Am. Dec. 693; 12 Am. Dec. 386; 25 Am. Rep. 677.

**County Warrants** are money, p. 512.

Cited in *Superior v. Ripley*, 138 U. S. 98, holding that a complaint, based on acceptance of a draft payable in city warrants, need not aver that payment in city warrants was demanded and refused.

Judicial Notice is taken of a county seat and its removal, p. 512.

Cited in notes to 89 Am. Dec. 665, 666.

**Revenue of county**, in Political Code, section 4070, means "estimated revenue," not actual money in treasury, p. 513.

Cited in *People v. Lynch*, 51 Cal. 37, 21 Am. Rep. 694, as an illustration, in discussing legislative control over municipal finances; *Hilburn v. St. Paul Ry. Co.*, 23 Mont. 246, stating rules for statutory construction.

**County Auditor** cannot set up his judgment in a matter which the law has left to the discretion of board of supervisors, p. 514.

Cited in *Hunt v. Broderick*, 104 Cal. 315-317, where a writ issued to compel the auditor to audit a claim allowed by board of supervisors.

#### 47 Cal. 515-517. UNITED STATES v. LAND.

**Condemnation of Land.**—Value of building, erected by government prior to condemnation, is included in price government must pay, p. 515.

Cited in *United States v. Smith*, 110 Fed. 340, noted under *Railroad Co. v. Armstrong*, 46 Cal. 85. Distinguished in *San Diego Co. v. Neale*, 78 Cal. 74, holding that in a suit by a water company for condemnation, defendant cannot claim as damages increased value of his land from a dam on plaintiff's land adjoining. Disapproved in *Albion Co. v. Hesser*, 84 Cal. 439, 440, holding that a railway company need not pay for track and bridge built by it in good faith before beginning proceedings to condemn, and saying that if the principal case is irreconcilable with the Armstrong case in 46 Cal. 85, "the case in 47 Cal. should be declared overruled, and the case in 46 Cal. approved." Disapproved in *Johnsville Co. v. Adams*, 28 Fla. 647, and *Cohen v. St. Louis Co.*, 34 Kan. 165, 55 Am. Rep. 246, both cases holding that a railway need not pay for a track

note to 88 Am. Dec.

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any company to begin  
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similarly as to section  
Reynolds, 52 Ark.  
to be given by a rail-  
Jacksonville Co., 20  
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deciding the point;  
municipal corporation,  
for damages.

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11, 244, holding that  
jurisdiction of a com-  
to recover statutory  
L. 153, applying rule  
council; Attorney  
council as to elec-  
warranto; Ellison v.  
to try and determine  
v. County Court, 18  
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of the court, such  
council is only con-  
in 30 Am. Dec. 49,

trial court may be  
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cannot be amended after the statutory time; *Baker v. Borello*, 131 Cal. 617, but denying right to amend new trial bill after denial of motion and an appeal from the order; *Fountain W. Co. v. Superior Court*, 139 Cal. 656, 657, denying right of court to cancel settlement of bill after six months; *Hedlun v. Holy Terror Min. Co.*, 14 S. Dak. 370, where bill of exceptions affirmatively shows that trial court read instruction as one requested by defendant in language different from request, and when bill was settled, modification not called to court's attention, record can be returned to trial court for correction. Affirmed, on point that statement may be amended after perfection of appeal, in *William Co. v. Fussy*, 13 Mont. 403; *James v. Leport*, 19 Nev. 176; *Coulter v. Great Northern Co.*, 5 N. Dak. 585.

**47 Cal. 528-531. CALIFORNIA PACIFIC COMPANY v. CENTRAL PACIFIC COMPANY.**

**Certiorari** lies to review void order in condemnation proceedings, from which there is no appeal, p. 530.

Cited in *Enderlin Bank v. Rose*, 4 N. Dak. 332, holding that certiorari lies to review erroneous order of district court as to delivery of attached property; *State v. Kamman*, 151 Ind. 411, noted under *Babcock v. Goodrich*, 47 Cal. 488; *State v. Guinotte*, 156 Mo. 527, granting writ to review probate order revoking letters, made without jurisdiction, when remedy by appeal would be inadequate; note to 70 Am. Dec. 714.

**47 Cal. 531-535. WING CHUNG v. LOS ANGELES.**

**Damage by Mob.**—City not liable, p. 534.

Cited in note on this point in 56 Am. Dec. 590.

**Credibility of Witnesses** is for the jury, p. 535.

Cited in note on this point in 81 Am. Dec. 268, 269.

**Appeal.**—Order striking out evidence is nonprejudicial error when other witnesses testify to same effect without objection, p. 535.

Cited in *Major v. Oregon etc. Co.*, 21 Utah, 150, holding reversal not warranted under similar facts.

**47 Cal. 536-542. GREEN v. SWIFT.**

**Levee Commissioners**, acting within scope of their powers, are not liable for errors of judgment, or injuries to others from the work, if it was performed properly and with due care, p. 540.

Cited in *Moulton v. Parks*, 64 Cal. 178, holding that damage from overflow of a dam, whose construction was authorized by the state, was *damnum absque injuria*; *De Baker v. Southern California Co.*, 106 Cal. 283, 284, 46 Am. St. Rep. 252, holding that if a city authorizes a railway company to build a levee, and the plan is conceived and executed in good

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e, 34 La. Ann. 502,  
evee was damnum  
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tinguished in Chaffe  
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e, for the work was  
d in Smith v. Gould,  
authority to cut a  
ey, 81 Fed. Rep. 739,  
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97 Am. Dec. 568, on

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g owner was flooded,  
Keen v. State, 73 Cal.  
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affirmed in Lamb v.  
Sep. 781, 783, holding  
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284, 46 Am. St. Rep.  
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<sup>1</sup>the code, p. 545.

criticised in Hallack v. Attorney's dismissal is a "fetched," and were sport to such theory.

**Dismissal by Consent operates as a retraxit, p. 546.**

Affirmed in *Crossman v. Davis*, 79 Cal. 604. Distinguished in *Parks v. Dunlap*, 86 Cal. 191, holding that a voluntary dismissal by plaintiff as to one of several defendants was not a bar to a later suit against him; *Landregan v. Pappin*, 94 Cal. 470, holding that plaintiff, in an action to quiet title, after judgment in his favor, was entitled to a writ of possession, notwithstanding that a suit in ejectment by him against defendant for the same land had been dismissed by consent after judgment in the former cause for the principal case decided that the dismissal was only a defense "to another claim afterward brought upon the same cause of action, . . . . and we are not disposed to extend the doctrine beyond the limits fixed by the authorities"; *Pierce v. Hilton*, 102 Cal. 276, 277, holding that a voluntary dismissal by plaintiff in ejectment was not a bar; *Stoutenborough v. Board of Education*, 104 Cal. 667, holding that a voluntary dismissal of an action to quiet title was not a retraxit, and a motion later that judgment of dismissal be entered *nunc pro tunc* was properly granted. Affirmed in *Chetwood v. California Bank*, 113 Cal. 426, holding that a stipulation for dismissal of two defendants, after a judgment and referee's report against them and a codefendant, was equivalent to a retraxit. Distinguished in *Pyle v. Piercy*, 122 Cal. 385, holding judgment of dismissal for want of prosecution not a bar to a second action; *Hibernia etc. Soc. v. Portener*, 139 Cal. 93, ruling similarly as to dismissal without prejudice at plaintiff's request; *Westbay v. Gray*, 116 Cal. 667, holding that a dismissal entered on the minutes on plaintiff's motion, without notice to defendant, was not a retraxit; *Jones v. Graham*, 36 Ark. 389, holding that a dismissal before submission of the merits is presumed to be without prejudice; *Martin v. McCarthy*, 3 Colo. App. 39, holding a voluntary dismissal not a retraxit; *Smith v. Auld*, 31 Kan. 268, holding that the "mere fact that the dismissal is not expressed to be without prejudice does not necessarily establish that it was a decision on the merits"; *Marshall v. Otto*, 59 Fed. Rep. 253, holding that although a dismissal at first entered might have been a retraxit, a later amendment rendered it without prejudice. Affirmed in *United States v. Parker*, 120 U. S. 95, holding that where a judgment of dismissal recited that a suit had been "adjusted and settled by the parties, this is equivalent to a judgment that the plaintiff had no cause of action," and was a bar; *Phillipotts v. Blasdel*, 10 Nev. 23, holding that a written stipulation for dismissal, each party paying his own costs, was a bar to another suit. Disapproved in *Rolfe v. Burlington Co.*, 39 Minn. 400, holding that a written stipulation for dismissal did not imply a settlement and was not a retraxit; *Murphy v. Creath*, 26 Mo. App. 585, holding that a dismissal by agreement was not a retraxit, and the great weight of authority was against the theory that it was a bar; *Kelly v. Milan*, 21 Fed. Rep. 864, holding that a decree by consent, validating issue of bonds by a town to aid a railway was not upon the

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to hold a patent void,  
not repealed; Fee v.  
void because issued  
Pugsley v. Brown, 35  
4 N. Mex. 299, dis-  
nied in Utah etc. Co.  
nts under act of June

test a patentee of fed-  
676.

Hagar v. Spect, 48  
Miranda v. Toomey,  
Rowlett, 55 Cal. 98;  
0 Cal. 344; Valentine  
statute began to run

against the title of San Francisco to pueblo lands only upon passage of act of Congress of March, 1866, in McManus v. O'Sullivan, 48 Cal. 17; to same effect as to act of Congress of July, 1864, in Hoadley v. San Francisco, 50 Cal. 273, Palmer v. Low, 98 U. S. 17, and Ohm v. San Francisco, 92 Cal. 455, to the point that five years' adverse possession after passage of act of April 18, 1863, bars action by holder of unpatented Mexican or Spanish title; Jatunn v. Smith, 95 Cal. 157, holding that there can be no adverse user of water while title to it remains in the United States; King v. Thomas, 6 Mont. 415, holding that the statute began to run from date of a mining patent, not from date of a townsite patent; notes in 76 Am. St. Rep. 480 and 94 Am. Dec. 742.

47 Cal. 581-584. **McKEON v. MILLARD.**

Boundary by adjoining land held sufficient, p. 584.

Cited in People v. Blake, 60 Cal. 508, to the point that a map is more reliable than imaginary lines or streets.

47 Cal. 584-585. **PEOPLE v. WHITNEY.**

Prohibition refused against trial in lower court pending appeal from refusal to change venue, p. 585.

Cited in Bandy v. Ransom, 54 Cal. 88, refusing the writ against a justice's court proceeding on execution after insolvency petition had been filed by defendant; Kalloch v. Superior Court, 56 Cal. 231, to the point that to authorize issuance of the writ, proceedings complained of must be in excess of jurisdiction; Southern Pacific Co. v. Superior Court, 63 Cal. 610, refusing to prohibit a superior court from proceeding in a case after filing by defendant of petition and bond on removal to federal court; Wiggin v. Superior Court, 68 Cal. 402, refusing to prohibit a superior court from further proceedings on discharge of an administrator; State v. Withrow, 133 Mo. 523, holding that the writ issues for excess of jurisdiction as well as for absence of it; State v. Laughlin, 9 Mo. App. 487, denying the writ because want of jurisdiction was not pleaded below; State v. Evans, 88 Wis. 264, refusing to prohibit a preliminary examination before a justice's court, because there was an adequate legal remedy; and note on this point in 12 Am. Dec. 607.

Refusal of Change of Venue does not stay proceedings pending appeal, p. 585.

Cited in Howell v. Thompson, 70 Cal. 636, holding that where a superior court tried a case, pending appeal from refusal to change venue, reversal of order of refusal required reversal of judgment on merits.

47 Cal. 588-591. **GARDINER v. SCHMAELZLE.**

Motion for Nonsuit must specify grounds, and if defective proof is alleged, plaintiff may amend, p. 590.

that no grounds other than those given by court or the appellate; that the cause of action for injunction by defendant was not specific enough; that the cause of action in refusing nonsuit is the same as in the trial; Idaho case; note to 24 Am. Dec.

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21, holding an assessment by the words used could be construed as of defendant, even if the property was owned by him, when the owner was liable. 681, under Indiana law, that "assessments" cover assessments, state. "Co." is not sufficient to identify the property by the Pittsburg, Ft. Warren, 28 Mont. 68, property of particular property described thereunder.

Assessing assessors, is valid, to determine the latter, p. 594. Reference in municipal Cal. 72, as to power to

in Reever v. White, 122 held unnecessary, p.

turn of interest money Richards v. Fraser, 122 distinguished in Wester-

**feld v. New York Life Ins. Co.**, 129 Cal. 83, restitution of amount for which claim for life insurance settled necessary in order to rescind for fraud.

**47 Cal. 602-603. CROSS v. ZANE.**

Judgment may be Revived where property sold on execution did not belong to defendant, p. 602.

Affirmed in Scherr v. Himmelmann, 53 Cal. 316, and Hitchcock v. Caruthers, 100 Cal. 102. Cited in Merguire v. O'Donnell, 139 Cal. 8, applying rule to sale by sheriff under order of court and void execution; Cantwell v. McPherson, 2 Idaho, 1048, holding that where mortgagor's title to land utterly failed after foreclosure sale, judgment could be revived; Rouse v. Fort, 3 Mont. 184, holding that after foreclosure sale has been set aside, purchaser is guilty of laches unless he immediately revives judgment or sues in equity for same purpose; Utah Bank v. Beardsley, 10 Utah, 409, holding that the rule of reviver applies equally to execution sales of personal property. Distinguished in Weaver v. Guyer, 59 Ind. 203, holding that where an execution creditor bought in a lump several lands to satisfy judgment and costs, he could not complain that the sheriff sold more land than necessary. Cited in notes, on title of purchaser at execution sale, in 53 Am. Dec. 705, and 24 Am. St. Rep. 832.

**47 Cal. 603-604. PEOPLE v. LADD.**

Street Assessment is void where resolution of intention is to do work "where necessary," p. 604.

Affirmed in Himmelmann v. McCreery, 51 Cal. 563, and Brady v. King, 53 Cal. 45.

**47 Cal. 604-606. REYNOLDS v. COUNTY COURT.**

Certiorari.—Petition is not part of record, p. 605.

Affirmed in Garretson v. Supervisors of Santa Barbara, 61 Cal. 55, and Rauer v. Justice's Court, 115 Cal. 85. Cited in Kirby v. Circuit Court. 10 S. Dak. 40, 41, holding record on writ confined to record before lower tribunal when order was made.

Certiorari lies for excess of jurisdiction, not for mere error, p. 606.

Cited in Spring Valley v. Bryant, 52 Cal. 135, holding that the writ does not lie to review legislative action of supervisors in passing an ordinance; Philips v. Welch, 12 Nev. 170, to the point that inquiry is limited to question of jurisdiction.

**47 Cal. 606-608. BLANC v. RODGERS.**

Motion to Dismiss Appeal cannot be made by stranger to record, p. 608.

holding it immaterial.

<sup>96</sup> Cited in note to

denial, correctly de-

99 under Cooke v. Spears,  
99 an answer raising an  
99 P. 190; v. Weston, 85 Cal. 92,  
99 etc. Co., 2 Idaho,

...to prosecute, p. 616.  
...commencing judgment of dis-

...must show due diligence,

<sup>13</sup> See, e.g., *United States v. Gandy*, 453 U.S. 397, 403-04 (1981) (holding that under amendment to § 1913, § 1913(a)(2) does not apply to three years after beginning of trial); *United States v. Gandy*, 620 F.2d 1253, 1258 (5th Cir. 1980), *cert. denied*, 449 U.S. 950 (1981) (same). The time limit for filing a motion for new trial is for the court's discretion; see *United States v. Gandy*, 620 F.2d at 1253, holding that disallowing such motion was error; and note on this point in *United States v. Gandy*, 620 F.2d at 1258.

...as to school tax, and

BNEL-ZB-<sup>1</sup>, I am excited to point that

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point that "assessment of personal property to a named person, other than the owner, is absolutely void; Pearson v. Creed, 69 Cal. 539, holding void an assessment to a dead owner; and Emeric v. Alvarado, 90 Cal. 465, holding void an assessment to Castero when the owner was Castro; Pennsylvania Co. v. Cole, 132 Fed. 681, under Indiana acts of 1891, page 323, chapter 118, relating to sewer assessments, statement of owner's name as "P. Ft. W. & C. Railway Co." is not sufficient to sustain an assessment against property owned by Pittsburg, Ft. Wayne and Chicago Railroad Company; Birney v. Warren, 28 Mont. 68, misnomer of owner of personality assessed as property of particular person vitiates assessment and renders sale thereunder void; State v. Ernst, 26 Nev. 127, where assessor returned assessment of E.'s property, and later equalization board ordered him to add to E.'s assessment name of M. L. & L. Co., and to add certain property to such assessment, and E. had no interest in company except as stockholder, and did not own the property added, order of board was void.

**47 Cal. 619-620. EKEL v. SWIFT.**

**Absence of Attorney** at trial held no ground for reversing judgment against him, p. 620.

Affirmed in Smith v. Tunstead, 56 Cal. 177, and McGuire v. Drew, 83 Cal. 230. Cited in Brooks v. Johnson, 122 Cal. 572, noted under Haight v. Green, 19 Cal. 113; dissenting opinion in Horton v. New Pass Co., 21 Nev. 193, a majority of the court holding that refusal of the lower court to open a default was an abuse of discretion, for absence of attorney was excusable.

**47 Cal. 621-622. ESTATE OF BEVERSON.**

**Meretricious Cohabitation** is not marriage, p. 622.

Cited in McKenna v. McKenna, 180 Ill. 580, quoting Cartwright v. McGown, 121 Ill. 399; Estate of Maher, 183 Ill. 65, holding no marriage established; Cartwright v. McGown, 121 Ill. 399, 2 Am. St. Rep. 109, holding that there was no presumption of marriage from cohabitation while an undivorced wife of the man was alive; note in 22 Am. Dec. 161, on proof of marriage; and note in 69 Am. Dec. 619, on contract de verba futuro.

**47 Cal. 622-623. HENSLEY v. MORGAN.**

**Death of Defendant Dissolves Attachment**, p. 623.

Cited in Day v. Superior Court, 61 Cal. 494, to the point that an attachment is dissolvable for death or insolvency of defendant; and notes on this point in 80 Am. Dec. 139, and 89 Am. Dec. 57.

..... against his attorney

..... 578, 579, holding that  
..... for creditors, in op-  
..... ; and in dissenting  
..... majority of the court  
..... imprisonment, threats of  
..... not privileged, unless

..... by motion in original

..... point that one district  
..... Scheneau v. Ireland, 5  
..... cause remedy was by

..... that homestead may be  
..... house on another lot;  
..... Rep. 528, holding that  
..... "other improvements";  
..... Rep. 151; 38 Am. St.

..... al. 322; 33 Cal. 74.  
..... on new trial, p. 637.  
..... 687, holding that the  
..... binding in an appeal  
..... facts being materially

..... of discretion, p. 640.  
..... v. South San Fran-  
..... 115 Cal. 628. Cited  
..... Grigsby v. Napa Co.,

**47 Cal. 640-642. CALDWELL v. PARKS.**

**Errors of Law**, embodied in bill of exceptions, are reviewable on appeal from judgment, p. 641.

Affirmed in *Berry v. San Francisco & N. P. Co.*, 47 Cal. 644; *Tregambo v. Comanche Co.*, 57 Cal. 504, holding that the rule applies to a bill of exceptions from refusal to open default; *Sanford v. Duluth Co.*, 2 N. Dak. 10; *Jones Co. v. Faris*, 5 S. Dak. 351.

**47 Cal. 643-644. BERRY v. SAN FRANCISCO & NORTHERN PACIFIC COMPANY.**

**Errors of Law**.—Same point as 47 Cal. 640, *supra*.

Cited erroneously as to volume, page, and point, in *Los Angeles Bank v. Raynor*, 61 Cal. 147.

**47 Cal. 644-646. GRIFFITH v. GRUNER.**

**Dismissal of Order Denying Motion** for new trial is equivalent to denial of new trial, p. 646.

Approved in *Wyman v. Jensen*, 26 Mont. 240, delay of party in bringing motion for new trial to a hearing is not ground for denying motion.

**47 Cal. 646-674. HOUGHTON v. AUSTIN.**

**Delegation of Taxing Power**.—Statute authorizing board of equalization to increase a tax for delinquency is unconstitutional, pp. 650, 652.

Cited in *Wills v. Austin*, 53 Cal. 178, holding that the logical deduction from the principal case is that the whole of section 3696 of the Political Code is void, for the delinquency clause "is so blended with the remainder of the section, and the several clauses are so dependent on each other, that they must all stand or fall together"; therefore a tax deed based on the levy for 1872-73 is void on its face and not a cloud on title. Cited in *Harper v. Rowe*, 53 Cal. 235, saying that the principal case decided that the tax levy for 1872-73 was void, "and there was consequently no valid levy of state taxes for those years," and holding that the statute of 1874, making a new levy for 1872-73, did not validate a sale previously made on the void levy of 1872-73; *Grimm v. O'Connell*, 54 Cal. 522, to the point that "the assessment for the fiscal year 1872-73 was void"; *People v. Parks*, 58 Cal. 644, holding the drainage statute of 1888 unconstitutional, "because its provisions are made contingent upon the judgment and discretion of the board of drainage commissioners, and because in making it so contingent the legislature delegated to the board powers which are not in their nature transferable"; *San Francisco & N. P. Co. v. State Board*, 60 Cal. 34, holding that the statute of 1881, authorizing the board of equalization to add twelve per cent for delinquencies, was not a delegation of power. Cited in note on this point in 74 Am. Dec. 591, 593. Denied in *Ames v. People*, 26 Colo. 92, sustain-

...ization; State v. Ada... 1410, 1411, 1554, as  
...to collect uncollected state taxes  
... bid in by county.  
...ction of an illegal tax,

...l. 70. Cited in Byrne  
... Austin, 46 Cal. 415;  
... applies to an assess-  
... 36, holding that after  
... injunction against  
... Cal. 435, to the point  
... unless it appears that  
... injunction is necessary  
... cast a cloud on his

... power to value property

... holding that proceed-  
... private property cannot  
... company, and such right to  
... Hooper, 76 Cal. 407,  
... to condemn a right of  
... idate with other com-

... legislature with powers  
... police regulation," p.

... Rep. 426, 431, holding  
... become a law when it  
... take effect only when it  
... of a township," and be-  
... any governmental or  
... holding a statute un-  
... dendent of schools the  
... v. Pond, 93 Mo. 669,

... Am. Rep. 706, holding  
... sum of all the values,"  
... are not subject to

... alleged to state board

of equalization, for this would violate the constitutional provision as to election of assessors, p. 664.

Cited in Wells, Fargo & Co. v. State Board, 56 Cal. 202, 203, in partly concurring opinion, holding that the state board may change individual assessments on a county roll, within the county, while a majority of the court hold that the state board can only equalize county rolls, leaving to the county boards the individual assessments in their respective counties; People v. Dunn, 59 Cal. 333, ordering mandamus to issue to the auditor of San Francisco to compel obedience to the order of the state board increasing the city and county assessment roll, and holding the intent of the constitutional provision to be that "the equalization by the board of supervisors shall conclusively determine that all individual assessments within the county have been made, relatively to each other, equal and uniform, leaving to the state board simply the task of equalizing assessments as between the several counties." Distinguished in Board of Equalization Cases, 49 Ark. 527, saying that the principal case was in point chiefly on the question of election of assessors, and holding that a statute providing for a board of equalization was not in violation of a constitutional provision as to assessors. Cited in State v. Tonella, 70 Miss. 711, holding unconstitutional a statute appointing a revenue agent to perform duties of an assessor.

**Stare Decisa.**—"No such rule ever existed as that a court should be absolutely bound by a previous decision," p. 668.

Cited in dissenting opinion in *Ex parte Koser*, 60 Cal. 204, a majority of the court holding the Sunday law constitutional, under the rule of previous decisions.

**General Citation.**—*Eldridge v. State*, 76 Miss. 355.

### III.

E.

CHARLES L. THOMPSON.

66

which the court may, in  
demeanor, is entitled

that admission to bail  
Marks, 49 Cal. 681,  
section 1243 of the  
should not be allowed,  
circumstances of an  
and "in the event of an  
admission to bail as

claim of the opposite  
paramount proprietor,

session in admitted  
Francoeur v. New-  
Ry. Co. v. Kranich,  
80 Fed. Rep. 272,  
United States; Allen v.  
O'Neill, 35 Or. 215,

adverse possession  
affirmation of title by

Cited in *Pacific Mut. L. Ins. Co. v. Stroup*, 63 Cal. 153; *Emeric v. Alvarado*, 64 Cal. 609; *McLaran v. Benton*, 73 Cal. 344, 2 Am. St. Rep. 822, as to when statute of limitations begins to run.

**General Citation.**—Referred to in *Baker v. Brickell*, 87 Cal. 334, as to nature of title of city of San Francisco to the pueblo lands, as successor to the pueblo of San Francisco.

#### 48 Cal. 19-26. **PEOPLE v. OUTEVERAS.**

**Criminal Law.**—Principals in second degree, and accessories before the fact, are to be indicted, tried, and punished as principals in the first degree, p. 22.

Approved in *People v. Ah Fat*, 48 Cal. 64, holding that if an indictment for murder charges the defendant with having been the actual perpetrator of the crime, he can be convicted if it is proved that he was present aiding and abetting the killing; *People v. Rozelle*, 78 Cal. 89, 90, information charging defendant with aiding, assisting, and procuring his wife to throw vitriol upon the person of another; *State v. Patterson*, 52 Kan. 349, under Kansas statutes; so in *State v. Kent*, 4 N. Dak. 582, under statutes of North Dakota; *People v. Bliven*, 112 N. Y. 88, 90, 8 Am. St. Rep. 707, 709, to same effect; so in *State v. Kirk*, 10 Oreg. 507; *State v. Steeves*, 29 Oreg. 91; and *State v. Duncan*, 7 Wash. 340, 38 Am. St. Rep. 891. Cited in 51 Am. Dec. 376, extended note, as to what amounts to aiding and abetting crime.

#### 48 Cal. 26-28. **YOUNG v. SHINN.**

**Public Lands.**—Certificate of purchase is *prima facie* evidence of title, p. 28.

Cited in *Cucamonga Fruit Land Co. v. Moir*, 83 Cal. 110, dissenting opinion of Paterson, J., as authority that a certificate is sufficient to maintain ejectment.

Certificate of purchase of unsurveyed land is void, p. 28.

Affirmed in *Aurrecochea v. Sinclair*, 60 Cal. 549; and approved, to same effect, in *United States v. Curtner*, 14 Saw. 546, 38 Fed. Rep. 9.

In contest to purchase, the party who first commences his proceedings to acquire the title has the better right, p. 28.

Affirmed in *Shinn v. Young*, 57 Cal. 527; *Merriam v. Bachioni*, 112 Cal. 195. Explained and harmonized in 69 Cal. 194.

#### 48 Cal. 36-57. **WARD v. FLOOD.** 17 Am. Rep. 405.

Motion by applicant for writ of mandamus that the writ issue notwithstanding the matters alleged in the defendant's answer, is equivalent to a general demurrer to the answer, p. 46.

Cited in *People v. Johnson*, 95 Cal. 474, as authority that an allegation of an answer upon a material issue raised by the pleadings is ad-

mitted by plaintiff's motion for judgment upon the pleadings; and so in McGowan v. Ford, 107 Cal. 185, also an application for writ of mandamus.

Opportunity of instruction in public schools is a legal right, as much so as a vested right in property, p. 50.

Approved in State v. White, 82 Ind. 285, 42 Am. Rep. 502, and applied to right of admission for instruction in public university. Cited in 76 Am. Dec. 165, note, treating of duties and powers of school teachers.

Law providing for education of colored children in separate schools, to be provided at the public expense the same as other public schools, is constitutional, pp. 49.

Cited in Wysinger v. Crookshank, 82 Cal. 589, noting the change in the law relative to the subject, and holding that since the act of April 7, 1880, it is not within the power of boards of education or school trustees to establish public schools exclusively for colored children, or to exclude them from the public schools established for white children; Maddox v. Neal, 45 Ark. 125, 55 Am. Rep. 543, as to the power of school directors to provide for the separate education of whites and blacks; Board v. Purse, 101 Ga. 446, 65 Am. St. Rep. 330 (and pages 335, 336, 339), sustaining right of board of education to suspend pupils for parent's interference with teacher; Wong Him v. Callahan, 119 Fed. 382, upholding California Political Code, section 1662, providing that where separate schools are established for Mongolian children, such children must not be admitted to other schools; People v. Board of Education, 101 Ill. 317, 40 Am. Rep. 202, holding that where the state has not authorized separate schools for colored children, a city board of education has no right to establish them; State v. Gray, 93 Ind. 303, in approval of the ruling stated; so in Ex parte Plessy, 45 La. Ann. 85; affirmed, 163 U. S. 545; Lehew v. Brummell, 103 Mo. 552; 23 Am. St. Rep. 899; People v. Gallagher, 93 N. Y. 454; 45 Am. Rep. 243; Martin v. Board of Education, 42 W. Va. 516. Disapproved in Ferguson v. Gies, 82 Mich. 363, 21 Am. St. Rep. 580, and holding that, under the laws of Michigan, there is an absolute, unconditional equality of white and colored persons before the law in all public places; so in Board of Education v. Tinnon, 26 Kan. 17, denying the power of the board of education of cities of the second class to exclude colored children from any of the city schools. Distinguished in Claybrook v. City of Owensboro, 16 Fed. Rep. 302, 303, holding void an act discriminating between whites and blacks in distribution of school fund; and so in Davenport v. Cloverport, 72 Fed. Rep. 694, to same effect. Cited in 89 Am. Dec. 737, extended note, treating of "law of mandamus"; 14 Am. St. Rep. 606, note, to the ruling stated; so in 23 Am. St. Rep. 900, note; and 25 Am. St. Rep. 875, extended note, considering the Fourteenth Amendment with relation to special privileges, burdens, and restrictions.

**General Citations.**—In Tape v. Hurley, 66 Cal. 475, holding that the Notes Cal. Rep.—152.

teacher of a public school is the only necessary defendant in a proceeding to compel the admission thereto of a child unlawfully excluded; South and North Ala. R. R. Co. v. Morris, 65 Ala. 201, as to duty of state to preserve equality of rights among its citizens; Phenix Ins. Co. v. Hart, 112 Ga. 772; Atchinson etc. R. R. Co. v. Matthews, 174 U. S. 116.

**48 Cal. 61-65. PEOPLE v. AH FAT.**

**Continuance.**—Affidavit for, in a criminal case, on ground of absence of witness, should clearly state the facts to which the absent witness would testify, and show that the testimony can be procured at the next or a succeeding term, p. 63.

Approved in People v. Wade, 118 Cal. 673, as to requisites of affidavit for continuance, and holding that the showing was insufficient in the particular case; and so in State v. O'Neil, 13 Oreg. 186.

**Criminal Law.**—One indicted as principal in first degree may be convicted upon proof that he was present aiding and abetting the crime, p. 64.

Cited, as so holding, in 51 Am. Dec. 376, extended note, discussing the subject.

**Same.**—Prosecution may rebut impeachment of prosecuting witness by the introduction of testimony showing the good character of the witness, for truth and varacity, p. 64.

Approved in Diffenderfer v. Scott, 5 Ind. App. 252, holding that proof of character may be made in support of a witness who has been impeached by any of the methods known to the law.

**48 Cal. 65-70. CENTRAL PACIFIC RAILROAD COMPANY v. COR-CORAN.**

**Injunction.**—Will not issue to restrain the collection of a tax by the sale of real property, p. 70.

Cited in Lent v. Tillson, 72 Cal. 435, and holding that an injunction will not be issued in such case, unless it appears that the plaintiff would suffer irreparable injury, or it is necessary to prevent a multiplicity of suits, or the sale would cast a cloud on plaintiff's title; 69 Am. Dec. 199, extended note, discussing the subject.

**48 Cal. 70-74. SPENCER CREEK WATER COMPANY v. VALLEJO.**

**Special Cases.**—Supreme court has no appellate jurisdiction of, under the constitution, p. 72.

Cited, so holding in Bixler's Appeal, 59 Cal. 555, 556, and referred to, p. 557, as seeking to limit the rule in Houghton's Appeal, 42 Cal. 35.

**Same.**—Jurisdiction of special cases may be controlled by the legislature, but cannot be conferred upon the county judge, nor upon any tri-

bunal or officer, except one of the courts mentioned in the sixth article of the Constitution, p. 73.

Cited as authority in Chollar Min. Co. v. Wilson, 66 Cal. 377, McKinstry, J., that the act of March 21, 1872, relative to removal of officers of corporation, is unconstitutional and void; Green v. Superior Court, 78 Cal. 561, as to jurisdiction in cases of misdemeanor. Referred to in In re Stevens, 83 Cal. 331, 17 Am. St. Rep. 259, as relating to the exercise of the right of eminent domain, and said to be of no authority in the case before the court, the question involved being the power of the legislature to regulate the adoption of children.

**Jurisdiction.**—Legislature may authorize judges of courts, at chambers, to perform certain duties in respect to a cause, yet some court must have jurisdiction of the cause, p. 73.

Cited in Chase v. Miller, 88 Va. 798, holding that a judge, acting in vacation, has no authority, except that expressly conferred by the statute under which he acts. So, to same effect, in Pressley v. Lamb, 105 Ind. 199, dissenting opinion of Mitchell, J.

#### 48 Cal. 74-80. **BALLARD v. CARR.**

**Specific Performance.**—Agreement to give land in compensation for services of attorney may be enforced, if the services have been substantially performed, or full performance is waived, p. 80.

Approved in Howard v. Throckmorton, 48 Cal. 489, case of a similar contract; so in King v. Gildersleeve, 79 Cal. 510; Calanchini v. Branstetter, 84 Cal. 254, contract for the sale of land at the option of the vendee only, upon election and notice; Thurber v. Meves, 119 Cal. 37, 38, contract for the conveyance of land, in consideration of personal services to be performed by the vendee; and so in Water-Supply Co. v. Root, 56 Kan. 199. Distinguished in Moore v. Tuohy, 142 Cal. 348, denying specific performance where plaintiff's obligations are unperformed under facts stated.

**Equity.**—He who asks equity must do equity, p. 80.

Cited in Benson v. Shotwell, 87 Cal. 60, holding that relief sought in an action to quiet title is within the rule, and requiring return of money deposit by vendor as a condition to relief.

**General Citations.**—In notes to 15 Am. Dec. 318, 320; 13 Am. St. Rep. 300; and 3 McCrary, 68, all treating of the subject of champerty.

#### 48 Cal. 80-83. **PEOPLE v. WOODY.**

**Robbery—Assault.**—Question of intent is for the jury, p. 82.

Cited in People v. Hite, 135 Cal. 78, sustaining conviction under facts stated.

**Error in Criminal Case in refusing to allow defendant to ask witness**

question is cured by afterward permitting witness to answer same question, p. 83.

Approved in *Miller v. Durst*, 14 S. Dak. 593, where plaintiff introduces justice of peace to show prior adjudication of defendant's counterclaim, and justice testifies to filing of claim as counterclaim in his court, it is error to refuse to allow him to state whether he considered counter-claim in determining cause.

#### 48 Cal. 83-85. ESTATE OF MEDBURY.

**Appeal.**—On appeal from order of probate court removing guardian of estate, and appointing another, the latter is a necessary party, p. 84.

Cited in *Williams v. Mining Assn.*, 66 Cal. 196, as to necessity of notice of appeal on all the parties whose rights may be affected; and so in *Toy v. San Francisco etc. R. R. Co.*, 75 Cal. 544.

**Same.**—Transcript on appeal must be agreed to by all the parties or their counsel, or certified to by the clerk, p. 84.

Cited in *Warren v. Hopkins*, 110 Cal. 509; and *In re Ryer*, 110 Cal. 560, holding that where a motion is made to dismiss an appeal upon the ground that the transcript has not been properly authenticated, if the appellant, prior to the hearing of the motion, files with the clerk of the appellate court a transcript properly authenticated by the clerk of the superior court, the ground of the motion is removed.

#### 48 Cal. 85-97. PEOPLE v. DOYELL.

Juror is prohibited by public policy from impeaching his own verdict by affidavit, p. 90.

Ruling approved in *Territory v. Taylor*, 1 Dak. Ter. 468, indictment for libel; *Coker v. Hayes*, 16 Fla. 395, action of trover; *Taylor v. Garnett*, 110 Ind. 292, action for damages sustained by reason of false representations; *People v. Flynn*, 7 Utah, 384, noted under *Wilson v. Berryman*, 5 Cal. 46.

A witness impeached by proof of contradictory statements cannot ordinarily be confirmed by proof of other consistent statements made by him, before being called as a witness, pp. 90, 91.

Referred to as discussing the subject, and the doctrine applied, in *Mason v. Vestal*, 88 Cal. 398, 22 Am. St. Rep. 312. Cited in *People v. Rodley*, 131 Cal. 255; excluding self-serving declarations in perjury case; *Kipp v. Silverman*, 25 Mont. 302, ruling similarly as to declarations as to ownership of goods alleged to have been wrongfully levied on; and cf. to same effect, *Ewing v. Keith*, 16 Utah, 322; *Silva v. Pickerd*, 10 Utah, 87, 88, and the court say that "exception to the rule should not be extended, except it be in extreme cases." Distinguished in *Hewitt v. Corey*, 150 Mass. 447. See *State v. Callahan*, 47 La. Ann. 480.

If, however, the account given is claimed to be a fabrication of late

date, it may be confirmed by proof that the same account was given when its effect could not be foreseen, p. 91.

Doctrine approved in Barkly v. Copeland, 74 Cal. 4, 5 Am. St. Rep. 415. So, to same effect, in McCord v. State, 83 Ga. 532, case of indictment for perjury; State v. Hendricks, 32 Kan. 563, prosecution for murder; State v. Dudoussat, 47 La. Ann. (part II) 1007, dissenting opinion of Watkins, J.; and Riojas v. State, 36 Tex. Cr. 186, also prosecution for murder. Cited in 11 Am. Dec. 759, note, as an exception to the general rule.

**Instructions.**—All of the charge of court to jury must be taken together as an entirety, p. 93.

Approved and applied in People v. Welch, 49 Cal. 182, charge to jury in trial for murder; People v. Nelson, 56 Cal. 81, charge in trial for robbery; People v. Gray, 61 Cal. 182, in murder trial; so in People v. Movine, 61 Cal. 370; People v. Hurtado, 63 Cal. 292; People v. McCurdy, 68 Cal. 582; California Electric etc. Co. v. Safe Deposit etc. Co., 14 Cal. 130, in action by corporation against executors of deceased manager to recover secret commissions received on sale of its property, where motives of witness who testified to sharing commission are assailed as having concocted story after manager's death, his letters to decedent making claim to commission are admissible; People v. Karnaghan, 72 Cal. 610, 617, sustaining certain instructions on subject of reasonable doubt; People v. Mize, 80 Cal. 46, instruction held erroneous; People v. Clark, 84 Cal. 583, instructions sustained; People v. Worden, 113 Cal. 571, holding that a correct instruction upon subject of reasonable doubt is not rendered erroneous or misleading by adding thereto the sentence, "A juror is not at liberty to disbelieve as a juror what he believes as a man"; People v. Neber, 125 Cal. 502, construing and sustaining charge in burglary case; State v. Bartmess, 33 Or. 126, ruling similarly in murder case; People v. Bernard, 2 Idaho, 180; Territory v. Scott, 7 Mont. 417, holding that the court cannot presume that a charge is erroneous; and Territory v. Hart, 7 Mont. 502, asserting it to be a fundamental principle in the construction of a charge to a jury, that the whole charge must be construed together.

**Criminal Law.**—Murder is the unlawful killing of a human being with malice aforethought, p. 94.

Definition approved in People v. Jefferson, 52 Cal. 453, case involving question of sufficiency of indictment for burglary, and holding that the indictment should charge burglary generally, and leave the degree to be determined by the verdict if the plea is not guilty, and by the court if the plea is guilty.

**Same.**—Unlawful killing, accompanied with malice, but not deliberate and premeditated, is murder in second degree, pp. 94, et seq.

Cited as authority, People v. Guance, 57 Cal. 154, in which case an in-

struction to find the defendant guilty of murder in first degree was held erroneous; People v. Keefer, 65 Cal. 233, 235, as to intent of legislature in dividing crime of murder into first and second degrees. So, to same effect, in Sohanan v. State, 18 Neb. 64; 53 Am. Rep. 796; People v. Hamblin, 68 Cal. 104, pointing out distinction between murder in first and second degrees; People v. Kernaghan, 72 Cal. 613, as to distinction between murder in second degree and manslaughter; People v. Williams, 73 Cal. 533, as defining degrees of murder, and holding that the elements of premeditation and deliberation are essential to constitute murder in first degree. So, to same effect in People v. Cox, 76 Cal. 286; People v. Olsen, 80 Cal. 126, holding that a homicide committed in an attempt to commit a felony is murder; State v. Wong Fun, 22 Nev. 342, as to meaning of words "wilful, deliberate, and pre-meditated," as used in the statute, defining murder in first degree; and 18 Am. Dec. 787, note, as to definition of murder in second degree.

**General Citation.**—In People v. Wasson, 65 Cal. 539, as to statements of deceased as part of the *res gestae*, but the citation does not appear to be pertinent.

#### 48 Cal. 97-99. COHEN v. GOUX.

**Promissory Note.**—Maker of, as against payee, may show want of consideration as a defense to an action on the note, p. 98.

Cited in Schultz v. Noble, 77 Cal. 81, holding that in an action by indorser against maker of note which has been paid by the indorser, it is proper to show in defense the circumstances under which the note was made.

#### 48 Cal. 99-118. THOMPSON v. TOLAND.

**Transfer of Stock.**—Stock allowed to stand in the name of another may be sold or hypothecated to a bona fide purchaser discharged of equities, p. 112.

Ruling approved and applied in Winter v. Belmont Min. Co., 53 Cal. 432, case of purchase in good faith and without notice, in the usual course of business, of a stolen certificate of stock; so in Gass v. Hampton, 16 Nev. 189, a case in which the true owner of certificates of mining stock was held to be estopped from asserting title thereto as against a purchaser in good faith.

**Same.**—In California, mining stocks properly indorsed, pass by mere delivery, p. 113.

Cited in Graves v. Mono Lake etc. Min. Co., 81 Cal. 326, as authority to the proposition that certificates of stock indorsed in blank by the owners pass by mere delivery, without further indorsement or transfer on the books of the corporation; so in International Bank v. German Bank, 71 Mo. 196, 36 Am. Rep. 478, reversing S. C. 3 Mo. App. 368, case

of certificate of deposit indorsed in blank, and the court held that even considering the certificate non-negotiable, the transferee might pledge it to an innocent party who would hold it as against the true owner, to the amount advanced, unaffected by the equities between the transfer and the payee.

Addition of word "trustee," in a certificate of stock, to the name of the person to whom it is issued, will not affect a bona fide purchaser, pp. 103, 113.

Referred to as so holding in *Moore v. Boyd*, 74 Cal. 170, discussing stockholders' liability for debts of corporation, and the barring of this liability by limitation. Denied in *Geyser etc. Co. v. Stark*, 106 Fed. 563, noted under *Brewster v. Sime*, 42 Cal. 139. Disapproved in *Gerard v. McCormick*, 130 N. Y. 268, as not being in accord with the current of authority.

**Pledge of Stock** is satisfied by return of certificate for same number of shares, p. 116.

Cited in *Morris v. East Side etc. Co.*, 104 Fed. 417, noted under *Atkins v. Gamble*, 42 Cal. 86.

**Pledge.**—Pledgee may recover full value of pledge converted against a stranger, but only his special interest as against the owner or one in privity with him, p. 117.

Approved in *Sanger v. Henderson*, 1 Tex. Civ. App. 416, case of an attaching creditor causing property held in pledge to be seized and taken from the possession of the pledgee. Cited in 94 Am. Dec. 775, note.

**General Citations.**—In 49 Am. Dec. 734, extended note, as authority that certificates of stock may be held in pledge; 75 Am. Dec. 315, extended note, as authority that the law imposes upon a stockbroker all the responsibilities of a broker and pledgee, and confers upon him all of the advantages of those relations; and 75 Am. Dec. 319, that the broker is not bound to deliver, or to have on hand for delivery, any particular shares of stock, or the identical shares purchased for his client.

#### 48 Cal. 118-122. GUERRERO v. BALLERINO.

Trustee cannot purchase at his own sale, either directly or indirectly, p. 121.

Cited in *Golson v. Dunlap*, 73 Cal. 159, holding that such attempted purchase is voidable at the election of the cestui que trust. Cited in 12 Am. Dec. 85, note; and 87 Am. Dec. 163, note, to the ruling stated.

**Evidence.**—Inherent improbability of a statement may deny to it all claims to belief, p. 122.

Approved in *Mattock v. Goughnour*, 11 Mont. 273, case of an exception to the general rule, that the verdict of a jury will not be disturbed where the evidence is conflicting.

**48 Cal. 123, 124. PEOPLE v. NOREGEA.**

**Larceny.**—Possession of the stolen property is not of itself sufficient to warrant a conviction, p. 123.

Cited to same effect in People v. Swinford, 57 Cal. 87; People v. Swazey, 6 Utah, 98, applying rule to prosecution for marking another's sheep under local statute; State v. Bliss, 27 Wash. 467, instruction in prosecution for burglary that if jury believe defendant was found in possession of property stolen soon after theft, such possession is strong circumstance tending to show guilt, is erroneous; People v. Hurley, 60 Cal. 78, 44 Am. Rep. 58, holding that the bare fact of finding the hides of cattle, that had been stolen, in the defendant's barn, which was shown to have been open to any one who chose to enter it, in the absence of any evidence tending to prove that he knew or had any reason to suppose that such hides were there, is not sufficient to justify the inference of guilt; State v. Pomeroy, 30 Oreg. 25, holding that the inference from the possession of stolen property is one of fact, and is strong or weak according to the character of the property, the nature of the possession, and its proximity in time with the theft; and so, to same effect, State v. Walters, 7 Wash. 251.

**General Citation.**—In 70 Am. Dec. 448, extended note, as holding that an instruction that the prisoner must prove his possession to be innocent to secure an acquittal, is erroneous.

**48 Cal. 131, 132. DREYFOUS v. ADAMS.**

**Stipulation.**—Where counsel stipulate in open court that jury may assess damages in currency if they find for plaintiff, they are estopped from objecting to the verdict on that ground, p. 132.

Referred to in Newell v. Meyendorff, 9 Mont. 263, 18 Am. St. Rep. 743, as authority that a party is bound by the rulings of the court which he obtains upon his own motion.

**New Trial.**—Court may require plaintiff to remit a part of the verdict as a condition on which motion for new trial will be denied, p. 132.

Cited to same effect in Clanton v. Coward, 67 Cal. 375, action on promissory note; Davis v. Southern Pacific Co., 98 Cal. 18, action for damages for personal injuries; and so in Brooks v. San Francisco etc. Ry. Co., 110 Cal. 176, referred to as a case recognizing and upholding the right of the trial court to impose terms and conditions in granting and refusing motions for new trials.

**48 Cal. 133-143. CLARK v. SAWYER.**

**Venditioni Exponas.**—If levy is on personal property, writ of can only issue to officer who made the seizure, p. 138.

Cited in Pecotte v. Oliver, 2 Idaho, 231, holding that the officer who

attaches goods is the one to whom the execution of the judgment should issue; so, to same effect, in 76 Am. Dec. 88, extended note on subject.

**Same.**—When a sheriff, who levies on land, goes out of office before selling the land, a *venditioni exponas* may issue to his successor, pp. 138, 139.

Cited as authority to same effect in *Lewis v. Bartlett*, 12 Wash. 216, 50 Am. St. Rep. 888; so in notes to 36 Am. Dec. 706; 38 Am. Dec. 768; 65 Am. Dec. 60. See 68 Am. Dec. 338, note, citing, as to the point stated, *Clark v. Sawyer*, Cal. Sup. Ct., Jan. term, 1870, not reported.

**Sheriff's Deed** need not recite the judgment and execution under which he acted, p. 140.

Approved in *Montgomery v. Robinson*, 49 Cal. 260, holding that a sheriff's deed which recites enough to identify the judgment, and to show the authority of the officer to sell, is admissible in evidence as proof of transmission of title. Cited, to same effect, in notes to 65 Am. Dec. 424, 452; and 99 Am. Dec. 448.

He who alleges error must make it clearly appear, p. 142.

Cited in *Langenbeck v. Louis*, 140 Cal. 411, as to alleged error on striking out of answer as not responsive; *Roberts v. Eldred*, 73 Cal. 393, holding that where there is but one defendant, and the record states that the answer is verified, the inference is that it was verified by the defendant, and if this was not the fact, it should be made to appear; *People v. Grundell*, 75 Cal. 304, holding that if the appellant claims error in admitting a transcript of the shorthand reporter's notes because the original notes were not filed, he must show affirmatively that they were not filed; *O'Callaghan v. Bode*, 84 Cal. 498, rule applied in an analogous case; *Frevert v. Swift*, 10 Nev. 402, question of disqualification of judge.

**Registry Act.**—Vendee of holder of second deed without consideration is bound by the registry of the prior deed before his purchase, though subsequent to the registry of the second deed to his vendor, pp. 142, 143.

Doctrine approved and applied in analogous case of *County Bank v. Fox*, 119 Cal. 64.

#### 48 Cal. 143-147. PEOPLE v. EUREKA LAKE AND YUBA CANAL COMPANY.

**Board of Supervisors.**—Records of, are admissible as proof of the action of the board, though not officially signed, p. 145.

Cited in *Pacheco v. Beck*, 52 Cal. 24, 34, dissenting opinions of Crockett and McKinstry, JJ., on subject of authentication of record of returns of election; *County of San Diego v. Seifert*, 97 Cal. 598, in approval.

**Same.**—Tax levied is not void because record of levy was not signed by chairman and clerk of the board, pp. 144, 145.

Cited in Holland v. Davies, 36 Ark. 451, holding that omissions and irregularities of school directors will not defeat levy of tax for school purposes.

**Same.**—Statute requiring assessor to return assessment roll to clerk of board, prior to a certain date, is directory merely, p. 146.

Cited in Ede v. Knight, 93 Cal. 162, and so held of statute providing for extensions of time of contracts for street work; so in Buswell v. Supervisors, 116 Cal. 354, as to the provisions of section 3762 of the Political Code, relative to the time of the session of the county board of equalization.

**48 Cal. 147-151. LANGENBERGER v. KROEGER.** 17 Am. Rep. 418.

Alteration of draft without authority by one not the agent of the payee, will not vitiate the draft, p. 149.

Cited in Andrews v. Calloway, 50 Ark. 360, holding that an alteration by a stranger has no effect upon the rights or liabilities of the parties to a bill or note; Port Huron etc. Co. v. Sherman, 14 S. Dak. 467, where clerk in plaintiff's office without plaintiff's knowledge inserted in note executed by defendant name of bank as place of payment, insertion did not avoid note; Ritchie v. Frazer, 50 Ark. 396, as to inadmissibility of parol evidence to explain promissory note; principle approved in Willard v. Ostrander, 51 Kan. 481, 494, 37 Am. St. Rep. 302; so in Ruby v. Talbot, 5 N. Mex. 258, 269, case of a note altered by the maker, and indorser not consenting thereto held to be discharged; 17 Am. Rep. 102, extended note, discussing the subject.

**48 Cal. 151-152. FOSCALINA v. DOYLE.**

**Appeal.**—Motion to dismiss as frivolous, made intermediate the taking of the appeal and the filing of the transcript, will not be entertained, p. 152.

Cited in In re Blythe, 108 Cal. 127, dismissal of appeal from decree of distribution; Corder v. Speake, 37 Or. 108, denying motion when made to hasten hearing on merits.

**48 Cal. 152-156. HUTCHINGS v. CASTLE.**

**Trover—Pleading.**—Allegation of detention is immaterial when defendant has parted with property before the suit, and judgment is for value only, p. 155.

Cited in Faulkner v. Bank, 130 Cal. 267, holding complaint one in trover and sustaining form of judgment therein.

**Appeal—Evidence.**—When evidence is not objected to in court below,

because not admissible under the averments of the answer, it is too late to raise the objection for the first time in the appellate court, pp. 155, 156.

Approved in *Scott v. Sierra Lumber Co.*, 67 Cal. 75; *Water Co. v. Richardson*, 72 Cal. 600; *In re Doyle*, 73 Cal. 568; *White v. White*, 86 Cal. 223; and *Sukeforth v. Lord*, 87 Cal. 403; *Treanor v. Williams*, 145 Cal. 320, applying rule in election contest.

When omitted findings must have been adverse to the appellant, their omission is not error sufficient to authorize the reversal of the judgment, p. 156.

Affirmed in *Reed v. Johnson*, 127 Cal. 541, holding failure to find non-prejudicial error under facts stated; *Naddy v. Dietze*, 15 S. Dak. 33, where defendant in action to quiet title alleged plaintiff abandoned property, and court found generally that plaintiff had no title or right to possession, failure to find on question of abandonment is not prejudicial to plaintiff; *People v. Center*, 68 Cal. 564, action to quiet title; *Demartin v. Demartin*, 85 Cal. 75, appeal from order setting apart a homestead to an insolvent debtor; *Winslow v. Gohransen*, 88 Cal. 453; So in *Southern Pac. R. R. Co. v. Whitaker*, 109 Cal. 274. Approved in *Chamberlain v. Woodin*, 2 Idaho, 613, action to contest right to office; *MERCHANTS' NAT. BANK v. McKinney*, 4 S. Dak. 230, 232, action to recover back purchase money on ground of breach of warranty; *Martin v. Minnekahta*, 7 S. Dak. 268, action to recover deposit in bank; and *Groome v. Ogden City*, 10 Utah, 59, action for damages for breach of contract.

**Evidence.**—Declarations of vendor, made after sale and delivery of personal property, are inadmissible in evidence to show fraud in the sale, p. 156.

Approved in *Garlick v. Bowers*, 66 Cal. 122; *Briswalter v. Palomares*, 66 Cal. 261, applied to declarations of vendor, made after execution of conveyance. Cited, to same effect, in 42 Am. Dec. 632, note.

**General Citation.**—*Paulson Mercantile Co. v. Seaver*, 8 N. D. 218.

#### 48 Cal. 157-160. **ATHERTON v. BOARD OF SUPERVISORS.**

**Rehearing.**—Court will not consider upon petition for, any point waived, either expressly or tacitly, at the argument, p. 160.

Cited in *People v. Northey*, 77 Cal. 635, and the rule held applicable to criminal cases.

#### 48 Cal. 160-165. **PENNYBECKER v. McDUGAL.**

**Fixtures.**—Building set upon blocks resting on the ground is personal property, p. 164.

Cited in *Miller v. Waddingham*, 91 Cal. 379, holding that the mere erection of a building upon land does not necessarily make it a fixture.

Explained in *Doscher v. Blackiston*, 7 Oreg. 148, as decided with reference to the statute laws of California, and holding that such a building erected by one person on the land of another with an intention to hold an adverse possession as against the true owner, is a part of the realty.

**Same.**—A portable fence is not a fixture, p. 164.

Cited in 42 Am. Dec. 449, note, to the ruling stated.

**Same.**—Purchaser of land from United States becomes the owner of personal property affixed to the land by a third person while the land was a part of the public domain, p. 164.

Cited in *McKiernan v. Heese*, 51 Cal. 596, as authority to the ruling stated.

**Jurisdiction.**—Ad *damnum* clause in complaint is the test of jurisdiction, pp. 161, 164.

Cited in *Dashiell v. Slingerland*, 60 Cal. 656; *Troy v. Hallgarth*, 35 Or. 165, noted under *Maxfield v. Johnson*, 30 Cal. 545; 98 Am. Dec. 584, note; 21 Am. St. Rep. 618, note, as authority to the ruling stated.

#### 48 Cal. 165-171. ESTATE OF MILLER. 17 Am. Rep. 422.

**Will.**—Word “money” used in making a devise will be construed to include both personal and real property, where it clearly appears that such was the intention of the testator, pp. 169, 170.

Cited to same effect in *Jenkins v. Fowler*, 63 N. H. 246; *Smith v. Burch*, 92 N. Y. 232; *Sweet v. Burnett*, 136 N. Y. 208; *Gillen v. Kimball*, 34 Ohio St. 365; *Dillard v. Dillard*, 97 Va. 438; 2 Am. St. Rep. 662, note; and 23 Am. St. Rep. 232, note.

#### 48 Cal. 171-175. BLOOD v. FAIRBANKS. S. C. 50 Cal. 421, referring to the former for a statement of the principal facts.

**Amendment** of complaint allowed, plaintiff having left out a necessary party, p. 175.

Approved in *Walsh v. McKeen*, 75 Cal. 522, permitting amendment of prayer of complaint, so as to ask for the appropriate equitable relief.

#### 48 Cal. 175-178. WHITTIER v. WILBUR.

**Mechanic's Lien.**—Agreement of contractor to indemnify owner cannot deprive materialman of his lien, pp. 177, 178.

Cited as authority to same effect in *Miles v. Coutts*, 20 Mont. 52; *Ah Louis v. Harwood*, 140 Cal. 596, holding land subject to lien despite owner's contract; 19 Am. St. Rep. 699, note, in discussion of the point.

**General Citations.**—*Smalley v. Gearing*, 121 Mich. 198; *Aste v. Wilson*, 14 Colo. App. 328.

**48 Cal. 178-184. CUTTER v. CARUTHERS.**

**Rules of Court.**—Supreme court does not take judicial notice of rules of district courts, p. 183.

Cited in Sweeney v. Stanford, 60 Cal. 367, and applied to rules of superior court; 89 Am. Dec. 689, extended note, discussing subject of "judicial notice."

**Deed as Evidence.**—Party is not required to locate on the ground the calls of a deed before it is admitted in evidence, p. 184.

Cited in Hogans v. Carruth, 18 Fla. 590, 592, in approval. Referred to in Coffee v. Groover, 20 Fla. 82, as authority that oral evidence is competent to identify premises.

**48 Cal. 189-190. PEOPLE v. SHEPARDSON.**

**Principal and Accessory.**—Indictment may in one count charge defendant as principal, and in another count charge him as an accessory, p. 190.

Cited in 51 Am. Dec. 376, note, as so, under the California statute; Street v. State, 39 Tex. Cr. 136.

**48 Cal. 194-197. EDWARDS v. ESTELL.**

**County Surveyor** is one of the agents of the state for the sale of swamp and overflowed lands, and is prohibited, by considerations of public policy, from becoming the purchaser of such lands, p. 196.

Affirmed in Yoakum v. Brower, 52 Cal. 376. Cited in Jones v. Hanna, 81 Cal. 510, and rule applied to purchase for benefit of executor at probate sale. Approved in Miller v. Byrd, 90 Cal. 153, but holding that the rule does not apply to a county treasurer. Cited in 66 Am. Dec. 514, extended note, discussing subject of contracts void as against public policy.

**Statute of Frauds.**—Nothing will be considered a part performance, sufficient to take an oral contract for the sale of land out of the statute, which does not put the purchaser in a situation which is a fraud upon him, unless the agreement is performed, p. 196.

Cited in Anson v. Townsend, 73 Cal. 418, and a parol gift of land held to be void, the donee being in possession, but made no improvements on the land; Puterbaugh v. Puterbaugh, 131 Ind. 291, holding that payment of the purchase price will not be regarded as part performance, and discussing effect of possession as part performance.

**48 Cal. 197-201. OAKS v. RODGERS.**

Oath administered by clerk in open court is administered by the court in the sense of the statute, p. 201.

Doctrine approved in Walker v. State, 107 Ala. 10; and State v.

Caywood, 96 Iowa, 371, cases of indictment for perjury; Dunlap v. Patterson, 4 Idaho, 477, an agent may make affidavit required by Revised Statutes, section 3104, relating to mining locations. Distinguished in Straight v. State, 39 Ohio St. 498, in which case the oath was not administered by lawful authority, and it was held that a prosecution for perjury could not be sustained.

**General Citation.**—Frank v. Bullion etc. Min. Co., 19 Utah, 45.

**48 Cal. 201-208. POEHLMANN v. KENNEDY.**

**Insolvency.**—Assignee becomes vested with the title to all the insolvent's property from and after the surrender, although it is not mentioned in the schedule, p. 207.

Approved in Vincent v. Collins, 122 Cal. 390, holding service of notice of appeal necessary on appeal by his assignor from foreclosure decree against latter as mortgagor; Hinkel v. His Creditors, 63 Cal. 331, maintaining right of assignee to oppose insolvent's discharge on ground of fraud.

**Intervention.**—Rights of intervenor not affected by a nonsuit of plaintiff on defendant's motion, p. 207.

Cited as so holding in 15 Am. Dec. 163, note; Brown v. Saul, 16 Am. Dec. 184, extended note, treating of "intervention."

Motion to dismiss intervention should specify the precise ground on which it is made, p. 208.

Cited in Belcher v. Murphy, 81 Cal. 41, and applied to a motion for a nonsuit.

**48 Cal. 208-211. GRAY v. COREY.** See Rosenbaum v. Hayes, 8 N. D. 472.

**48 Cal. 212-214. O'HALE v. SACRAMENTO.**

**Negligence.**—City is not liable for negligence of contractor in constructing sewers under contracts let by the city, p. 214.

Affirmed in Krause v. Sacramento, 48 Cal. 222; so in Barton v. McDonald, 81 Cal. 267. Distinguished in Donovan v. Oakland etc. Transit Co., 102 Cal. 249, in which case there was no statute requiring or regulating the letting of the contract, nor had the contractors control of the manner in which the work should be done. Cited in notes to 65 Am. Dec. 528; and in 68 Am. Dec. 359, discussing subject of "respondeat superior"; note to 76 Am. St. Rep. 395, 427, on independent contractors.

**48 Cal. 215-221. RUBIDOEX v. PARKS.**

**Principal and Agent.**—Act of agent with respect to subject matter

of the agency, injurious to the principal, may be avoided by the latter, as between themselves, p. 219.

Cited in *San Pedro etc. Co. v. Reynolds*, 121 Cal. 89, also holding burden of proof to be on such agent to account for all losses occasioned through him; and on last point cf. *Webb v. Marks*, 10 Colo. App. 431; *Calmon v. Sarraile*, 142 Cal. 641, noted under *King v. Wise*, 43 Cal. 628; *Golson v. Dunlap*, 73 Cal. 162, as to adequacy of consideration, and holding that if a trustee attempts to purchase from himself, the transaction is voidable at the election of the cestui que trust. So, to same effect, in *Tilleny v. Wolverton*, 46 Minn. 258.

**48 Cal. 222-229. BURRELL v. HAW. S. C. 40 Cal. 373.**

**Pre-emption.**—Decision of land department as to facts entitling to pre-emption is conclusive in the absence of fraud, p. 228.

Doctrine approved in *Rutledge v. Murphy*, 51 Cal. 398, dissenting opinion of Rhodes, J.; *Lynch v. Brigham*, 51 Cal. 494, dissenting opinion of McKinstry, J.; *Chapman v. Quinn*, 56 Cal. 287. Cited in *Peabody v. Prince*, 78 Cal. 516, holding that a patent valid on its face cannot be assailed on the ground that the judgment upon the contest was rendered by default.

**General Citations.**—In *Plummer v. Brown*, 70 Cal. 546, in approval, as to what the unsuccessful claimant must allege and prove in an action to compel a conveyance to himself of the legal title, where the successful claimant has acquired such title affected with any fraud or trust in relation to it; *People v. Hayne*, 83 Cal. 124, 17 Am. St. Rep. 221, as authority that the supreme court may adopt the opinion of the trial judge as its own, and for the reasons therein stated, affirm the judgment or order appealed from.

**48 Cal. 234-236. POWELL v. POWELL.**

**Sureties on administrator's bonds for letters, and for sale of real estate,** are jointly liable if the condition of each bond is identical, and they may be properly joined as codefendants in an action on the bonds, p. 236.

Cited in *Bernero v. Insurance Companies*, 65 Cal. 387, in approval, joinder of two insurance companies as defendants in an action to recover a loss; *Evans v. Gerken*, 105 Cal. 313, as to liability of sureties on bond of executor; *Slater v. McAvoy*, 123 Cal. 439, holding sureties proper defendants in action by administrator against deceased predecessor for accounting; distinguished in *Botkin v. Kleinschmidt*, 21 Mont. 5, 69 Am. St. Rep. 643, holding sureties on bond for sale of realty alone liable for defalcation in reference thereto; and see note to *Culliford v. Walser*, 70 Am. St. Rep. 445, on liability of sureties; *Dugger v. Wright*, 51 Ark. 234, 14 Am. St. Rep. 49, to same effect;

•*Gilbert v. Board of Education*, 45 Kan. 35, 23 Am. St. Rep. 703, applied where the treasurer of a board of education gave two bonds with different sets of sureties; *Wibaux v. Grinnell Live Stock Co.*, 9 Mont. 161, in approval of the principle of the decision; so in *Stoner v. Keith*, 48 Neb. 293, case of sureties on bond of county treasurer; 51 Am. Dec. 524, extended note, discussing subject of sureties' liability on bonds.

In such case the sureties are liable to contribution inter esse, p. 236.

Cited in *Dugger v. Wright*, 51 Ark. 235, 14 Am. St. Rep. 49, to same effect; *Kellogg v. Lopez*, 145 Cal. 499, applying rule to sureties on note of corporation.

#### 48 Cal. 236-239. PEOPLE v. AH WEE.

**Evidence.**—Conversation held in different languages, between persons understanding them, may be proved as to each part by persons understanding that part only, p. 238.

Cited in *People v. Keith*, 50 Cal. 139, holding that if a witness is unable to state the whole of a conversation, the remainder of it may be proved by another witness; *People v. Lee Fat*, 54 Cal. 530, as cited by 1 Wharton on Evidence, section 174, but said not to sustain the rule as broadly as stated by him; and holding that the reporter's notes, taken before a committing magistrate upon a preliminary examination for felony, are inadmissible, where the testimony was taken through an interpreter; *People v. Irwin*, 77 Cal. 506, holding inadmissible evidence of a mere scrap of conversation overheard between the defendant and an alleged conspirator, with nothing to show to whom it referred; *Fertig v. State*, 100 Wis. 307, admitting evidence of different witnesses as to different portions of conversation.

**Instructions.**—Defendant, in criminal case, cannot complain that the court did not instruct the jury upon a point in issue, unless he asked for such instruction, p. 237.

Cited to same effect in *People v. Gray*, 66 Cal. 277, prosecution for embezzlement, and failure to request an instruction as to the purposes for admission of evidence of similar acts; also in *Hart v. Telegraph Co.*, 66 Cal. 591, 56 Am. Rep. 119; *People v. Flynn*, 73 Cal. 514, failure to request instruction upon subject of "reasonable doubt"; *People v. Olsen*, 80 Cal. 128, prosecution for murder, and failure to request instruction as to what verdict jury might return; *People v. McLean*, 84 Cal. 483, prosecution for arson, and failure to request the court to caution the jury in regard to evidence stricken out as irrelevant; *Carroll v. State*, 45 Ark. 549, failure to request an instruction as to what constitutes an accomplice. Examined in *State v. Myers*, 8 Wash. 183, and holding that the court should instruct the jury, without an affirmative request, that no inference of guilt should arise against the defendant, because of failure to testify in his own behalf.

**48 Cal. 239-250. SPRAGUE v. EDWARDS.**

**Construction of Contract.**—Intention of parties should be effectuated, regardless of errors in language, p. 250.

Cited in *McCloskey v. Tierney*, 141 Cal. 102, holding assignment of bank account shown.

**Deed.**—Legal effect of, will be determined from the instrument itself, construed in the light of surrounding circumstances, pp. 246, 250.

Construction of same deed affirmed in *Wilcoxson v. Miller*, 49 Cal. 196, approving substitution of word "approval" for word "appeal."

Cited in 31 Am. St. Rep. 26, note, as authority that intent governs in construing deed.

**Trustee's Deed** will not convey title unless made in conformity with the deed to him, p. 249.

Cited in *Mersfielder v. Spring*, 139 Cal. 595, as inconsistent with *Savings etc. Soc. v. Deering*, 68 Cal. 281, holding recitals in trustee's deed conclusive as to existence of prerequisites.

**Same.**—When a conveyance is made to a trustee, with power to sell and convey, subject to approval of cestui que trust, the deed of a trustee to a purchaser will not pass the legal title without the approval of the cestui que trust in writing, pp. 249, 250.

Cited in 19 Am. St. Rep. 267, 278, extended note, discussing subject of "sales and conveyances by trustees"; and so in 64 Am. Dec. 199, extended note on subject; *Murray v. Green*, 64 Cal. 368, said not to be an analogous case, and holding that where the granting clause in a deed purporting to convey a title in fee simple is followed by a clause prohibiting the grantee from conveying without the consent of the grantor, the latter clause is repugnant to the interest created by the former, and being in restraint of alienation, is void.

**48 Cal. 250-253. PEOPLE v. INDIAN PETER.**

**Discharge of Prisoner**, that he may be a witness against others, must be made at the trial, before the defendant has gone into his defense, by the court of its own motion, or upon the application of the district attorney, pp. 252, 253.

Cited in *Whitney v. State*, 53 Neb. 305, on point that agreement with prosecuting officer alone for immunity is not protection unless done with advice or consent of the court; 40 Am. St. Rep. 768, extended note on subject of "state's evidence."

**48 Cal. 253-257. PEOPLE v. BROWN.**

**Jurors.**—Hypothetical opinion qualified upon truth of report or rumor does not disqualify, though requiring evidence to remove it, p. 256.

Notes Cal. Rep.—153.

Approved in *State v. Hoyt*, 47 Conn. 530, overruling challenge for cause.

**Larceny.**—Mere possession of stolen property will not justify verdict of guilty, but there must be proof of other facts tending to establish guilt, p. 257.

Cited to same effect in *State v. Loveless*, 17 Nev. 428, construing the word "indicating" as used in instruction; doctrine denied in *Territory v. Casio*, 1 Ariz. 487.

#### 48 Cal. 257-258. PEOPLE v. O'NEIL.

Jury, in criminal case, must consist of twelve men, and defendant cannot consent to be tried by a jury composed of a less number, p. 258.

Approved in *People v. Deegan*, 88 Cal. 608, case of prosecution for larceny; and so in *Territory v. Ah Wah, and Ah Yen*, 4 Mont. 173, 47 Am. Rep. 345, trial for murder; *Territory v. Ortiz*, 8 N. Mex. 158, reversing conviction by jury of eleven, though impaneled with defendant's consent in felony case.

#### 48 Cal. 259-271. TYLER v. GRANGER.

**Ejectment.**—One who merely holds the title to land in trust as security for a debt cannot maintain ejectment against the cestui que trust, or his assigns, to recover the land, p. 270.

Cited in *Bostwick v. McEvoy*, 62 Cal. 501, in approval of the doctrine; *Sacramento Bank v. Alcorn*, 121 Cal. 383, discussing nature of trust deed to secure debt, in California.

**General Citation.**—In *Adams v. Lambard*, 80 Cal. 439, as authority that when at trustee fails to give an accounting of his trust, and in violation thereof, sells the trust property to an innocent purchaser, he is not entitled to any interest on his account, but may be charged with compound interest from the date of the sale.

#### 48 Cal. 277-279. PEOPLE v. COLLINS.

**Instructions.**—When testimony offered is admissible for one purpose, but incompetent for another, the objecting party should ask an instruction limiting the evidence to the purpose for which competent, and if he fails to do so he cannot afterward complain, p. 279.

Cited to same effect in *People v. Ah Yute*, 53 Cal. 615; and *Williams v. Hartford Ins. Co.*, 54 Cal. 449, cases in point; *Hart v. Western U. Tel. Co.*, 66 Cal. 591, dissenting opinion of McKee, J., asserting the general rule that a party cannot, in a court of error, avail him-

self of an omission in the charge of the court, where he had made no request to the court on the subject; so in *People v. Olsen*, 80 Cal. 128; and *People v. McLean*, 84 Cal. 483; *State v. Simas*, 25 Nev. 447, holding defendant remediless on failure to request such instruction.

**General Citation.**—In *People v. Welsh*, 63 Cal. 168, as authority that the conduct of a party before and after the principal fact in issue is admissible as a circumstance connected with the act indicating the guilty intent.

**48 Cal. 279-323. EX PARTE WALL.** 17 Am. Rep. 425.

**Constitutional Law.**—Power to make laws cannot be delegated to the people, p. 313.

Approved in *Ex parte Anderson*, 134 Cal. 72, 86 Am. St. Rep. 239, holding statute invalid permitting county electors to frame and pass ordinances; *Territory v. Scott*, 3 Dak. Ter. 430, dissenting opinion of Edgerton, C. J., in which case an act for the selection by commissioners of a suitable location for the seat of government was sustained as valid; cited in 59 Am. Dec. 514, note, to ruling stated; so in *State v. Forkner*, 94 Iowa, 23, 30, dissenting opinion of Kinne, J. Distinguished in *People v. McFadden*, 81 Cal. 493, 15 Am. St. Rep. 69, sustaining constitutionality of act submitting to a vote of the people the question of creation of a new county. So, to same effect, in *People v. Nally*, 49 Cal. 480, 483, sustaining constitutionality of act submitting to a popular vote of the electors of a county, the question whether a portion of the territory of an adjoining county shall be annexed to it.

Legislature cannot transfer to others the responsibility of deciding what legislation is expedient and proper, with reference either to present conditions or future contingencies, p. 315.

Approved in *People v. Parks*, 58 Cal. 644, and applied to provisions of an act made contingent upon the judgment and discretion of the board of drainage commissioners; *State v. Liedtke*, 9 Neb. 498, in respect to expediency of legislation; and cited as so holding in 45 Am. St. Rep. 655, note; 63 Am. Dec. 519, note. Disapproved in *Newsom v. Earnheart*, 86 N. C. 396, sustaining an act permitting detached parts of several townships to be formed into a single district.

Legislature cannot refer the question of granting or refusing licenses to sell intoxicating liquors to a popular vote, pp. 316, 323.

Denied in *State v. Forkner*, 94 Iowa, 11, sustaining "local option" law. Approved in *Fell v. State*, 42 Md. 110, dissenting opinion of Bowie, J.; *Feek v. Township Board*, 82 Mich. 424, dissenting opinion of Morse, J. Disapproved in 93 Mo. 631, Sherwood, J., dissenting, pp. 669, 670; so in *Paul v. Gloucester County*, 50 N. J. L. 594, 597, Reed, J., dissenting, pp. 624, 627, in all of which cases the con-

stitutionality of "local option" laws is sustained. Cited in notes to 35 Am. Dec. 338; 47 Am. Dec. 500; 13 Am. Rep. 428; and 19 Am. Rep. 542, where the authorities are collected and the question discussed.

**Town Governments.**—Constitution is not self-acting, and town governments must be created by statute, p. 318.

Cited in 8 Am. St. Rep. 417, note, discussing the subject.

Words "system of town governments" were used in the constitution with reference to town organizations in their general features like those of other states where town governments had been established when the constitution was adopted, pp. 318, 319.

Construction approved in *People v. Lynch*, 51 Cal. 28, 31, 21 Am. Rep. 687, 689, discussing power of legislature over cities. So, to same effect, in *Bank of Sonoma County v. Fairbanks*, 52 Cal. 198; *People v. Townsend*, 56 Cal. 637, in approval of the ruling stated, discussing subject of uniform taxation; *Los Angeles v. Southern Pac. R. R. Co.*, 61 Cal. 64, as authority that the constitution provides for the creation of cities and the transfer to them of appropriate legislative functions. Referred to in *Longan v. County of Solano*, 65 Cal. 124, construing "County Government Act"; so in *Kahn v. Sutro*, 114 Cal. 332, and also discussing the question, Who are to be deemed county officers? Cited in 34 Am. Dec. 632, discussing at length, in an extended note, "power of the legislature to delegate authority to municipal corporations."

**General Citations.**—In *Johnson v. Martin*, 75 Tex. 39, as authority that the privilege of the electors of a district to be affected by a law, to say whether they will accept its provisions, the law giving them the right to accept or reject, is constitutional; *Owen v. Baer*, 154 Mo. 508.

#### 48 Cal. 323-331. PEOPLE v. CAGE. 17 Am. Rep. 436.

Failure of jury to agree, and their consequent discharge, avoids plea of once in jeopardy, p. 326.

Cited as authority to ruling stated in *People v. James*, 97 Cal. 401; so in *Ex parte Maxwell*, 11 Nev. 436, 440, discussing power of court to discharge a jury before verdict; notes to 12 Am. Dec. 548; 21 Am. Rep. 505; 3 Am. St. Rep. 215; and 21 Am. St. Rep. 247, discussing the subject of "once in jeopardy."

Discharge of jury before close of term by unnecessary adjournment, is equivalent to acquittal of defendant, p. 328.

Cited in *State v. Nelson*, 19 R. I. 471, 61 Am. St. Rep. 783 (and note, page 784), as to discharge of jury on information from court officer that a juror is unable to proceed, through illness. Distinguished in *State v. Lewis*, 31 Wash. 520, discharge of jury on holiday for failure to agree is not void act so as to constitute jeopardy; 21 Am. Dec. 507, extended note on subject.

**48 Cal. 331-334. PEOPLE v. HUNCKELER.**

Discharge of jury on trial of accused for manslaughter, because the evidence shows a higher degree of crime, is an acquittal, p. 334.

Principle approved and applied in People v. Ny Sam Chung, 94 Cal. 307, 28 Am. St. Rep. 132; so in Moore v. State, 71 Ala. 309; Mitchell v. State, 42 Ohio St. 398, 399; Moundsville v. Fountain, 27 W. Va. 194. Cited in People v. McDaniels, 137 Cal. 196, holding conviction of battery a bar to later prosecution for assault to murder, growing out of same facts; People v. Smalling, 94 Cal. 115, holding that the absence of the defendant at the time of discharge of jury, his presence having been waived by his counsel, did not affect the question of his jeopardy; State v. Shiver, 20 S. C. 406, as to when jeopardy exists, and holding that there can be no legal jeopardy upon a bad indictment. Referred to in State v. Davis, 31 W. Va. 393, holding that the discharge of a juror and the substitution of another under the circumstances in the particular case was proper. Distinguished in People v. Higgins, 59 Cal. 358, in which case the defendant fled during the progress of the trial, and the jury was discharged without rendering a verdict; held, that the plea of former jeopardy was without merit. Cited, treating of subject of jeopardy, in 21 Am. Dec. 505, 507, extended note.

**48 Cal. 335-339. PEOPLE v. MANNING.**

**Appeal.**—Judgment will not be disturbed on ground that evidence was insufficient to justify the verdict, unless it is clear that the jury must have acted under the influence of passion or prejudice, p. 337.

Doctrine approved in People v. Durrant, 116 Cal. 201, 207. So, to same effect, in Darke v. Smith, 14 Utah, 40; People v. Sullivan, 129 Cal. 560, holding circumstantial evidence sufficient to warrant conviction for murder.

**Venue of Crime.**—Must be proved beyond a reasonable doubt, but need not be testified to in so many words, p. 338.

Cited in People v. Bevans, 52 Cal. 471, holding that the plea of not guilty imposes on the prosecution the necessity of proving the locus delicti; People v. Lock Wing, 61 Cal. 381, evidence in the particular case held sufficient to support the venue; People v. Tonielli, 81 Cal. 279, holding that when the record on appeal shows that the trial took place in the city and county of San Francisco, and that the threatening letter was postmarked San Francisco, and was received there, the venue is sufficiently proved; People v. McGregor, 88 Cal. 144, in approval on similar evidence. So, to same effect, in People v. Etting, 99 Cal. 579; State v. McGinniss, 74 Mo. 246, as authority that inferential evidence will suffice to establish the locus delicti; and so in 54 Am. St. Rep. 304, note.

**Evidence.**—Party objecting to, must specify the ground of objection, and waives all objections not so specified, p. 338.

Ruling affirmed in *People v. Chee Kee*, 61 Cal. 405; *People v. Nelson*, 85 Cal. 428; *Brunley v. Flint*, 87 Cal. 474; *People v. Louie Foo*, 112 Cal. 21. Approved in *Vaughan v. State*, 58 Ark. 374; so in *State v. Leehman*, 2 S. Dak. 184, as authority that specification waives grounds not specified; *Bruce v. Foley*, 18 Wash. 99, as to effect of failure to object to admission in evidence of new matter not pleaded.

**General Citations.**—In *Marier v. State*, 68 Ala. 587, as to latitude allowed in cross-examination of witnesses; and *United States v. Wood*, 4 Dak. Ter. 466, as authority that it is the province of the jury to weigh the evidence; *Oxier v. United States*, 1 Ind. Ter. 97.

#### 48 Cal. 339-345. **CASSIDY v. CARR.**

**Mexican Grant.**—Confirmation of estops grantee from claiming more than the amount allotted by survey, p. 345.

Approved in *People v. San Francisco*, 75 Cal. 394; so in *United Land Assn. v. Knight*, 85 Cal. 484, opinion of Paterson, J.; *More v. Steinbach*, 127 U. S. 82; and *De Guyer v. Banning*, 167 U. S. 743, affirming S. C. 91 Cal. 402, as to conclusiveness of patent. Referred to in *United Land Assn. v. Knight*, supra, p. 484, as involving an entirely different question from the one before the court, and overruling case of *People v. San Francisco*, supra, so far as it determines the conclusiveness of the patent to the city of San Francisco.

#### 48 Ca. 346-349. **ROPER v. McFADDEN.**

**Power of Attorney** need not be acknowledged or recorded, p. 348.

Cited in *McAdow v. Black*, 6 Mont. 606, to same effect, and further holding that neither a seal nor subscribing witnesses are necessary.

#### 48 Cal. 349-355. **HESS v. BOLINGER.**

**Public Lands.**—Decisions of land officers, upon questions of fact, if unaffected by fraud or mistake, are conclusive, and will not be reviewed by the courts, p. 353.

Cited in *Chapman v. Quinn*, 56 Cal. 287, 288, dissenting opinion of Thornton, J., maintaining that such decisions are subject to review where the facts are properly alleged to be false and fraudulent; 20 Am. Dec. 273, extended note, to ruling stated.

**Appeal—Evidence.**—Objection that evidence was inadmissible under pleadings cannot be first raised on appeal, p. 354.

Cited in *Hibernia etc. Soc. v. London etc. Co.*, 138 Cal. 260, discussing nature of pleading.

**48 Cal. 355-358. HOWELL v. SCOGGINS.**

**Damages.**—In action for assault and battery, jury cannot take into consideration the plaintiff's expenses in prosecuting the suit, p. 358.

Approved in *Falk v. Waterman*, 49 Cal. 225, action for a trespass; *Atkins v. Gladwish*, 25 Neb. 402, action for assault; *Landa v. Obert*, 45 Tex. 546, recognizing such to be the general rule in actions for torts, but holding that when the plaintiff in an action for malicious prosecution is entitled to vindictive damages, the jury may consider his expenses as prosecuting the suit. Cited, discussing the subject, in notes to 86 Am. Dec. 769; and 8 Am. St. Rep. 158.

**48 Cal. 358-361. SWAIN v. DUANE.**

**Conveyance of Land to Wife,** "as her separate property, and to and for her sole and separate use," constitutes the premises, in law, for her separate estate, pp. 359, 360.

Ruling approved in *Hamilton v. Hubbard*, 134 Cal. 607, noted under *Peck v. Brummagin*, 31 Cal. 444; *Estate of McCauley*, 138 Cal. 548, holding property separate under facts stated; *Flournoy v. Flournoy*, 86 Cal. 294, 21 Am. St. Rep. 43, case of voluntary payment by the husband, out of his own separate funds, of a balance due on property deeded to the wife; *Shanahan v. Crampton*, 92 Cal. 13, 14, on principle of *stare decisis*; *Sanchez v. Grace M. E. Church*, 114 Cal. 297, to same effect.

**General Citations.**—In *Tolman v. Smith*, 85 Cal. 284, as to conclusiveness of recital in deed; *Pontiac Buggy Co. v. Dupree*, 23 Tex. Civ. App. 301.

**48 Cal. 361-364. DENNIS v. WOOD.**

**Forcible Entry and Detainer.**—In action of, defendant may introduce evidence of title in himself, for the purpose of showing that his entry was made in good faith, pp. 363, 364.

Cited to same effect in *Phenix etc. Co. v. Lawrence*, 55 Cal. 145; *Conoway v. Gore*, 27 Kan. 127; *Torrey v. Berke*, 11 S. D. 159; and so in 77 Am. Dec. 553, extended note on subject.

**48 Cal. 364-365. PAVISICH v. BEAN.**

**Complaint for Work and Labor,** alleging that defendant was, on a day named, indebted to the plaintiff in a certain sum of money for work and labor before that time performed for him at his request, states a cause of action, p. 365.

Approved in *Whitton v. Sullivan*, 96 Cal. 482; *Ball v. Fulton*, 31 Ark. 385, complaint in form of common count of *indebitatus assumpsit* sustained; and so in *Solomon v. Vinson*, 31 Minn. 206, complaint on

account for goods sold. Distinguished in *Shade v. Lumber Co.*, 115 Cal. 367, holding that where a complaint, in an action to recover for services rendered, does not show whether the plaintiff relies upon a specific contract for a stipulated compensation, or an implied contract for the reasonable value of the services alleged, a special demurrer thereto for uncertainty and ambiguity should be sustained. Cited in 57 Am. Dec. 545, extended note, treating of "common count in assumpsit."

**Parties.**—Effect of nonjoinder of parties defendant, not appearing on face of complaint, must be objected to by answer or the objection is waived, p. 365.

Cited as authority in *First Nat. Bank v. Hamor*, 49 Fed. Rep. 47; *United States v. Agee*, 108 Fed. 13, applying rule to question of misjoinder first raised at the trial.

**General Citation.**—*Sidney Stevens Imp. Co. v. South Ogden Land etc. Co.*, 20 Utah, 278.

#### 48 Cal. 366-368. BRUMMAGIN v. AMBROSE.

**Probate Court.**—Force and effect of judgments and decrees of, p. 368.

Cited in *Neil v. Tolman*, 12 Oreg. 295, as to conclusiveness of former judgment; notes in 29 Am. St. Rep. 499; and 52 Am. St. Rep. 178.

#### 48 Cal. 369-382. PATTERSON v. DONNER.

**Equitable Relief.**—No one can complain in equity of fraudulent practices of another, unless injured thereby, p. 378.

Cited in *London etc. Fire Ins. Co. v. Liebes*, 105 Cal. 207, as authority that a recovery cannot be had for a fraudulent representation without allegation and proof of damage.

**Contract.**—Agreement to procure witnesses to testify to a certain state of facts, is against public policy, and void, p. 379.

Cited to same effect in *Goodrich v. Tenney*, 144 Ill. 429; 36 Am. St. Rep. 462; so in *Boston Bar Association v. Greenhood*, 168 Mass. 185; *Quirk v. Muller*, 14 Mont. 474, 43 Am. St. Rep. 651; *Basket v. Moss*, 115 N. C. 464, 44 Am. St. Rep. 470, holding that a mortgage given to secure an agreement for compensation for securing an appointment to public office is void, as against public policy; and extended notes to 66 Am. Dec. 513; and 94 Am. Dec. 376, discussing the subject at length.

**Foreclosure.**—Stipulation in mortgage, allowing counsel fees on foreclosure, does not entitle the plaintiff to such fees unless he pays them, p. 380.

Cited to same effect in *Bank of Woodland v. Treadwell*, 55 Cal.

381; *Prescott v. Grady*, 91 Cal. 522, as authority that such stipulated counsel fees are in the nature of special damages to indemnify the creditor against the necessity of paying an attorney, and must be specially averred in pleading; *Gray v. Robertson*, 174 Ill. 252, quoting *Cheney v. Ricks*, 168 Ill. 533; *Schroeder v. Richardson*, 101 Wis. 532, on point that amount of compensation is in discretion of trial court.

**Same.**—Plaintiff cannot, under such stipulation, recover counsel fees for foreclosing his own mortgage, p. 380.

Cited in *Cheney v. Ricks*, 168 Ill. 550, holding to same effect.

**General Citation.**—In 17 Am. Dec. 306, extended note, as authority that a defeasance expressing an illegal condition is void.

#### 48 Cal. 386-394. HILLS v. SHERWOOD.

**Relief in Equity.**—Judgment at law against defendant in ejectment is not a bar to his suit for relief in equity, p. 392.

Cited to same effect in *School District v. Whalen*, 17 Mont. 16; so in 54 Am. St. Rep. 225, extended note, where the subject of relief in equity against judgments, decrees, and other judicial determinations, is very fully discussed.

**Creditor's Suit.**—Any creditor of estate of decedent whose claim has been established, may maintain an action to reach property fraudulently conveyed by the decedent in his lifetime, p. 393.

Ruling affirmed in *Ohm v. Superior Court*, 85 Cal. 547, 549, 20 Am. St. Rep. 246, 247. Limited in *Emmons v. Barton*, 109 Cal. 667, holding that such action by a creditor will not lie, unless he shows that he has exhausted all means to procure such an action to be brought by the executor or administrator of the decedent. It was held, however, in the particular case, that the suit would lie in favor of the creditors, the alleged fraudulent grantor being the executrix. Cited in 90 Am. Dec. 291, extended note, treating of creditors' bills, as authority in favor of the right of an executor or administrator to sue for property fraudulently alienated by the deceased in his lifetime; 90 Am. Dec. 293, note, as to object of creditor's suit. Distinguished in *Fehringer v. Bank*, 23 Utah. 396, creditors of insolvent estate cannot bring action in own names to set aside conveyance made by decedent, except on refusal of administrator after demand to sue.

**Same.**—Judgment obtained in such action proves the indebtedness *prima facie* in favor of plaintiff as against the grantees of the testator, p. 394.

Cited, as so holding, 90 Am. Dec. 299, extended note.

**General Citations.**—In *Mills v. Fletcher*, 100 Cal. 149, as authority that matter constituting a complete defense should not be pleaded

as a cross-complaint; and *Witte v. Lockwood*, 39 Ohio St. 144, as sustaining the rule that a defense, where the same facts constitute a counterclaim, may be withheld without estopping the defendant.

**48 Cal. 394-395. MILLER v. SHARP.**

Requisites of complaint in partition stated, p. 394.

Cited in *Nordholt v. Nordholt*, 87 Cal. 556, 22 Am. St. Rep. 271, as authority that duress in the execution of a deed should not be permitted to be proved, unless specially pleaded; *Spader v. McNeil*, 130 Cal. 501, but holding complaint sufficient.

**48 Cal. 395-397. COLUMBET v. PACHECO.**

**Estoppel.**—Long acquiescence in location of fence as a division line estops the parties from controverting the correctness of the location, p. 397.

Affirmed in *Biggins v. Champlain*, 59 Cal. 117; *Dierssen v. Nelson*, 138 Cal. 398, quoting *White v. Spreckles*, 75 Cal. 610; *Western Union Oil Co. v. Newlove*, 145 Cal. 774, where findings as to practical location by agreed fence are supported by evidence and are sufficient to support judgment for defendant, findings which are mere conclusions of law from practical location, as to laches and estoppel of owner under whom plaintiff claims, are immaterial; principle of the decision approved and applied in *Cooper v. Vierra*, 59 Cal. 283; *Johnson v. Brown*, 63 Cal. 393; *White v. Spreckles*, 75 Cal. 616; *Hughes v. Wheeler*, 76 Cal. 234; *Burris v. Fitch*, 76 Cal. 398; *Strosser v. Fort Wayne*, 100 Ind. 447; *O'Donnell v. Penny*, 17 R. I. 167; and *Brown v. Leete*, 6 Saw. 338, 2 Fed. Rep. 447, cases of acquiescence in an agreed boundary line for a period longer than that fixed by the statute of limitations. Distinguished in *Quinn v. Windmiller*, 67 Cal. 464, in which case the line of the fences was never settled and agreed upon by the parties as the true and correct boundary line.

**48 Cal. 398-405. SAN FRANCISCO AND NORTH PACIFIC RAIL-ROAD COMPANY v. BEE.**

Property of corporation is vested in its trustees as a trust for the protection of its creditors, p. 404.

Cited to same effect in *Kohl v. Lilenthal*, 81 Cal. 385, a similar case of formation of a new corporation; *Olney v. Land Company*, 16 R. I. 600, 27 Am. St. Rep. 769, as authority that officers of a corporation are trustees for the stockholders; *Lang v. Dougherty*, 74 Tex. 232, that equity will interfere to prevent unjust preferences among creditors of an insolvent corporation; notes to 99 Am. Dec. 337, 384; and 55 Am. St. Rep. 26, discussing the subject. Referred to, and said not to be in point, in *Grenell v. Ferry*, 110 Mich. 284, noting that the

California statute authorizes creditors' bills without issue of an execution, but otherwise in Michigan.

Corporation cannot avoid its liabilities by a reincorporation and transfer of its assets to new company, p. 405.

Cited in Higgins v. Cal. Pet. etc. Co., 122 Cal. 376, holding lessor to original company entitled to royalties under its lease notwithstanding such a transfer; Schaacke v. Eagle etc. Co., 135 Cal. 484, noted under Martin v. Zellerbach, 38 Cal. 300; Grenell v. Detroit Gas. Co., 112 Mich. 73, ruling similarly as to like attempt to escape liability for negligence.

**48 Cal. 406-409. HAGAR v. SPECT.**

Statute of Limitations does not begin to run against holder of patent for land until patent has been issued, p. 408.

Approved and applied in Manly v. Howlett, 55 Cal. 98; Emeric v. Alvarado, 64 Cal. 609; and King v. Thomas, 6 Mont. 415; note to Schnieder v. Hutchinson, 76 Am. St. Rep. 482, on general subject.

**48 Cal. 409-426. ROBINSON v. WESTERN PACIFIC RAILROAD COMPANY.**

Where a railway train passing along a city street is stopped at a crossing, and is suddenly backed without warning, to the injury of a person who is walking along the cross-street in the rear of the train, the employees of the company are guilty of gross negligence, and the company is liable therefor, p. 421.

Questioned in Magoon v. Railroad Co., 67 Vt. 188, holding that one who attempts to pass between cars standing across a public highway is guilty of contributory negligence. Cited in 26 Am. Rep. 210, note, as to care required on part of railway company in running its trains in public streets; Walker v. St. Paul etc. Co., 81 Minn. 411, holding contributory negligence not shown by crossing in front of car under facts stated; and cf. Baker v. Kansas etc. Co., 147 Mo. 167, ruling similarly; Hall v. Street Ry. Co., 13 Utah. 256, 57 Am. St. Rep. 732, as to duty of motorman to give warning on approaching public crossing.

Person injured in such case has a right to presume that the employees of the company would use the degree of care which persons of ordinary prudence are accustomed to employ under similar circumstances, p. 421.

Approved in Franklin v. Motor Road Co., 85 Cal. 70, case of railroad company carrying a passenger beyond and away from all its usual stopping places; Solen v. Virginia etc. Ry. Co., 13 Nev. 125, as to right of person to presume that a railroad company will give the usual signals. So, to same effect, in Bunting v. Central Pac. R.

R. Co., 14 Nev. 361; and cited, to ruling stated, in 90 Am. Dec. 61; Fink v. Furnace Co., 10 Mo. App. 70, as authority that it is not negligence in one person not to anticipate and guard against future negligence of another person.

It is not enough that the plaintiff's act contributed to the injury, but it must appear that by his own fault he has so contributed, p. 422.

Cited in approval of rule, in Lawrence v. Green, 70 Cal. 421, 59 Am. Rep. 431, case of injury to passenger caused by negligent overturning of stage-coach.

If neglect of ordinary care by plaintiff concurs as approximate cause in producing the injury, the defendant is not liable, p. 423.

Doctrine approved in Hearne v. Railroad Co., 50 Cal. 484, holding that if a person, while crossing a railroad track on a public highway, is injured by a passing train, his negligence, if it contributes at all to the injury, contributes directly and proximately; so in Strong v. Railroad Co., 61 Cal. 328, in which case it was held that the evidence did not show such contributory negligence as to justify a nonsuit; Esrey v. Southern Pac. Co., 103 Cal. 545, adopting the rule that "the party who last had a clear opportunity of avoiding the accident, notwithstanding the negligence of his opponent, is considered solely responsible for the injury"; Carter v. Chambers, 79 Ala. 229, generally, in approval, as to what constitutes contributory negligence; so in Louisville etc. R. R. Co. v. Webb, 90 Ala. 193; Lopez v. Mining Co., 1 Ariz. 480; Candelaria v. Railroad Co., 6 N. Mex. 275; and Patnode v. Harter, 20 Nev. 310.

New Trial.—Erroneous instruction, if nonprejudicial, is not ground for, p. 424.

Cited in People v. Hagar, 52 Cal. 184, to same effect; so in Hughes v. Wheeler, 76 Cal. 233.

Exceptions to oral charge to jury should point out the specific portions excepted to and be made at the time, p. 425.

Cited, in approval of the rule, in Rogers v. Mahoney, 62 Cal. 612; Cockrill v. Hall, 76 Cal. 195, where an exception "to each and every part, and to the whole," of the instructions, is held too general. So, to same effect, in Frost v. Grizzly Bluff C. Co., 102 Cal. 527; Cavallaro v. Texas etc. Ry. Co., 110 Cal. 358, 52 Am. St. Rep. 101, said to be an established rule of practice, but noting that the rule "has no application to the special instructions asked by the parties and given or refused by the court, concerning which a general exception has always been held sufficient"; Bernstein v. Downs, 112 Cal. 206, holding that a general exception "to the instructions asked for and allowed by the court on the part of the plaintiff is insufficient, and that it is necessary that there should be, at least, a particular exception to each of the instructions, by number or other designation"; Black v. City of Lewis-

ton, 2 Idaho, 258; *People v. Berlin*, 10 Utah, 46, dissenting opinion of Bartz, J.; *Marks v. Tompkins*, 7 Utah, 425, holding general exception insufficient; *People v. Hart*, 10 Utah, 206, following dissenting opinion of Bartz, J., all sustaining the rule stated. Cited, as so holding, in 85 Am. Dec. 125.

**Pleading.**—Complaint in action to recover damages for negligence need not negative contributory negligence on part of plaintiff, p. 426.

Approved in *Yik Hon v. Spring Valley Water Works*, 65 Cal. 620, injuries caused by negligence in repairing water pipes; *Magee v. North Pac. Coast R. R. Co.*, 78 Cal. 433, 12 Am. St. Rep. 71, injuries resulting from negligence of railroad company in not keeping its track properly fenced; *Durgin v. Neal*, 82 Cal. 597, negligence resulting in flooding basement; *Boyd v. Oddona*, 97 Cal. 512, negligence in manner of keeping a vicious dog; *House v. Meyer*, 100 Cal. 593; *City of Orlando v. Heard*, 29 Fla. 586; *Hickman v. Railroad Co.*, 66 Miss. 158; *Grau v. Railroad Co.*, 1 N. Dak. 280, all in approval of the ruling stated. Cited in 7 Am. St. Rep. 417, note, to ruling stated; so in 12 Am. St. Rep. 75, note.

**Contributory Negligence** is a matter of defense, to be proved affirmatively by the defendant, p. 426.

Cited, in approval of the rule, in *McQuilken v. Central Pac. R. R. Co.*, 50 Cal. 8; 84 Cal. 465; *Nehrbas v. Central Pac. R. R. Co.*, 62 Cal. 334; *MacDougall v. Central R. R. Co.*, 63 Cal. 432, 434; *Bowers v. Railroad Co.*, 4 Utah, 224; *Sheff v. City of Huntington*, 16 W. Va. 317; *Green v. Southern Pac. Co.*, 132 Cal. 257, but holding contributory negligence shown as matter of law by plaintiff's own testimony; but cf. *Schneider v. Market St. Ry. Co.*, 134 Cal. 487, holding it not sufficiently proved; 62 Am. Dec. 687, extended note on subject.

**General Citations.**—In *Kennon v. Gilmer*, 9 Mont. 112, as an instance of a judgment sustained where the verdict was claimed to be excessive; *Brown v. Evans*, 8 Saw. 496, 17 Fed. Rep. 918, as authority that in cases of personal torts it is for the jury to fix the amount of damage; 50 Am. Dec. 768, extended note, as to the allowance of exemplary damages in case of injury caused by gross negligence.

#### 48 Cal. 427-431. PEOPLE v. CONE.

**Taxation.**—Assessment of land for taxes, describing the whole tract by metes and bounds, but not describing excepted portions in any manner, except by reference to recorded deeds, is void, pp. 429, 430.

Followed in *People v. Hyde*, 48 Cal. 433. Cited in *People v. Mahoney*, 55 Cal. 289, as to the necessity of a full and accurate description of realty in the assessment-roll; so in *Power v. Larabee*, 2 N. Dak. 148; and *Holmes v. School District*, 11 Oreg. 332, holding that

an assessment extended on the roll as follows, "Acres of land, 1,580; value of land, \$1,680," is void.

**Same.**—In action to recover a tax, it is necessary to show on the trial a valid assessment of the same land described in the complaint, p. 430.

Cited as authority in *Richardson v. Simpson*, 82 Md. 160, case of insufficient description of land in notice of tax sale; *O'Neil v. Tyler*, 3 N. Dak. 66, as to requisites of complaint to foreclose lien of tax, or to recover judgment for a delinquent tax.

#### 48 Cal. 431-433. PEOPLE v. HYDE.

**Taxation.**—Assessment of land by quantity and boundaries, excepting a portion thereof before sold, without description, is void, p. 433.

Cited in 55 Cal. 289, holding that the description must be certain of itself, and not such as to require evidence aliunde to render it certain.

#### 48 Cal. 433-436. BALDWIN v. BORNHEIMER.

**Instructions.**—If the evidence does not appear in the transcript, the applicability of instructions asked and refused will not be considered on appeal, p. 435.

Cited in *Carpenter v. Ewing*, 76 Cal. 488, holding that in such case it will be presumed that the evidence justified the instructions, and the judgment will not be disturbed on account of alleged error therein.

**Additional Defendants.**—In case of additional trial, complaint should be amended as of a date prior to the judgment, p. 436.

Cited in *Alameda Co. v. Crocker*, 125 Cal. 104, 105, and *Hoffman v. Keeton*, 132 Cal. 196, noted under *McKinlay v. Tuttle*, 42 Cal. 572.

#### 48 Cal. 436-437. PEOPLE v. FREEL.

**Homicide.**—Whether homicide amounts to murder, or to manslaughter merely, does not depend upon the presence of absence of the intent to kill, p. 437.

Cited to same effect in *People v. Crowley*, 56 Cal. 42, holding that in cases of homicide, it is the presence or absence of deliberation and malice that makes the crime manslaughter or murder. Commented on in *People v. Kernaghan*, 72 Cal. 612, and approved in S. C. pp. 620, 621, dissenting opinion of Thornton, J. Cited in *People v. Bruggy*, 93 Cal. 482, as to the nature of the provocation sufficient to reduce a felonious homicide from the grade of murder to that of manslaughter; *State v. Vaughan*, 22 Nev. 302, in approval of the doctrine stated.

**Homicide.—Intent to kill does not distinguish murder from manslaughter,** p. 437.

Cited in *People v. McFarlane*, 138 Cal. 487, holding verdict of manslaughter sustained by the evidence.

**48 Cal. 438-439. SNEATH v. GRIFFIN.**

**Judgment.—Reasons correctly stated in brief of counsel may be adopted by the court as the ground of its decision,** p. 439.

Cited as authority to the ruling stated in *People v. Hayne*, 83 Cal. 124, 17 Am. St. Rep. 221, discussing subject of duties of supreme court commissioners.

**48 Cal. 439-452. DAMBMANN v. WHITE.**

**Bankruptcy.—Requisites of complaint in action by assignee, set forth,** p. 450.

Cited in *Tucker v. Parks*, 7 Colo. 70, in approval. *Cortelyou v. Jones*, 132 Cal. 132, on point that trustee need not allege means by which he acquired the legal title vested in him; *Farnsworth v. Sutro*, 136 Cal. 344, on point that qualification will be presumed when assignment is alleged.

Assignee in Bankruptcy becomes vested with title to all assignor's property, p. 450.

Cited in *Scoville v. Anderson*, 131 Cal. 592, further holding that his title takes effect by relation at the commencement of the proceedings.

**General Citations.—In Donegan v. Davis**, 66 Ala. 372, holding that the authority of the assignee to maintain suits cannot be collaterally assailed, except by showing the appointment to be void ab initio. So, to same effect, in *Fitzgerald v. Neustadt*, 91 Cal. 603.

**48 Cal. 452-455. PARRELL v. HANCOCK.**

**Sureties on Appeal Bond** cannot be sued until the judgment against their principal is in a condition to be enforced by an execution, pp. 454, 455.

Cited to same effect in *Sharon v. Sharon*, 84 Cal. 434; *Starr v. Kreuzberger*, 131 Cal. 44, holding sureties on stay bond not liable on motion when principal is not yet subject to execution; *Wren v. Peel*, 64 Tex. 379, applied to case of sureties on replevin bond. Examined and distinguished in *Coburn v. Brooks*, 78 Cal. 446; so in *Parrott v. Kane*, 14 Mont. 30, in which case the principal was absolutely liable on the judgment when the action was commenced. Cited, to ruling stated, in 38 Am. St. Rep. 712, 714, extended note on subject of "liability of sureties on appeal bonds."

**48 Cal. 455-459. BULL v. SHAW.**

**Public Lands.**—If one residing on public land subject to pre-emption, executes a mortgage thereon, and then sells the land to another, who takes possession and afterward pre-empts the land and obtains a title from the United States, the mortgage cannot be enforced against the title thus acquired, pp. 458, 459.

Explained and distinguished in *Stewart v. Powers*, 98 Cal. 520, holding that a title derived by patent from the United States, under the pre-emption laws, may be sold under foreclosure to satisfy a mortgage given by a pre-emptioneer on the land pre-empted prior to making his final proofs and entry. So, to same effect, in *Norris v. Heald*, 12 Mont. 286, 33 Am. St. Rep. 585, disapproving *Bass v. Buker*, 6 Mont. 444, which cites the principal case as authority to the ruling stated. Cited in 89 Am. Dec. 207, note; also, 4 Am. St. Rep. 704; 52 Am. St. Rep. 251, extended notes, discussing the subject at length.

**48 Cal. 460, 461. EDWARDS v. SOUTHERN PACIFIC RAILROAD COMPANY.**

**Venue.**—Counter-motion on ground of convenience of witnesses may be presented against motion of nonresident defendant for change of venue, p. 461.

Cited in *Hall v. Central Pac. R. R. Co.*, 49 Cal. 454, holding that the venue ought not to be changed, if the convenience of witnesses requires the action to be tried in the county where pending. Distinguished in *Cook v. Pendergast*, 61 Cal. 77, holding that the rule does not apply if the defendant's motion is made before answer.

**48 Cal. 462-464. WHITNEY v. DURKIN.**

**Evidence.**—Declarations of vendor, made after a sale, are not part of *res gestae*, and are not admissible in evidence against vendee, p. 463.

Cited to same effect in *Garlick v. Bowers*, 66 Cal. 122; so in 95 Am. Dec. 58, 65, extended note, discussing subject of *res gestae*.

**48 Cal. 467-472. BUHNE v. CHISM.**

**Public Lands.**—Title of state selection of seminary land depends upon the approval of the selection by the secretary of the interior under act of Congress of 1853, p. 471.

Affirmed in *Roberts v. Gebhart*, 104 Cal. 70.

**48 Cal. 478-482. QUALE v. MOON.**

**Mechanic's Lien.**—Sum paid by owner to contractor before abandonment of the work by the latter cannot defeat lien of subcontractor, unless the money was due when paid, pp. 479, 482.

Cited as authority in *Walsh v. McMenomy*, 74 Cal. 359, holding that when the owner pays his original contractor before the building is completed and before the money is due, he must be held liable to the materialman to the extent of the money thus prematurely paid; 79 Am. Dec. 270, extended note, as to lien of materialmen.

Cause of action for work and material furnished contractor may be joined with one for work and material furnished at the request of the owner, pp. 479, 482.

Followed in *Giant Powder Co. v. Flume Co.*, 78 Cal. 198, 199.

**Mechanic's Lien Laws** are constitutional, p. 482.

Cited in *Griffith v. Maxwell*, 20 Wash. 412, noted under *Hicks v. Murray*, 43 Cal. 521.

#### 48 Cal. 482-490. **HOWARD v. THROCKMORTON.**

**Specific Performance.**—Contract to convey land, in consideration of personal services to be performed by vendee, may be specifically enforced at the suit of the latter, after the services have been fully or substantially performed, p. 489.

Cited as authority, holding to the same effect, in *King v. Gildersleeve*, 79 Cal. 510; *Thurber v. Meves*, 119 Cal. 37, 38; *Water Supply Co. v. Root*, 56 Kan. 198; in extended note, 15 Am. Dec. 318, 320, discussing subject of chancery and maintenance; so in 3 McCrary, 68, note.

#### 48 Cal. 490-493. **POLACK v. TRUSTEES OF SAN FRANCISCO ORPHAN ASYLUM.**

Legislature has power to vacate a street in a city, and may delegate that power to the municipal authorities of the city, p. 492.

Cited in *San Francisco v. S. V. Water Works*, 48 Cal. 529, as to the power of the legislature to regulate the public use of streets; *People v. Williams*, 64 Cal. 502, as to power of legislature to control and regulate the use of navigable waters within the state boundaries; *Brook v. Horton*, 68 Cal. 558, in affirmance of the ruling stated. So, to same effect, in *San Francisco v. Burr*, 108 Cal. 462; *Blood v. McCarty*, 112 Cal. 564, applied to control of toll roads. Approved in *City Council v. Parker*. 114 Ala. 126.

Municipal authorities of city cannot vacate a street without consent of legislature, p. 492.

Cited to same effect in *Texarkana v. Leach*, 66 Ark. 42, 74 Am. St. Rep. 69, enjoining vacation by city and holding ordinance void; *Sims v. Frankfort*, 79 Ind. 455, holding that a municipal corporation cannot surrender the public streets to a mere licensee, nor by failing to improve part of a street, abandon the right to the unimproved part.

Legislature may vacate part of street, although a person owns prop-

Notes Cal. Rep.—154.

erty fronting on another part of the street which will be incidentally injured thereby, p. 493.

Cited in *Chicago v. Building Association*, 102 Ill. 393, 40 Am. Rep. 600, in approval of the principle; so in *Dautzer v. Railway Co.*, 141 Ind. 614, 50 Am. St. Rep. 351; and *Stanwood v. City of Malden*, 157 Mass. 18. Cited in 46 Am. St. Rep. 493, 494, extended note on subject of "damages for vacation of street."

General Citation.—*Newton v. New York etc. Ry. Co.*, 72 Conn. 428.

**48 Cal. 493-535. SAN FRANCISCO v. SPRING VALLEY WATER WORKS.**

Corporations, except for municipal purposes, must be formed under general laws, and the legislature cannot confer on them any powers or grant them any privileges, by special act, pp. 512, 513.

Approved in *Waterloo Turnp. Road Co. v. Cole*, 51 Cal. 384, declaring void an act authorizing the board of supervisors to grant a turnpike corporation franchises not common to all other similar corporations under the general law; so in *Spring Val. W. W. v. Bryant*, 52 Cal. 140, declaring void an act to establish water rates in San Francisco; *San Francisco v. Spring Val. W. W.*, 53 Cal. 611, affirming preceding case cited; *Omnibus R. R. Co. v. Baldwin*, 57 Cal. 166, 170-174, holding that an act exempting particular cases from the operation of a general law is unconstitutional and void; *People v. Stanford*, 77 Cal. 379, in approval of the doctrine; so in *People v. Central Pac. R. R. Co.*, 83 Cal. 413, pointing out tests of special legislation. So, to same effect, in *Home for Inebriates v. Reis*, 95 Cal. 150; *South Pasadena v. Terminal Ry. Co.*, 109 Cal. 320, 322. Explained, pointing out the scope of the decision, in 52 Cal. 118, 123, 126. Referred to, discussing effect of curative act, in *Strosser v. Fort Wayne*, 100 Ind. 453. Examined, and doctrine disapproved in *Ames v. Railroad Co.*, 21 Minn. 280; *Green v. Boom Corp.* 35 Minn. 159, 161; and *Southern Pac. R. R. Co. v. Orton*, 6 Saw. 192, 193, 32 Fed. Rep. 476-478. Distinguished in *Vought v. Columbus etc. Co.*, 58 Ohio St. 157, sustaining act leasing state property (the Hocking canal); *Ex parte Frazer*, 54 Cal. 96, sustaining constitutionality of act regulating the practice of medicine; so in *San Luis Water Co. v. Estrada*, 117 Cal. 175, sustaining validity of assignment of franchise to supply a town and its inhabitants with pure water.

Private corporations, to supply a city with water, cannot be created by special act, pp. 514.

Approved in *Spring Val. W. W. v. San Francisco*, 61 Cal. 11, dissenting opinion of Ross, J. Cited in *Spring Val. W. W. v. San Francisco*, 61 Cal. 30, in which case it was held that the act of 1858, "for the incorporation of water companies," was abrogated by the new constitution of 1879; *City v. Navin*, 151 Ind. 154, discussing statute as to railroad fares in certain classes of cities, but denied; and cf. *Los Angeles*.

etc. Co. v. City, 88 Fed. 738 et seq., noted under Cal. etc. Co. v. Alta etc. Co., 22 Cal. 398; Los Angeles v. Los Angeles City Water Co., 177 U. S. 572. Distinguished in Cook v. Port of Portland, 20 Oreg. 587, holding that the act establishing the port of Portland is not within the constitutional provision against creating corporations by special laws. Examined at length in Hawes v. Contra Water Co., 5 Saw. 290, treating of obligations of water companies formed under California statutes. Cited in 5 Saw. 565, note, bearing on the subject.

**Stare Decisa.**—Dictum should not be allowed to prevent correct construction of constitution, even at expense of property rights, p. 523.

Cited in note to Truxton v. Fait etc. Co., 73 Am. St. Rep. 104, on general subject.

Special act cannot be converted into a general act by a declaration of the legislature that it shall be so considered, p. 524.

Approved in People v. Central Pac. R. R. Co., 83 Cal. 405, holding that a clause or provision special in its character, is none the less "special" because inserted in the most general of public acts.

When portion of act is constitutional and another unconstitutional, and are so blended together as to make it clear that either clause would not have been enacted without the other, the whole act is void, p. 530.

Approved in People v. Parks, 58 Cal. 655, and applied to drainage act of 1880.

**General Citations.**—In Spring Valley W. W. v. Schottler, 62 Cal. 108, as to nature of franchise of Spring Valley Water Works; Kimball v. Grantsville City, 19 Utah, 397.

#### 48 Cal. 535-537. **ALTSCHUL v. DOYLE.**

Action of lower court in granting or refusing will not be interfered with in the appellate court, when there is a substantial conflict in the evidence, p. 536.

Approved in Macy v. Davila, 48 Cal. 648; So, in Bauder v. Tyrrel, 59 Cal. 100, holding also that the trial court may grant a new trial on conflicting evidence; and so in Wilson v. California Cent. R. R. Co., 94 Cal. 168.

The rule stated applies although the judge who heard and determined the motion for a new trial had not tried the case nor heard the evidence, p. 536.

Affirmed in Macy v. Davila, 48 Cal. 648; Bauder v. Tyrrel, 59 Cal. 100; Blum v. Sunol, 63 Cal. 343; Wilson v. California Cent. R. R. Co., 94 Cal. 168; Reay v. Butler, 95 Cal. 215. Approved in Welland v. Williams, 21 Nev. 233.

#### 48 Cal. 537-540. **DOYLE v. FRANKLIN.**

**Appeal.**—Alleged error in admitting in evidence a judgment-roll can-

not be reviewed on appeal, unless the record contains the judgment-roll, or states its contents, p. 539.

Cited as authority to same effect in *Frevert v. Swift*, 19 Nev. 402.

#### 48 Cal. 540-544. JAFFE v. SKAE.

**Law of Case.**—Decision of supreme court on appeal becomes the law of the case and must be always applicable as long as the facts presented in the case appear to be the same, p. 543.

Doctrine approved in *Heinlen v. Martin*, 59 Cal. 183; *Reclamation District v. Goldman*, 65 Cal. 636; *Sharon v. Sharon*, 79 Cal. 653, 687, but the rule held inapplicable in the particular case; *Castagnino v. Balletta*, 82 Cal. 260. Cited in 27 Am. Dec. 635, note, where the subject is discussed.

#### 48 Cal. 545, 546. REUBEN v. COHEN.

**Partnership.**—Mere silence of partner or omission to repudiate the unauthorized act of his copartner, upon knowledge of the facts, will not per se amount to ratification, p. 546.

Principle of decision approved and applied in *California Bank v. Sayre*, 85 Cal. 105, where the name of one apparent maker of a note was signed thereto by the other maker, without the authority, knowledge, or consent of the former; *Van Dyke v. Seelye*, 49 Minn. 563, a case in which the facts were similar. Approved in *First Nat. Bank v. State Nat. Bank*, 131 Fed. 429, where incoming partner had no knowledge until shortly before firm's bankruptcy that partner had executed firm notes to secure partner's pre-existing debts, incoming partner did not ratify their execution so as to justify allowance against firm's assets; *Michelson v. New East etc. Ry.*, 23 Utah, 51, mere seeing by railroad official of person on or about its train and his remaining silent does not amount to ratification of employment.

#### 48 Cal. 546-548. LANDER v. BEERS.

**Fraudulent Conveyance.**—Where a father purchases property and causes it to be conveyed to a daughter, in fraud of his creditors, a court of equity will, at suit of a judgment creditor, declare the deed void, p. 547.

Cited in 52 Am. Dec. 118, extended note, discussing subject of avoidance of voluntary conveyances.

#### 48 Cal. 549. PEOPLE v. RILEY.

If a longer term of imprisonment is imposed than that fixed by statute, the appellate court will reverse the judgment, and direct the court below to proceed to judgment on the verdict, p. 549.

Cited in *Roberts v. State*, 30 Fla. 85, as authority that error confined to the sentence solely, does not affect any prior step in the cause, and is not ground for a new trial; *In re Reed*, 143 Cal. 635, holding defendant not entitled to release on habeas corpus because judgment was for less than statutory term; *Territory v. Griego*, 8 N. Mex. 152 (dissenting opinion), main opinion denying power of court under local statute to order resentence. Distinguished in *Ex parte Bernart*, 62 Cal. 531, 533, in which case the judgment of the police court was declared void, because it was not one which included any judgment which that court had jurisdiction to render in such a case.

#### 48 Cal. 549-550. PEOPLE v. JOHNSTON.

**Indictment.**—If not signed or indorsed by foreman of grand jury defendant must take advantage of the defect by motion to set aside, and if he goes to trial on a plea of not guilty, he waives the defect, p. 550.

Cited as authority to same effect in *State v. McElvain*, 35 Or. 366, holding the objection so waived under similar local statutes; *State v. Williams*, 47 La. Ann. 1612, in which case the indictment was indorsed a "thru bill," evidently intended for a "true bill"; *Frisbie v. United States*, 157 U. S. 164, in approval of the ruling stated.

#### 48 Cal. 551-552. PEOPLE v. BARNES.

**Burglary.**—When a particular room is described as the one entered by defendant, the proof cannot be of entry into a different room, p. 551.

Cited in *People v. Stewart*, 85 Cal. 175; and *People v. Smith*, 106 Cal. 81 as sustaining the general rule that it is not permissible to prove that the defendant had committed crimes other than that charged, for the purpose of increasing the likelihood that he committed the particular offense charged, pointing out some exceptions to the rule; 2 Am. St. Rep. 397, extended note, discussing subject of "burglary."

**Burglary.**—Evidence as to time and place of entry must agree with allegations of indictment, p. 551.

Cited in *People v. Carpenter*, 136 Cal. 393, on point that indictment for one crime cannot be supported by proof of another.

#### 48 Cal. 552-553. PEOPLE v. PERDUE.

**Bail.**—Admission of defendant to bail pending appeal, after conviction of felony, is matter of discretion vested in the trial court, p. 553.

Ruling affirmed in *People v. January*, 70 Cal. 35; *Ex parte Turner*, 112 Cal. 629.

**48 Cal. 553-554. PEOPLE v. REED.**

**Evidence.**—Where the evidence of a witness shows that she is a prostitute, defendant is not injured by the refusal of the court to allow him to prove that she is reputed to be such, p. 554.

Cited in People v. Westlake, 62 Cal. 310, as authority that the exclusion of the testimony of one witness as to a fact which has been proved by the uncontradicted evidence of another witness, is not prejudicial evidence.

**48 Cal. 554-557. REWRICK v. GOLDSTONE.**

**Evidence.**—Copy of conveyance admitted in evidence, without objection, has the same effect as evidence that the original would have had, p. 557.

Cited in Wright v. Roseberry, 81 Cal. 91, as authority sustaining the rule that if a party permits his adversary to prove his case by secondary evidence, he cannot afterwards object that better evidence should have been produced. Haskins v. Dern, 19 Utah, 102.

**48 Cal. 557-559. PEOPLE v. McCARTY.**

If prosecution passes jury to defendant, who declines to challenge, the prosecution may then interpose a peremptory challenge to a juror before he is sworn, p. 559.

Cited in People v. Majors, 65 Cal. 148, and the principle held applicable, although in the latter case the defendant interposed a challenge; People v. Dolan, 96 Cal. 319, as to peremptory challenge of passed juror.

Motion in arrest of judgment must be based upon defects appearing upon face of indictment, p. 559.

Affirmed in People v. Gardner, 98 Cal. 128.

**Form of Verdict** is immaterial where intent of jurors appears, p. 559.

Cited in People v. Tilley, 135 Cal. 62, but holding verdict insufficient. Informal verdict is sufficient, if it can be clearly understood as being a general verdict of guilty or not guilty, p. 559.

Approved in People v. Perdue, 49 Cal. 427, verdict of manslaughter sustained; People v. Douglass, 87 Cal. 283, sustaining verdict in general terms finding defendant guilty of an assault with a deadly weapon; Johnson v. Visher, 96 Cal. 314, applying the principle to an informal verdict in action of ejectment.

**General Citation.**—Ackerman v. State, 7 Wyo. 512.

**48 Cal. 560-562. SAN FRANCISCO v. DOE.**

**Street Assessment.**—Complaint in action to enforce lien for, in San

Francisco, must aver that defendants are the owners of, or have some interest in, the land sought to be charged with the lien, p. 561.

Cited in Hancock v. Bowman, 49 Cal. 414, as to the necessity of making all of the owners of the property defendants, and serving them all with summons; Bays v. Lapidge, 52 Cal. 482, applying the principle, holding that the contractor or his assigns are the only persons authorized to enforce such lien; Clark v. Porter, 53 Cal. 410, in approval of the ruling stated; so in Driscoll v. Howard, 63 Cal. 440. Explained in Phelan v. Dunne, 72 Cal. 231, as based upon the provisions of the act of 1870, and holding that under the act of 1872, the heirs or devisees of a deceased lotowner are the only necessary defendants, and that the personal representatives of the decedent need not be made parties defendant.

**48 Cal. 565-567. PENNINGTON v. BAEHR.**

**Bonds.**—Coupons of may be signed by a printed facsimile of maker's autograph, though not expressly authorized by statute, p. 567.

Cited in McKee v. Vernon County, 3 Dill. 213, note, as so holding, the decision in the case being to the same effect; 64 Am. Dec. 431, extended note, discussing subject of "coupons" at length; so in 98 Am. Dec. 678, extended note, discussing subject of "municipal bonds."

**48 Cal. 567, 568. DINAN v. STEWART.**

Filing and service of notice of appeal should be effected on the same day, p. 568.

Cited to same effect in People v. Ah Yute, 56 Cal. 120, further holding that where it appears from the indorsements upon the notice that it was filed on a certain day, and that service thereof was admitted underneath the indorsement of filing, the court will presume that the service was made on the day of filing.

If appeal is ineffectual from failure to file and serve notice on same day, motion to dismiss will be denied, p. 568.

Disapproved in Territory v. Harris, 7 Mont. 430, pointing out the conflict in the California decisions on the point.

**48 Cal. 572-580. VALLEJO LAND ASSOCIATION v. VIERA.**

Mortgage of land purporting to convey the land in fee, carries title afterward acquired by mortgagor, p. 579.

Cited in Sherman v. McCarthy, 57 Cal. 515; Orr v. Stewart, 67 Cal. 277; Kline v. Ragland, 47 Ark. 117, all in approval. So, to same effect, in Rogers v. Miller, 13 Wash. 86, 52 Am. St. Rep. 22; and cited to ruling stated in notes to 76 Am. Dec. 458; 79 Am. Dec. 192; and 89 Am. Dec. 207.

Effect of decree enforcing such mortgage, set forth, p. 579.

Cited in *Barnard v. Wilson*, 74 Cal. 519, in approval.

Mortgagor, who mortgages in fee, is estopped to deny that the estate mortgaged was other or less than an estate in fee simple, p. 580.

Cited in *Barnard v. Wilson*, 74 Cal. 517; *Trope v. Kerns*, 83 Cal. 557, in approval of the doctrine.

#### 48 Cal. 581-586. DE LAURENCEL v. DE BOOM.

Letter by testator to devisee stating certain trusts, upon which the devise is made, with acceptance by devisee in writing, creates a valid trust which equity will enforce, though not specified in will, p. 585.

Cited in *Clarke v. Ransom*, 50 Cal. 603, dissenting opinion of Wallace, J.; *Curdy v. Berton*, 79 Cal. 427, 12 Am. St. Rep. 161, oral directions given by the testator with respect to the distribution of property, and the legatee charged as a constructive trustee for the beneficiaries; *Amherst College v. Ritch*, 151 N. Y. 323, as authority that if the testator is induced to make a will, or not to change one after it is made, by a promise on the part of a legatee that he will devote his legacy to a certain lawful purpose, a secret trust is created, and equity will compel him to apply property thus obtained in accordance with his promise; *Ahrens v. Jones*, 169 N. Y. 562, compelling grantee under deed to convey property to another heir according to her promise at time of receiving the deed; 24 Am. Dec. 415, extended note, discussing subject of "parol evidence of a trust in a bequest." Disapproved in *Orth v. Orth*, 145 Ind. 198; 57 Am. St. Rep. 195.

#### 48 Cal. 590-591. GEIL v. STEVENS.

Sheriff is not entitled to keeper's fees or expenses unless certified by court as just and reasonable, p. 591.

Cited in *Lane v. McElhany*, 49 Cal. 424, stating requisites of complaint in action by sheriff to recover for his services in keeping property; *Shumway v. Leakey*, 73 Cal. 262, in approval; so in *Nash v. Muldoon*, 16 Nev. 410; and so in *First Nat. Bank v. Kickbusch*, 78 Wis. 221.

#### 48 Cal. 592-601. GARRISON v. McGOWAN.

**Appearance by Attorney.**—Presumption is that an attorney appearing in court for a party has authority to do so, p. 600.

Cited to same effect in *Hunter v. Bryant*, 98 Cal. 251, holding also, that in order to show want of authority upon the part of the attorney the litigant must present clear and convincing evidence; *Bonnifield v. Thorp*, 71 Fed. Rep. 927, in approval.

If attorney, without authority, enters the appearance of a defendant without service of process, and the fact of want of authority is made to appear, the entry of the appearance is void, p. 600.

Cited in *McEachern v. Brackett*, 8 Wash. 656, 40 Am. St. Rep. 925, and holding that a judgment procured in such case, and a foreclosure and sale based thereon, will be vacated in equity though the defendant had no defense to the action, if he offers to pay the amount of the mortgage debt and interest; *Blythe v. Swenson*, 15 Utah, 363, setting forth what defendant must show on moving to set aside the judgment.

**48 Cal. 601-610. THOMPSON v. TRUE.**

**Public Lands.**—Judgment upon reference of contest between pre-emptor and state applicant, is conclusive between the parties as to the state's title, p. 609.

Cited in *Garfield v. Wilson*, 74 Cal. 177, as to jurisdiction of contest to purchase swamp and overflowed land; *Mace v. Merrill*, 119 U. S. 584, land contest, denying jurisdiction of supreme court of United States over a judgment of the supreme court of California upon the adverse claims of the parties.

**48 Cal. 610-614. TIDBALL v. HALLEY.**

**Sureties.**—Delivery of bond to obligee not having knowledge of the understanding of the sureties that the bond was to be signed by other persons, will bind the sureties who signed, p. 613.

Ruling approved in *Ney v. Orr*, 2 Mont. 564; so in *King County v. Ferry*, 5 Wash. 584, 34 Am. St. Rep. 890, a case in which there was an erasure in the body of the bond of the name of a person proposed as a surety, and the substitution of another name without the knowledge or consent of the sureties signing; principle of decision approved in *Clark v. Dreyer*, 9 Colo. App. 460; *Benton etc. Bank v. Boddicker*, 105 Iowa. 554, 67 Am. St. Rep. 315, but holding notice to obligee shown and denying recovery on the bond; *United States v. O'Neill*, 19 Fed. Rep. 570, but held to be inapplicable to a case where the name of a surety in the body of the instrument was altered with the knowledge of the obligee.

**48 Cal. 614-619. ABBEY HOMESTEAD ASSOCIATION v. WILLARD.**

Error in denying nonsuit is cured, if the defendant afterward introduces evidence which enables the plaintiff to supply the defects in his case, p. 617.

Cited to same effect in *Higgins v. Ragsdale*, 83 Cal. 222, also an action of ejectment; *Elmore v. Elmore*, 114 Cal. 520, holding that if the motion for a nonsuit should have been granted, and no evidence is afterward introduced by defendant which changes the status of the case, he may avail himself of the error committed in the refusing of the nonsuit; *Bowman v. Eppinger*, 1 N. Dak. 24, in approval of the rule. Cited in 24 Am. Dec. 621, extended note, discussing subject of compulsory nonsuits.

Court may permit plaintiff to introduce further evidence after motion for nonsuit is made, p. 618.

Cited in Clavey v. Lord, 87 Cal. 419, as to discretionary power of court to permit further evidence when it sets aside the verdict in an equity case; Horn v. Reitler, 15 Colo. 319; Kelly v. Manufacturing Co., 22 Colo. 223, in approval; 24 Am. Dec. 624, extended note, on subject of compulsory nonsuit.

**Statute of Limitations.**—Taking of lease by one in adverse possession, interrupts the running of the statute, p. 619.

Cited in Pacific Mut. L. Ins. Co. v. Stroup, 63 Cal. 154, action of ejectment, and applied where an offer is made to buy the title of the plaintiff by one in adverse possession; Parrott v. Hungelburger, 9 Mont. 534, disapproving California decisions as to effect of acceptance of lease by party in possession from a person out of possession.

When statement or bill of exceptions is settled, it will be presumed to contain all the evidence material to the points specified, p. 619.

Cited in Judson v. Lyford, 84 Cal. 509, in approval; Estate of Taylor, 131 Cal. 182, holding that bill purported to contain all the evidence.

**General Citation.**—In Sears v. Taylor, 4 Colo. 43, as to possession necessary to maintain ejectment.

#### 48 Cal. 627-631. ESTATE OF HOLBERT.

Executor is not liable for more than legal interest on loss from a loan of money of the estate on security not good, and that only in case he could have loaned the money to others at such rate, p. 630.

Cited, applying the principle of the decision, in Estate of Cousins, 111 Cal. 450, holding that mere error of judgment is not sufficient to subject a trustee to punitive responsibility.

**General Citation.**—Nagle v. Robins, 9 Wyo. 249.

#### 48 Cal. 634-637. WINANS v. HASSEY.

Special custom of board of brokers relied on as part of contract may be shown in rebuttal of receipt of payment, p. 637.

Cited as authority in Burns v. Sennett, 99 Cal. 372, holding that evidence of usage has a legitimate office in aiding to interpret the intention of the parties to a contract, the character of which is to be ascertained from general implications and presumptions.

Receipt is only *prima facie* evidence of payment and may be explained by parol testimony, p. 637.

Cited in Snodgrass v. Parks, 79 Cal. 60, holding that a receipt is not conclusive; 75 Am. Dec. 321, extended note, discussing "duty of stock broker to his client."

Objection to testimony should specify the grounds of objection, p. 637.

Cited in *People v. Chee Kee*, 61 Cal. 405; *Steele v. Pacific Coast Ry. Co.*, 74 Cal. 331; and *People v. Nelson*, 85 Cal. 428, all in approval in the rule.

**48 Cal. 638-639. KELLER v. DE OCANA.**

Complaint in Ejectment held sufficient, p. 638.

Cited in *Jones v. Memmott*, 7 Utah, 343, ruling similarly as to complaint there discussed.

**48 Cal. 639-643. PICO v. CUYAS.**

**Law of Case.**—Supreme court having settled the law of a case, the court below has no right to assume that the law is otherwise than as settled, p. 642.

Cited in *Haggan v. Clark*, 71 Cal. 452; *Powell v. Railroad Co.*, 14 Oreg. 23; *Venard v. Green*, 4 Utah, 458, all in approval of rule of law of case.

**48 Cal. 643-645. ESTATE OF PFUELBB.**

**Will.**—Word "relation," in statute providing that a devise to a relation shall not lapse by the death of the devisee during the lifetime of the testator, if the devisee leaves lineal descendants, includes only relations by blood, p. 644.

Cited in 94 Am. Dec. 160, extended note, discussing effect of death of devisee before testator; note to 79 Am. St. Rep. 205, on general subject.

**48 Cal. 646-648. MACY v. DAVILA.**

**New Trial** may be granted in discretion of court below on conflicting evidence, even if the order is made by a judge who did not hear the evidence at the trial, p. 648.

Cited in affirmation of the rule, in *Bauder v. Tyrrel*, 59 Cal. 100; *Blum v. Sunol*, 63 Cal. 343; *Wilson v. California Cent. R. R. Co.*, 94 Cal. 168; *Reay v. Butler*, 95 Cal. 215; *Jones v. Sanders*, 103 Cal. 679; and ruling approved in *Welland v. Williams*, 21 Nev. 233. See *Altschul v. Doyle*, 48 Cal. 535, and notes thereto, ante.



## VOLUME XLIX.

By WILLIAM FOSTER.

Revised to include citations to Volume 147, by CHARLES L. THOMPSON.

### 49 Cal. 3-6. ROOKER v. JOHNSTON.

Purchase of State Lands.—Curative act of 1870 deals with applications only, p. 5.

Cited in Oakley *v.* Stuart, 52 Cal. 534, holding that the first application filed after approved survey in the field has priority; Rowell *v.* Perkins, 56 Cal. 227, holding that the curative act of 1872 dealt not only with applications, but gave the applicant right to acquire title upon full payment; People *v.* Noyo Co., 99 Cal. 480, holding that "the act of 1872 was superseded by section 3573 of the Political Code, which is substantially the same as the act of March 24, 1870"; Klauber *v.* Higgins, 117 Cal. 464, holding that the act of 1872 as well as that of 1870 was merely intended to validate defective applications for lands subject to sale and did not apply to reserved lands.

### 49 Cal. 6-9. PEOPLE *v.* AH KONG.

Justifiable Homicide.—Instruction as to statutory burden of proof must depend on the evidence, p. 8.

Cited in People *v.* Elliott, 80 Cal. 305, holding that evidence required instructions that burden of proof was on prosecution.

Immaterial Instruction may be refused, p. 8.

Affirmed in United States *v.* Cannon, 4 Utah, 139.

Instructions on Second Degree, where proof warranted first degree, are harmless, p. 8.

Affirmed in Territory *v.* Salazar, 3 N. Mex. 241; Territory *v.* Baker, 4 N. Mex. 130, holding instructions not prejudicial to defendant; Territory *v.* Evans, 2 Idaho, 398, holding instructions on second degree correct.

### 49 Cal. 9-12. PEOPLE *v.* RODERIGAS.

Chaste Character of enticed female must be alleged and proved by prosecution; it is not presumed as against presumption of defendant's innocence, p. 10.

Cited in *People v. O'Brien*, 130 Cal. 7, holding instruction erroneous in rape case; *Dunlop v. United States*, 165 U. S. 503, holding that facts-raising presumption that defendant mailed obscene matter prevailed over presumption of his innocence. Affirmed in *Commonwealth v. Whitsaker*, 131 Mass. 225, enticement case; *State v. Lockerby*, 50 Minn. 364, 36 Am. St. Rep. 626, seduction; *Zabriskie v. State*, 43 N. J. L. 646; 39 Am. Rep. 615; seduction. Distinguished in *Ferguson v. State*, 71 Miss. 809, 810, 42 Am. St. Rep. 494, 495, holding that under seduction statute it was necessary to allege or prove chastity of seduced. Cited in note on seduction in 87 Am. Dec. 405.

#### 49 Cal. 12-13. **GALINDO v. WITTENMEYER.**

Statute of Limitations begins to run against claim on Mexican or Spanish grant, from issuance of patent, p. 13.

Affirmed, as to swamp land, in *Manley v. Howlett*, 55 Cal. 98; as to Mexican grant, in *Emeric v. Alvarado*, 64 Cal. 609; *Altschul v. O'Neill*, 35 Or. 216, noted under *Page v. Fowler*, 28 Cal. 665; note to *Schneider v. Hutchinson*, 76 Am. St. Rep. 483, on general subject.

#### 49 Cal. 13-15. **PEOPLE v. WILSON.**

Insanity of Defendant is proven by preponderance of evidence, p. 14.

Affirmed in *People v. Wreden*, 59 Cal. 395; *People v. Meassersmith*, 61 Cal. 248; *People v. Travers*, 88 Cal. 238, holding rule not changed by *Bushton* case, 80 Cal. 160, where defense was accident, or *Elliott* case, 80 Cal. 296, where plea was self-defense *People v. McNulty*, 93 Cal. 443; *People v. Ward*, 105 Cal. 343; *Jones v. People*, 23 Colo. 282; *State v. Lewis*, 20 Nev. 354. Cited in notes on insanity in 36 Am. Dec. 410; 97 Am. Dec. 176; 44 Am. Rep. 436.

#### 49 Cal. 15-18. **BLANC v. RODGERS.**

Pardon.—Discharge for good conduct does not remove disability to testify, p. 18.

Cited in *State v. Grant*, 79 Mo. 127, 49 Am. Rep. 224, holding that disability can be removed by pardon only and a statute allowing a felon to testify is not retrospective; *State v. Foley*, 15 Nev. 68, 70, 37 Am. Rep. 460, 462, to point that pardon removes disability; note on pardon in 59 Am. Dec. 580.

#### 49 Cal. 18-28. **ESTATE OF BAUBICHON.**

Antenuptial Contract controls rights of wife in estate of deceased husband, p. 28.

Cited in *Ragsdale v. Barnett*, 10 Ind. App. 485, holding an antenuptial contract gave surviving husband a life interest.

**Foreign Law cannot govern distribution of estate in California, p. 28.**

Cited in note on conflict of laws in 13 Am. Dec. 350.

**49 Cal. 29-31. WILCOX v. OAKLAND.**

Certiorari issues from county court only in aid of appellate jurisdiction, p. 31.

Cited in Spring Valley v. Bryant, 52 Cal. 135, as an example of county court issuing the writ.

**Condemnation of Land.—Power of commissioners to try title not decided, p. 31.**

Cited in City of Los Angeles v. Pomeroy, 124 Cal. 612, noted under Sacramento etc. Co. v. Moffatt, 7 Cal. 577; note to 89 Am. Dec. 435, on condemnation.

**49 Cal. 34-38. TOBIN v. GALVIN.**

**Married Woman can be sued alone only when abandoned by husband, p. 38.**

Cited in Humphrey v. Pope, 122 Cal. 255, but allowing her to sue alone for enticing away of her husband.

**49 Cal. 38-41. SLOAN v. DIGGINS.**

**Contract Annexed to Answer is deemed genuine and duly executed, where plaintiff files no affidavit to the contrary, p. 40.**

Cited in Carpenter v. Shinners, 108 Cal. 361, holding that the only effect of such admission of genuineness is to avoid necessity of proof thereof; Moore v. Copp, 119 Cal. 432, to the point that genuineness means only that the instrument "is not spurious, counterfeit, or of different import on its face from the one executed"; Parkison v. Boddicker, 10 Colo. 510, holding that in defense to promissory note answer must be verified if it sets up duress; Teitig v. Boesman, 12 Mont. 429, holding the rule inapplicable where facts outside and annexed instrument were the real defense.

**49 Cal. 41-42. PEOPLE v. BEAUCHAMP.**

**Verdict of Felony is void unless defendant is present at rendition, p. 42.**

Affirmed in People v. Higgins, 59 Cal. 358, and People v. Jung Sing, 70 Cal. 472. Cited in note to 68 Am. Dec. 224.

**Bailed Prisoner may be ordered into custody at beginning of trial for felony, or on retirement of jury, p. 42.**

Affirmed in People v. Williams, 59 Cal. 676.

**49 Cal. 42-47. MARTIN v. MATFIELD.**

**Judgment Against Law or Evidence is not ground for new trial, p. 2.**

Affirmed in Quinn v. Smith, 49 Cal. 166. Cited in Polk v. Boggs, 122 Cal. 117, holding failure to make necessary findings not reviewable in allegation in notice of intention "that the evidence is against law"; Petaluma etc. Co. v. Singley, 136 Cal. 618, on point that failure of findings to support conclusions is not objection that "evidence is against law"; Kaiser v. Dalto, 140 Cal. 169, on point that where findings upon all the issues are correct, erroneous judgment therefrom cannot be corrected by motion for new trial; Swift v. Occidental etc. Co., 141 Cal. 165, on point that such motion cannot review sufficiency of pleadings or findings to support judgment. Distinguished in Knight v. Roche, 56 Cal. 17, holding that the code phrase, "decision against law, . . . includes a case where the decision is based upon findings which do not determine all of the material issues of fact raised by the pleadings." Cited in Simmons v. Hamilton, 56 Cal. 495, 497, 498, to the point that erroneous conclusions of law from findings of fact are a decision against law and ground for new trial; Sawyer v. Sargent, 65 Cal. 260, to the point that the motion should be directed at the decision, not at the judgment; to same effect in Little v. Jacks, 67 Cal. 165. Affirmed in Boston Co. v. McKenzie, 67 Cal. 486. Cited in Estate of Doyle, 73 Cal. 571, applying the same rule to a case where material allegations in pleading not being denied, "the facts alleged must be assumed to exist." Affirmed in Mazkewitz v. Pimentel, 83 Cal. 451. Cited in Brison v. Brison, 90 Cal. 328, and Kirman v. Hunnewill, 93 Cal. 526, to the point that insufficiency of findings to support judgment can be raised only on appeal from the judgment. Affirmed in Curtis v. Walling, 2 Idaho, 385; Froman v. Patterson, 10 Mont. 113. Cited in Marshall v. Golden Fleece Co., 16 Nev. 174, to the point that the decision of a court or referee is against law if inconsistent with the issues, and new trial is the remedy; Simpson v. Ogg, 18 Nev. 34, to the point that on appeal from refusal of new trial, errors in judgment roll cannot be reviewed; and Welland v. Williams, 21 Nev. 235, to the point that error in implied findings is not reviewable if no request for findings was made below.

**49 Cal. 47-49. BRYANT v. WILCOX.**

**Notice to Indorser of note held waived, p. 48.**

Cited in note on this point in 14 Am. Dec. 189.

**49 Cal. 49-50. WELCH v. KENNY.**

**Novation is not within statute of frauds, p. 50.**

Affirmed in Mitts v. McMorran, 64 Mich. 669, as to promise to pay to creditor of third party debt due latter by promisor.

**49 Cal. 50-56. KREICHBAUM v. MELTON.**

Foreclosure Sale cannot include after-acquired rights of mortgagor's vendee, p. 54.

Distinguished in Rice v. Kelso, 57 Iowa, 119, holding that a mortgage included after-acquired land, and was prior to a later judgment lien.

Cross-complaint, like complaint, must contain facts essential for affirmative relief, p. 55.

Affirmed in Brodrib v. Brodrib, 56 Cal. 566; Coulthurst v. Coulthurst, 58 Cal. 240; Loup v. California Southern Co., 63 Cal. 100; Winter v. McMillan, 87 Cal. 283; 22 Am. St. Rep. 247. Cited in note to 76 Am. Dec. 550, on equitable relief.

**49 Cal. 56-57. PEOPLE v. IVEY.**

Criminal Jury are not judges of law, p. 57.

Affirmed in State v. Burpee, 65 Vt. 28; 36 Am. St. Rep. 795.

**49 Cal. 57-58. PEOPLE v. BEAVER.**

Possession of Stolen Goods is not conclusive evidence of guilt of possessor, p. 58.

Affirmed in People v. Clough, 59 Cal. 441; Metz v. State, 46 Neb. 555; Gravely v. Commonwealth, 86 Va. 401. Cited in note on this point in 2 Am. St. Rep. 397.

**49 Cal. 59-67. SAUNDERS v. SCHMAELZLE.**

Recording.—Description in deed is not vitiated by erroneous statement that another deed was "recorded," p. 66.

Cited in McCullough v. Olds, 108 Cal. 534, holding that a map, referred to as "recorded," may be identified by extrinsic evidence, and the fact that it is not recorded is immaterial.

Surviving Trustee may execute power to convey conferred by trust deed, p. 67.

Cited in notes on this point in 64 Am. Dec. 201, and 19 Am. St. Rep. 276.

**49 Cal. 67-70. PEOPLE v. SOTO.**

Confession must be shown by prosecution to have been voluntary, and defendant may show it was not, p. 69.

Cited in Jackson v. State, 83 Ala. 78, and State v. Kinder, 96 Mo. 551, to the point that defendant has right to show confession was involuntary; Lefevre v. State, 50 Ohio St. 588, holding burden is on accused in this respect; State v. Moran, 15 Oreg. 265, holding that the question is Notes Cal. Rep.—155.

for the court; notes on confessions in 6 Am. St. Rep. 244, 245, and 41 Am. St. Rep. 523.

**Penal Statutes.—Construction** is not strict since codes, p. 70.

Cited in Snell v. Bradbury, 139 Cal. 382, noted under *Ex parte Gutierrez*, 45 Cal. 429.

#### 49 Cal. 74-76. VOLLM v. BUTLER.

**Forcible Entry and Detainer.**—Action can be maintained only by one in actual peaceable occupation, p. 75.

Affirmed in Castro v. Tewksbury, 69 Cal. 564; Johnson v. West, 41 Ark. 541; Milligan v. Cuff, 14 Mont. 373. Cited in note on this point in 18 Am. Dec. 147.

#### 49 Cal. 76-87. ESTATE OF DELANEY.

**Confirmation of Executor's Sale** is not required by Probate Act, where he holds fee in trust, pp. 84-86.

Cited in Estate of Pforr, 144 Cal. 126, on point that executors holding as trustees do not require confirmation of their sales: Estate of Walker, 6 Utah, 373, noted under Norris v. Harris, 15 Cal. 255; Estate of Durham, 49 Cal. 495, and Perkins v. Gridley, 50 Cal. 99 (same case, reported twice), holding that where power of sale under a will is not coupled with an interest, code provisions as to notice, account and confirmation of sale must be complied with by executor. Affirmed in Estate of Williams, 92 Cal. 185, holding that same rule applies to such sales under section 1561 of Code of Civil Procedure, and confirmation proceedings thereon are without jurisdiction and void. Distinguished in Bennalack v. Richards, 116 Cal. 408, holding that power of sale under a will did not create any trust in executors, and a sale by them without confirmation by court was void. Affirmed in Brown v. Brown, 7 Oreg. 299, holding that a devise in trust to pay debts conferred power coupled with an interest, and sale by the trustee required no confirmation.

**Distribution of Trust Estate** refused, because premature, pp. 84, 87.

Cited in Estate of Dolan, 79 Cal. 68, holding distribution of a trust estate improper, because the beneficiary had only a right to enforce the trust; and Blatchford v. Newberry, 99 Ill. 49, holding that the testator intended no distribution till after death of certain heirs; the dissenting opinion in latter case, pages, 85, 105, distinguishing the principal case.

**Devisee Named as Trustee and Executor** holds as trustee, p. 86.

Cited in Estate of Higgins, 15 Mont. 501, holding that one who is both executor and trustee does not cease to be executor until approval of his accounts; Hunt v. Hunt, 11 Nev. 450, holding that where husband devised everything to wife, leaving it to her to provide for their chil-

dren, she took absolutely, not as trustee, and need not account to the children for her sales.

General Citation.—*Farmington Sav. Bank v. Curran*, 72 Conn. 349.

**49 Cal. 87-90. PASTENE v. ADAMS.**

**Intervening Cause of Damage does not lessen liability of originator of proximate cause, p. 90.**

Affirmed in *Muller v. Hale*, 138 Cal. 168, applying rule to case of concurrent negligence; *Barrett v. Southern Pacific Co.*, 91 Cal. 303, 25 Am. St. Rep. 190, holding that liability of railway company for leaving a turntable exposed and unguarded causing injury to a boy, was "not affected by the fact that the table was set in motion by the negligent act of other boys"; *Lewis v. Terry*, 111 Cal. 45, 52 Am. St. Rep. 148, holding seller of folding-bed liable to a lodger of the buyer for injury from collapse of the bed, there being no proof that the buyer knew of an inherent defect that would make him "a culpable intervening cause"; *Martin v. North Star Works*, 31 Minn. 410, holding that where an iron company piled material too near a railway track, and a passing train pushed the material against a signal tower, injuring the occupant, the iron company was responsible, notwithstanding negligence of railway company in not removing the obstruction; *Welch v. McAllister*, 15 Mo. App. 498, holding owner of packing-house liable for injury to a customer from falling through an open hatchway; *Bunnell v. Stern*, 122 N. Y. 544, 19 Am. St. Rep. 522, holding the proprietor of a cloak store liable for loss of a customer's old wrap while trying on a new one; *Boss v. Northern Pacific Co.*, 2 N. Dak. 139, 33 Am. St. Rep. 763, holding a railway company liable for injury to a sectionhand, riding on a car step, from contact with a switch stand target, though an intervening cause was the crowding of plaintiff into a dangerous place by his fellow workmen. Affirmed, also, in *Ouverson v. Grafton*, 5 N. Dak. 291, holding a city liable for allowing a threshing engine to stand on a principal street, causing a horse to shy and upset his carriage, though an intervening cause was a projecting platform scale against which the carriage was thrown; *Harriman v. Pittsburg Co.*, 45 Ohio St. 34, 4 Am. St. Rep. 522, holding a railway company liable for explosion of a signal torpedo, left on the track by an employee, causing injury to a boy, though the intervening cause was the careless handling of the torpedo by another boy, for the latter act was "a contributing condition which defendant's servants ought to have anticipated as a probable consequence of their negligent act or omission"; *Atkinson v. Goodrich Co.*, 60 Wis. 166, 50 Am. Rep. 355, holding a steamer liable for fire on shore caused by sparks from its smokestack igniting shavings in a planing-mill, from which the fire spread to plaintiff's building, because negligence at the planing-mill was not a culpable intervening cause; *Union Pacific Co. v. Callaghan*, 56 Fed. Rep. 992, holding a railway company liable for injury to an employee on a repair train

that fell through a bridge from failure of the conductor to stop and inquire before crossing, as required by the company's rule; and the engineer's failure to see and respond to a danger signal at the bridge was not a culpable intervening cause, for it did not interrupt the natural and probable result of the conductor's neglect. Affirmed, also, in Missouri Pacific Co. v. Moseley, 57 Fed. Rep. 926, holding that negligence of one walking unlawfully on the track in a railway yard, struck by an engine that failed to ring its bell, was proximate cause of his injury, and the engineer's neglect "simply failed to interrupt the natural sequence of events"; and The Joseph Thomas, 81 Fed. Rep. 588, holding a ship liable for injury to a stevedore in the hold, upon whom fell a ship's keg placed on the hatch cover to dry, the fact that somebody tipped the keg over being no excuse for negligence in putting it there. Distinguished in State v. Finn, 11 Mo. App. 407, holding a sheriff liable for nominal but not actual damages for false return of summons, because the wrongful act of the court in a later entry of judgment was proximate cause of injury to judgment debtor, being "an independent, responsible human agency, interrupting causal connection between a prior wrong and a subsequent damage"; Seale v. Gulf Co., 65 Tex. 279, 57 Am. Rep. 604, holding that where sparks from a train ignited brush, and plaintiff's daughter was burned to death in trying to prevent the fire from reaching their house, the railway company was not liable in damages, for while it must anticipate the direct results of negligence of its employees, it was not bound to anticipate that "the life of any one attempting in a careful manner to extinguish the flame would be sacrificed." Cited in Nugent v. Wann, 1 McCrary, 443, in charge to jury, on relative liabilities for injury to a policeman chasing a criminal at night through a private lane, the verdict not being reported; Holwerson v. St. Louis etc. Ry. Co., 157 Mo. 230; 36 Am. St. Rep. 845, an extended note on proximate and remote damage.

#### 49 Cal. 90-94. MATTHAI v. MATTHAI.

Corroboration of Plaintiff in Divorce held sufficient, p. 94.

Cited in Cooper v. Cooper, 88 Cal. 48, holding that the corroboration need not be on every point; and note in 30 Am. Dec. 549.

#### 49 Cal. 94-101. MARTIN v. PARSONS.

Court commissioner, who drafted fraudulent tax decree and purchased at sale, is enjoined from setting up such decree as defense in ejectment, pp. 99, 100.

Affirmed in same case on second appeal, 50 Cal. 501. Cited in Great West Co. v. Woodmas Co., 12 Colo. 60, 13 Am. St. Rep. 216, to the point that where judgment by default was taken without proper service, a purchaser at execution sale cannot rely on the judgment; Roush v. Fort, 2 Mont. 485, holding that a purchaser at sheriff's sale was not affected

by a fraudulent excess in the judgment, not objected to by judgment debtor; Handley v. Jackson, 31 Oreg. 556, enjoining an execution, because the judgment debtor's attorney was not authorized to appear for him in the suit; Dowell v. Goodwin, 22 R. I. 293, 84 Am. St. Rep. 847, enjoining enforcement of judgment based on fraud of officer in serving writ; note in 21 Am. Dec. 204, on officer's knowledge of defective process; notes in 73 Am. Dec. 693, and 54 Am. St. Rep. 223, 244, on equitable relief against a judgment.

**49 Cal. 101-102. HARTMAN v. OLVERA.**

Conditional Order Opening Default must be obeyed within time fixed, p. 102.

Cited in State v. Harrison, 53 Mo. App. 348, holding that an order setting aside dismissal on terms must be complied with in a reasonable time.

**49 Cal. 103-105. FRINK v. ALSIP.**

Adverse Possession by Wife cannot exist during coverture, as to premises rented by husband for their home, p. 105.

Cited in Mauldin v. Cox, 67 Cal. 390, holding that during coverture, and while he remains head of the family, husband cannot claim homestead adversely to wife; and note on this point in 18 Am. St. Rep. 115.

Secondary Evidence, admitted at trial without objection, cannot be questioned on appeal, p. 105.

Cited in Wright v. Roseberry, 81 Cal. 91, holding that where ownership of land was proved by showing certificate of purchase after issuance of patent, it could not be objected on appeal that patent was best evidence.

General Citation.—Chicago etc. R. Co. v. Keegan, 185 Ill. 230.

**49 Cal. 106-108. CLARK v. GRIDLEY.**

Appeal from Judgment, on ground that evidence does not support decision, must be taken within sixty days, p. 108.

Cited in Brown v. Willoughby, 5 Colo. 8, to the point that there is no review of evidence on appeal from judgment.

**49 Cal. 109-111. MOORE v. JACKSON.**

Mechanic's Lien attaches for repairs ordered by tenant unless landlord disclaims responsibility in statutory mode, p. 111.

Affirmed in West Coast Co. v. Newkirk, 80 Cal. 279; Hines v. Miller, 122 Cal. 521, quoting Evans v. Judson, 120 Cal. 284, holding that landlord had sufficient notice of proposed improvement; Rosina v. Trowbridge, 20 Nev. 120, holding that owner cannot substitute another notice

for statutory one; *Post v. Miles*, 7 N. Mex. 335, in dissenting opinion, a majority of the court holding that lien claimant need not aver relation between owner and one who ordered work; *Graff v. Portland etc. Mineral Co.*, 12 Colo. App. 455; note 61 Am. Dec. 700.

**49 Cal. 116-117. FLUBACHER v. KELLY.**

Refusal to Strike Out Cost Bill can be reviewed only on appeal from judgment, p. 117.

Distinguished in *Empire Co. v. Bonanza Co.*, 67 Cal. 411, holding that order refusing to tax cost bill after final judgment can be reviewed only by direct appeal from the order; and *Orr v. Haskell*, 2 Mont. 351, holding that refusal to retax costs is not appealable.

**49 Cal. 117-121. ROOD v. McCARGAR.**

Hogs Damage Feasant may be held till damage is paid, p. 120.

Cited in note on estrays in 8 Am. St. Rep. 271.

Constitutional Part of Statute may be upheld, if severable from remainder, p. 120.

Affirmed in *Hale v. McGettigan*, 114 Cal. 121, as to County Government Act of 1893.

**49 Cal. 126-128. BATES v. GAGE.**

Verdict in Equity is advisory only, and motion for new trial made before filing of findings is premature, p. 128.

Cited in *Reclamation Dist. v. Thisby*, 131 Cal. 574, holding that action in such case is one tried by the court and not by the jury; *Warring v. Freeear*, 64 Cal. 56, holding that where a verdict in equity does not respond to all the issues, the court must make findings to cover those omitted. Affirmed in *Spottiswood v. Weir*, 66 Cal. 529. Cited in *Haggan v. Raymond*, 67 Cal. 303, to the point that a verdict in equity may be disregarded by the court; *Dominguez v. Mascotti*, 74 Cal. 270, to the point that premature notice of motion for new trial is ineffectual; *Bell v. Marsh*, 80 Cal. 414, to the point that "time to give the notice does not begin to run until the court has either adopted or rejected the findings of the jury"; *Arnold v. Sinclair*, 11 Mont. 567, 28 Am. St. Rep. 494, to the point that ordering a reference does not necessarily determine whether a trial is ended; *Simpson v. Harris*, 21 Nev. 376, to the point that motion for new trial must be made upon findings, not upon verdict; *Smith v. Richardson*, 2 Utah, 427, to the point that equity verdict is only advisory.

**49 Cal. 128-130. HOGAN v. CENTRAL PACIFIC COMPANY.**

Negligence of Fellow-servant.—Master not liable unless negligent in selecting the servant at fault, p. 130.

Cited in dissenting opinion in *Brown v. Central Pacific Co.*, 68 Cal. 176, a majority of the court holding that it could not be presumed on demurrer that an injury was caused by negligence of fellow-servant, when complaint averred negligence of employer as cause of action; *Brown v. Sennett*, 68 Cal. 228, 58 Am. Rep. 10, holding that foreman, charged by employer with entire supervision of job was not fellow-servant of one of his men injured by his negligence, but employer was liable; *Congrave v. Southern Pacific Co.*, 88 Cal. 365, holding demurrer properly sustained, because it appeared on face of complainant that brakeman on train, killed by negligence of conductor, was fellow-servant; *Stevens v. San Francisco & N. P. Co.*, 100 Cal. 567, holding that engineer and oiler of steamer were fellow-servants; *Randolph v. Baltimore & Ohio Co.*, 109 U. S. 484, holding engineer and brakeman of different trains fellow-servants; and notes on this point in 36 Am. Dec. 279; 99 Am. Dec. 627; 16 Am. Rep. 502.

#### 49 Cal. 131-136. BRAGG v. SHAIN.

Surety on Contractor's Bond is released by owner's breach of stipulation to retain part of price till contract is performed, p. 135.

Affirmed in *Kiessig v. Allspaugh*, 91 Cal. 233. Cited in *County of Glenn v. Jones*, 146 Cal. 522, sureties on contractor's bond entirely released by premature payment without their consent, of first installment before all materials furnished, as per contract, where contractor, on receiving such payment, abandoned contract leaving materials unpaid for; *Parke Co. v. White River Co.*, 110 Cal. 665, holding that one who gave mortgage, as surety for performance of contract between mortgagee and third parties, was released by alterations made in contract without his consent; *Eppinger v. Kendrick*, 114 Cal. 626, holding that joint maker of note, who was really only surety, was released by failure of payee to apply funds to payment of note, as directed by principal maker. Cited in *Stillman v. Wickham*, 106 Iowa, 590, holding surety released by provisions as to extra work; *Fidelity etc. Assn. v. Dewey*, 83 Minn. 393, applying principle to sureties on agent's bond when stipulations are broken by consent of principal and agent; *Hand etc. Co. v. Marks*, 36 Or. 531, 532, permitting surety so released to file lien claims thereafter on the building; *City Council v. Ormond*, 51 S. C. 126, holding sureties so released under facts stated; *Peters v. Mackay*, 20 Wash. 174, ruling similarly when payments were in excess of contract stipulations (but cf. *Stephens v. Elver*, 101 Wis. 398, holding aliter as to loans by owner to contractor); *Mundy v. Stevens*, 61 Fed. 84, holding sureties released by supplemental agreement as to payment; *United States v. Free*, 92 Fed. 303, stating general rules as to release of such sureties. Distinguished in *Foster v. Gaston*, 123 Ind. 107, holding that where contractor took note in part payment from owner, which proved uncollectible, surety was not discharged, because there was no fraud, and he had consented.

Affirmed in *Backus v. Archer*, 109 Mich. 668; *Simonson v. Grant*, 36 Minn. 443; *Bell v. Paul*, 35 Neb. 245; *Gray v. School District*, 35 Neb. 448; *Board of Commrs. v. Branham*, 57 Fed. Rep. 182. Cited in *Pioneer Co. v. Freeburg*, 59 Minn. 234, holding that surety on indemnity bond, given to mortgagee at date of mortgage, was released by overcharges for interest and expenses by mortgagee; *Evans v. Graden*, 125 Mo. 77, to the point that surety is discharged if changes are made in contract without his consent; *Burley v. Hitt*, 54 Mo. App. 276, holding that surety on bond, given by agent for faithful performance of duties, is discharged where employer allows agent to exceed authority as to retaining funds; to same effect, as to agent incurring debts, in *Kimball v. Baker*, 62 Wis. 531; *Brennan v. Clark*, 29 Neb. 399, holding that where owner paid contractor without requiring architect's certificate as stipulated, surety on contractor's bond was not responsible for loss sustained thereby; *Truckee Lodge v. Wood*, 14 Nev. 310, holding that owner's failure to pay contractor as agreed discharged surety on latter's bond; *Marquette Co. v. Wilson*, 109 Mich. 230, holding that failure of owner to retain percentage of price till work was completed reduced surety's obligation pro tanto; *Graves v. Merrill*, 67 Minn. 475, holding surety on contractor's bond not discharged, for owner's failure to retain part of price was not a breach; *Kerschbaum v. Blair*, 98 Va. 45.

**49 Cal. 136. GALLARDO v. HANNAH.**

Certiorari.—Petition to supreme court must show sufficient reason why it was not addressed to a lower court, p. 136.

Affirmed in *Everitt v. Board of Commrs.*, 1 S. Dak. 371. Cited in *People v. City*, 193 Ill. 520, quoting *Everitt v. Board*, 1 S. Dak. 365.

**49 Cal. 137-138. LYNCH v. BRIGHAM.**

Federal Receiver's Receipt for price of public lands, as proof of plaintiff's title in ejectment, held insufficiently found, p. 138.

Distinguished in *Witcher v. Conklin*, 84 Cal. 503, holding such receipt sufficient proof, saying that in the principal case "the only question decided related to the sufficiency of a finding."

**49 Cal. 139-141. STOCKTON COMPANY v. GALGIANI.**

Condemnation of Land is a special case wherein appeal lies, p. 140.

Affirmed in *People v. Pfeiffer*, 59 Cal. 90, holding that appeal cannot be taken by one not a party to the action or not prejudiced by the judgment. Cited in *Lord v. Dunster*, 79 Cal. 484, holding that supreme court has appellate jurisdiction in contested election cases.

Value of Condemned Land cannot be based on annual profit from particular use, p. 140.

Cited in *San Diego Co. v. Neale*, 88 Cal. 62, holding that market value

of land may be enhanced by fact that it is valuable for particular purpose for which condemnation is sought; Los Angeles Co. v. Rumpp, 104 Cal. 27, to the point that comparative value of land before and after construction of railway cannot be considered in proceedings by railway to condemn it; Newburyport Co. v. Newburyport, 168 Mass. 554, holding that market value is the test, in proceedings by a city to take over the plant of a water company.

**Condemnation.**—Judgment affirmed and reversed in parts, p. 140.

Cited in Bigelow v. Draper, 6 N. Dak. 173, affirming power of appellate court to make such order under local statutes.

#### 49 Cal. 141-146. MAGEE v. KAST.

**Assumpsit** may be pleaded under code, p. 145.

Cited in note on this point in 57 Am. Dec. 545.

**Contract.**—Conditions attached to signature of one party become part of the contract if agreed to by the others, p. 145.

Cited in Schroeder v. Pissio, 128 Cal. 213, affirming finding that signature was unconstitutional, when evidence was conflicting, as in main case.

#### 49 Cal. 149. HOLLOWAY v. GALLIAC.

**Death of Respondent**, after submission of appeal but before decision, causes decision to be entered as of date of submission, p. 149.

Cited to similar effect in head-note to Mayor v. Dasher, 90 Ga. 197.

**Remittitur** may be recalled when causes decided after death of one of the parties, p. 149.

Cited in Trumpler v. Trumpler, 123 Cal. 252, noted under Rowland v. Kreyenhagen, 24 Cal. 52.

#### 49 Cal. 152-155. ESTATE OF McKINLEY.

**Allowance of Probate Claim** has force and effect of a judgment, p. 154.

Cited in Estate of Glenn, 74 Cal. 568, holding that an allowed claim draws interest; Holt Co. v. Ewing, 109 Cal. 357, holding that where seller of goods under conditional sale had his claim for unpaid balance of price allowed against estate of buyer, his election of this remedy barred later proceedings to recover the goods.

**Facts Outside Issues** will not be presumed in support of judgment, p. 155.

Cited in Ortega v. Cordero, 88 Cal. 226, holding that findings outside the issues are disregarded on appeal from the judgment.

**49 Cal. 155-156. SOUTH FORK COMPANY v. SNOW.**

Nonsuit granted for misjoinder of plaintiffs, p. 155.

Cited in note on nonsuit in 24 Am. Dec. 624.

**49 Cal. 157-158. McQUILLAN v. DONAHUE.**

Directory Statute.—Code requirement as to written decision in jury-waived case is directory, p. 158.

Affirmed as to written decision in McLennan v. Bank, 87 Cal. 571; as to time of rendering judgment in justice's court, in Heinlen v. Phillips, 88 Cal. 559; as to time of deciding motion on new trial, in Gomer v. Chaffee, 5 Colo. 386; as to filing transcript on criminal appeal, in Territory v. Flowers, 2 Mont. 394. Cited in Emerson v. Bigler, 21 Mont. 203, noted under Keller v. Sutrick, 22 Cal. 472.

**49 Cal. 158-159. LAMONT v. SOLANO COUNTY.**

Attorney Appointed by Court to defend criminal cannot recover fees and expenses from county, p. 159.

Cited in Washoe Co. v. Humboldt Co., 14 Nev. 128, holding that an appointed attorney, who defends a criminal in two counties, is entitled to statutory fee for each county. Affirmed in Presby v. Klickitat Co., 5 Wash. 332, as to assigned attorney, and Sears v. Gallatin Co., 20 Mont. 467, as to member of sheriff's posse.

**49 Cal. 159-163. EX PARTE LE BUR.**

Federal Prisoner cannot be released on habeas corpus by state court, p. 163.

Distinguished in Ex parte State, 73 Ala. 509, holding that a prisoner held on extradition from another state is not within the rule. Cited in note on this point in 37 Am. Dec. 203.

**49 Cal. 163-166. QUINN v. SMITH.**

Counterclaim should contain all substantive averments necessary in a complaint, p. 165.

Cited in Clay v. Carroll, 67 Cal. 21, holding facts sufficiently stated in counterclaim; and note on this point in 89 Am. Dec. 491.

Judgment Contrary to Law or Evidence is not an error of law for which new trial can be granted, p. 166.

Affirmed in Mazkewitz v. Pimentel, 83 Cal. 451.

**49 Cal. 166-170. PEOPLE v. COTTA.**

Challenge for Implied Bias must specify statutory cause, p. 169.

Affirmed in People v. Welch, 49 Cal. 178; People v. Cochran, 61 Cal.

549; *People v. Thiede*, 11 Utah, 271. Cited in *People v. Owens*, 123 Cal. 486, noted under *People v. Dick*, 37 Cal. 277.

**Implied Bias.**—Decision of lower court on challenge is final, p. 169.

Affirmed in *State v. Hing*, 16 Nev. 309.

**Actual Bias.**—Decision of lower court on challenge is final, where no exception is taken to rulings on this issue, p. 169.

Affirmed in *People v. Vasquez*, 49 Cal. 562; *People v. Taing*, 53 Cal. 603; *People v. Riley*, 65 Cal. 108; *People v. Goldenson*, 76 Cal. 346; *People v. Bemmerly*, 87 Cal. 120; *State v. Gray*, 19 Nev. 218; *People v. Thiede*, 11 Utah, 273. Cited in *Yates v. State*, 26 Fla. 501, to the point that refusal of lower court to grant new trial, for alleged bias of jurors, was correct.

**Eavesdropping**, even if an offense at common law, does not discredit evidence of a police officer obtained by it, p. 169.

Cited in *Shields v. State*, 104 Ala. 40, 53 Am. St. Rep. 21, holding that although search of a person carrying a concealed weapon was illegal, the evidence obtained thereby was admissible to prove the charge.

**Declarations of Coconspirator** are evidence against defendant, p. 170.

Affirmed in *People v. Brown*, 59 Cal. 352; *Baker v. State*, 7 Tex. App. 614; *Cox v. State*, 8 Tex. App. 302.

**Witness may Refresh Memory** by reference to written memoranda, p. 170.

Affirmed in *People v. Le Roy*, 65 Cal. 614; *People v. Amerman*, 118 Cal. 32, holding that a stenographer may refer to his notes to refresh his memory.

**Instruction Assuming Erroneous Fact** should not be given, p. 170.

Cited in *People v. Buster*, 53 Cal. 613, holding that an instruction assuming the fact in issue is erroneous.

**Intention to Kill** may precede killing "by no appreciable space of time," p. 170.

Cited in note on this point in 18 Am. Dec. 783.

#### 49 Cal. 171-173. **PEOPLE v. ESTRADO.**

**Statements in Defendant's Presence**, by a witness, are evidence only so far as defendant assented, p. 173.

Affirmed in *People v. Ah Yute*, 53 Cal. 615. Cited in *People v. Amaya*, 134 Cal. 536, noted under *People v. McCrea*, 32 Cal. 98; *People v. Ah Yute*, 54 Cal. 90, 91, holding such statements inadmissible without proof of defendant's conduct in response thereto; to same effect in *People v. Louie Foo*, 7 Tex. App. 264.

**Instruction Limiting Effect of Evidence** should be given, where evidence is admissible only for limited purpose, p. 173.

Cited in *Williams v. Hartford Co.*, 54 Cal. 449, holding that if no such instruction is asked, objecting party "cannot afterward complain"; *Smith v. Whittier*, 95 Cal. 294, holding evidence of negligent servant admissible as to fact that employer had cautioned him, but the jury must be instructed to consider the evidence solely for that purpose. Affirmed, as to statements by witness in defendant's presence, in *People v. Mallon*, 103 Cal. 514, 515.

Instruction on Manslaughter properly refused, where evidence did not warrant it, p. 173.

Cited in *Territory v. Gay*, 2 Dak. Ter. 142, holding correct an instruction to find murder or manslaughter.

**49 Cal. 174-185. PEOPLE v. WELCH.**

Challenge to Panel of Jurors can be taken only on statutory ground, p. 178.

Cited in *People v. Fellows*, 122 Cal. 236, holding challenge to panel summoned by elisor insufficient when elisor not alleged to have been biased or prejudiced; *Bruner v. Superior Court*, 92 Cal. 253, 267, holding prohibition the proper remedy for restraining prosecution on indictments found by a grand jury illegally summoned by an elisor; *People v. Wallace*, 101 Cal. 283, holding that challenge to special venire, because they were nonresidents, was properly overruled; *Mabry v. State*, 50 Ark. 497, holding that ordering talesmen to be summoned in defendant's absence was not a statutory ground of challenge; *State v. Kent*, 4 N. Dak. 601, holding it unnecessary to consider bias of sheriff who summoned panel, because new trial was ordered, and new sheriff had taken office.

Instruction assuming that a killing was murder is proper, where there is no evidence of manslaughter, p. 182.

Cited in *People v. Fellows*, 122 Cal. 236, holding refusal to charge on manslaughter not error when evidence would not support conviction therefor; *City v. Gildmacher*, 133 Cal. 398, discussing and defining instructions on "matters of fact"; *State v. Morgan*, 22 Utah, 170, noted under *People v. Bealoba*, 17 Cal. 399; *Territory v. Gay*, 2 Dak. Ter. 144, holding correct an instruction to find verdict for murder or manslaughter; *Hogan v. Shuart*, 11 Mont. 512, holding that a charge on uncontested matters of fact was proper; and note on charging facts in 72 Am. Dec. 543.

Charge to Jury must be taken as a whole, pp. 182, 183.

Cited in *People v. Bernard*, 2 Idaho, 180, manslaughter; *United States v. Cannon*, 4 Utah, 140, polygamy; *State v. Bartmess*, 33 Or. 126, noted under *People v. Doyell*, 48 Cal. 85.

Hypothetical Opinion of Juror, if not malicious does not disqualify him, p. 183.

Cited in *State v. Walton*, 74 Mo. 282, holding juror not disqualified, *State v. Cullen*, 82 Mo. 636, in dissenting opinion, a majority of the court holding a juror disqualified from reading newspaper report of evidence; dissenting opinion in *State v. Bryant*, 93 Mo. App. 294, holding juror competent.

**Penalty for Murder** in first degree is death, unless jury commute to imprisonment for life, p. 185.

Cited in *People v. Atherton*, 51 Cal. 496, holding that this power of the jury necessitates careful instructions to them; *People v. Brick*, 68 Cal. 192, holding that the jury can exercise this discretion only when satisfied that lighter penalty should be imposed; *People v. McCurdy*, 68 Cal. 582, holding that jury were properly instructed as to penalty; *People v. French*, 69 Cal. 179, holding that the penalty is death where the jury fail to fix any; *Territory v. Miller*, 4 Dak. Ter. 179, holding that where defendant pleads guilty penalty is death.

**General Citation.**—*Huntley v. Territory*, 7 Okla. 68.

**49 Cal. 185-188. RENTON v. CONLEY.**

**Mechanic's Lien.**—Materialmen and laborers have liens only on unpaid balance due contractor when notice of liens was given, p. 188.

Affirmed in *Wells v. Cahn*, 51 Cal. 424. Cited in *Dingley v. Greene*, 54 Cal. 335, holding that creditors of an absconding contractor had no liens for amount paid by owner to another contractor to finish the job; *Rosenkranz v. Wagner*, 62 Cal. 154, holding that where complaint on lien for labor and materials failed to allege balance due to original contractor or notice to owner of plaintiff's claim, it stated no cause of action; *Whittier v. Hollister*, 64 Cal. 284, holding that lien for materials furnished to subcontractor was only enforceable against unpaid balance due original contractor; *Walsh v. McMenomy*, 74 Cal. 359, holding that where owner pays balance to contractor before it is due, owner is liable to extent of amount prematurely paid. Distinguished in *Kellogg v. Howes*, 81 Cal. 175, holding owner liable for labor and material furnished to subcontractor, because contract was not recorded under section 1183 of the Code of Civil Procedure. Cited in *Gibson v. Wheeler*, 110 Cal. 245, holding that promise by owner to pay for materials furnished to contractor made after they were furnished, did not create a lien. Disapproved in *Henry Co. v. Evans*, 97 Mo. 61, holding that a subcontractor has a lien, notwithstanding payment to contractor of full contract price, and overruling *Henry v. Rice*, 18 Mo. App. 514, which approved the principal case; also, in *Hunter v. Truckee Lodge*, 14 Nev. 32-34, holding that subcontractors have a direct lien regardless of payments to original contractor. Distinguished in *Jones v. Great Southern Co.*, 86 Fed. Rep. 382, saying that the principal case raised no constitutional questions, holding that a statute giving direct lien to subcontractors, without regard to amount due original contractor, was constitutional, and overruling

same case in 79 Fed. Rep. 482, which had held the contrary and cited the principal case.

**49 Cal. 189-192. MEAGHER v. THOMPSON.**

**Power of Attorney** from husband to wife, to convey her separate property, is invalid, p. 191.

Cited in Gagliardo v. Dumont, 54 Cal. 500, holding that deed of homestead by wife and attorney in fact of husband was void; Rico v. Brandenstein, 98 Cal. 469, 35 Am. St. Rep. 196, holding that under the law existing in 1857, a wife could not convey her separate property directly to her husband; note in 52 Am. Dec. 776, on signature to power of attorney; and note to 81 Am. Dec. 778, on execution of power of attorney. Denied in Rogers v. Roberts, 13 Tex. Civ. App. 191, sustaining deed of wife's land executed by her personally, and as her husband's attorney in fact.

**49 Cal. 193-197. WILCOXSON v. MILLER.**

**Prior Recording** of deed from judgment debtor, after docketing of judgment against him, gives the deed priority over sheriff's deed on the judgment, recorded later, p. 195.

Cited in Vaughn v. Schmalsle, 10 Mont. 197, holding lien of mortgage, delivered prior to docketing of a judgment but not recorded till after, has priority over title of purchaser at execution sale on the judgment.

**Power of Attorney** to sell land, held to give no right to execute conveyance, p. 195.

Cited in Hunter v. Sacramento Valley Co., 7 Saw. 50, 11 Fed. Rep. 16, holding that subsequent ratification of the power referred to did not validate it; and note to 68 Am. Dec. 237.

**49 Cal. 198-202. JOHNSTON v. BUSH.**

**Homestead.**—Under act of 1851, after death of wife, her interest passed to her children, subject to husband's homestead claim, p. 201.

Cited in Plass v. Plass, 121 Cal. 134, noted under Broad v. Broad, 40 Cal. 493; Johnston v. San Francisco Savings Union, 75 Cal. 144, 7 Am. St. Rep. 135, holding that in such case the husband took as surviving partner, and must settle up affairs, not create new burdens; Smith v. Shrieves, 13 Nev. 325, 326, holding that after father's death, children had title and right of possession to his half of homestead; Rodgers v. Roberts, 13 Tex. Civ. App. 191; note to 60 Am. Dec. 614, on abandonment; and note to 65 Am. Dec. 483, on joint tenancy.

**49 Cal. 202-208. CAMARILLO v. FENLON.**

**Fraud of Lessor**, as defense for refusal of lessee to surrender, not proven, p. 206.

Cited in *Voss v. King*, 33 W. Va. 241, holding tenant had failed to show fraud or mistake, and was estopped to deny landlord's title.

**Lessee may Abandon**, if landlord fails to deliver the whole land; and rent cannot be apportioned, p. 207.

Cited in *Skaggs v. Emerson*, 50 Cal. 6, holding landlord not entitled to rent, because he had evicted tenant from part of land; *Dengler v. Michelssen*, 76 Cal. 127, holding landlord's failure to put tenant in possession justified latter in abandonment; *Brandt v. Phillipi*, 82 Cal. 641, holding that where landlord failed to deliver possession, it was "fairly inferable" that tenants had waived their rights; and note on this point in 38 Am. St. Rep. 482.

**Ejectment may be Continued** in plaintiff's name, if he sells pending suit, p. 208.

Cited in *Miller v. Luco*, 80 Cal. 284, to the point that either plaintiff or his vendee may continue suit; and *Elliot v. Teal*, 5 Saw. 190, holding that under Oregon statutes the suit may be continued in name of original plaintiff for benefit of whom it may concern; *Dundee etc. Co. v. Hughes*, 89 Fed. 185, noted under *Moss v. Shear*, 30 Cal. 475; *Rodgers v. Pitt*, 96 Fed. 672, discussing various methods of procedure in case of transfer of interest pendente lite.

**General Citation.**—*Hanchem v. Long*, 25 Ind. App. 532.

**49 Cal. 208-210. BREEZE v. AYRES.**

**Collateral Attack on Judgment** is not allowed, p. 210.

Affirmed in *Hodgdon v. Southern Pacific Co.*, 75 Cal. 648.

**49 Cal. 210-213. CANFIELD v. THOMPSON.**

**Certified Copy of Deed** is primary evidence, p. 212.

Affirmed in *Gethin v. Walker*, 59 Cal. 506. Distinguished in *Brown v. Griffith*, 70 Cal. 16, holding that under section 1951 of the Code of Civil Procedure, recorder's books are not evidence of instruments therein, until absence of original is accounted for.

**49 Cal. 213-218. CHANT v. REYNOLDS.**

**Landlord** is not bound by judgment against tenant unless landlord had opportunity to defend, p. 216.

Affirmed in *Patton v. Pitts*, 80 Ala. 376. Cited in *Clark v. Perdue*, 40 W. Va. 307, to the point that eviction of tenant by third party interrupted the possession; *Sanford v. Tanner*, 114 Ga. 1010, as to such judgment rendered on tenant's disclaimer; notes on this point in 39 Am. Dec. 313, and 95 Am. Dec. 473.

**State Selection** of unsurveyed public lands is invalid, p. 217.

Affirmed in *United States v. Curtner*, 14 Saw. 546, 38 Fed. Rep. 9. Cited in note on this point in 85 Am. Dec. 93.

**49 Cal. 218-220. SARVER v. GARCIA.**

Waiver by stipulation, of certificate to bill of exceptions, is allowed, p. 219.

Cited in *Meredith v. Santa Clara Assn.*, 60 Cal. 620, holding that where a foreign corporation appeared and appealed, it waived constitutional and statutory rights it might otherwise have claimed.

**49 Cal. 222-224. BACHMAN v. MEYER.**

Condition Precedent.—Where contract stipulates for liability only in case of negligence, party claiming liability must prove negligence, p. 221.

Cited in *Godchaux v. Carpenter*, 19 Nev. 419, holding that claimant of right of eminent domain must prove his compliance with statutory requirements.

**49 Cal. 224-225. FALK v. WATERMAN.**

Counsel Fees and expenses of litigation are not included in damages for trespass, p. 325.

Cited in *Atkins v. Gladwish*, 25 Neb. 402, holding that damages for assault cannot include counsel fees and loss of time and money; and note in 8 Am. St. Rep. 158, on counsel fees.

**49 Cal. 226-229. PEOPLE v. LIGHTNER.**

Court may on Sunday Adjudicate fact that jury in criminal case cannot agree and may then continue cause, p. 228.

Approved in *State v. Lewis*, 31 Wash. 520, discharge of jury on holiday for failure to agree is not a void act so as to constitute former jeopardy.

Asking Time to Plead is waiver of former arraignment, p. 228.

Cited in *Early v. State*, 1 Tex. App. 271, holding a verdict void where there had been neither arraignment or plea; to same effect in *Stacey v. State*, 3 Tex. App. 123; and to same effect as to plea in *Pate v. State*, 21 Tex. App. 198; *State v. McMahon*, 17 Nev. 371, holding that defendant's consent to separation of jury in felony trial waiver of error; *People v. Suesser*, 142 Cal. 357, on point that irregularity as to delivery of copy of information may be waived by failure to object. Distinguished in *People v. Walker*, 132 Cal. 141, holding errors in arraignment not waived by motion for new trial after conviction.

Verdict of Lesser Offense.—Assault to do bodily harm is included in a charge of assault to murder, p. 229.

Cited in *People v. Villarino*, 66 Cal. 229, holding that assault to murder was sufficiently charged. Affirmed in *State v. Collyer*, 17 Nev. 287, and *State v. Johnson*, 3 N. Dak. 152.

**49 Cal. 229-232. PEOPLE v. HAGAR.**

**Commissioners to Assess Swamp Land must act jointly, p. 232.**

Affirmed in People v. Ahern, 52 Cal. 211. Distinguished in Swamp District v. Gwynn, 70 Cal. 567, holding under a later statute that the commissioners need not act jointly in viewing the lands.

**Certificate of Commissioners that they jointly viewed and assessed is not conclusive, p. 232.**

Cited in Swamp District v. Gwynn, 70 Cal. 570, holding certificate of commissioners not conclusive as to legality of assessment; Swamp District v. Wilcox, 75 Cal. 451, holding a return of commissioners sufficient, for in absence of contrary proof, they are presumed to have done their duty; In re Madera District, 92 Cal. 333, 27 Am. St. Rep. 133, holding that in statutory proceedings for confirmation of acts of an irrigation district, a record of the board of supervisors reciting that they had jurisdiction was not evidence, for jurisdiction was the fact in issue, which petitioners must prove; Lower Kings River District v. Phillips, 108 Cal. 322, holding that while the order of a board of supervisors was conclusive as to legal organization of a reclamation district, it was not conclusive as to legality of subsequent assessments; Cooper v. Miller, 113 Cal. 246, holding that where an order of an irrigation district levying an assessment failed to recite that an election had been previously held, this was no proof that the election was not held, for no such recital would be conclusive.

**49 Cal. 233-235. MILLER v. SHARP.**

**Refusal to Reopen Case for further evidence is discretionary, p. 235.**

Affirmed in San Francisco Breweries v. Schurtz, 104 Cal. 428, sustaining refusal of lower court to reopen foreclosure case after decree had been ordered.

**49 Cal. 236-239. SYKES v. LAWLOR.**

**Damages for Injury to Child include expense of care and cure, p. 238.**

Affirmed in Netherland Co. v. Hollandcr, 59 Fed. Rep. 419. Cited in note on this point in 48 Am. Dec. 623.

**49 Cal. 239-241. LOOMIS v. ANDREWS**

**Order Made Out of Court is void except when permitted by statute, p. 241.**

Cited in Carpenter v. Nutter, 127 Cal. 64, noted under Larco v. Casanueva, 30 Cal. 565; Delano v. Board etc., 4 Idaho, 87, judge cannot in chambers issue subpoena for witness in criminal case.

**49 Cal. 241-242. PEOPLE v. BUCKLEY.**

**Challenge for Implied Bias of juroi must specify grounds, p. 242.**

Notes Cal. Rep.—156.

Affirmed in *People v. Cochran*, 61 Cal. 549, and *Southern Pacific Co. v. Rauh*, 49 Fed. Rep. 701; *People v. Owens*, 123 Cal. 486, noted under *People v. Dick*, 37 Cal. 277.

**49 Cal. 242-248. DANIELS v. HENDERSON.**

**Writ of Assistance.**—Judgment on motion for the writ does not determine right of possession or estop further litigation of such right, p. 247.

Cited in *Enos v. Cook*, 65 Cal. 178, holding that “conflicting legal or equitable rights of persons not parties to a foreclosure suit” cannot be settled on motion for the writ.

**General Denial in Ejectment**, that plaintiff is entitled to possession, authorizes defendant to show his own right of possession, p. 247.

Distinguished in *Wixon v. Devine*, 91 Cal. 481, holding in a suit to determine water rights that evidence of defendant’s prior occupation was not within the issues, because the answer confessed and avoided plaintiff’s right, but did not deny it.

**Purchase Pendente Lite**, by filing of lis pendens, failure to record assignment, or some other means may be bound by judgment of foreclosure, p. 248.

Cited in *Breedlove v. Norwich, etc. Soc.*, 124 Cal. 166, holding grantee under unrecorded deed so bound; *Randall v. Lower*, 98 Ind. 261, holding a purchaser pendente lite bound by foreclosure decree. Distinguished in *Houston v. Timmerman*, 17 Oreg. 504, 11 Am. St. Rep. 852, holding that where judgment creditor of husband bought in his land at execution sale, pending suit for divorce and alimony by judgment debtor’s wife, creditor was not bound by divorce decree, because wife’s title was derived therefrom.

**49 Cal. 250-252. HOBLER v. COLE.**

**Newly Discovered Evidence.**—Burden of proof is on appellant to show abuse of discretion of lower court in granting new trial on this ground, p. 251.

Cited in *People v. Sutton*, 73 Cal. 248, to the point that “applications on this ground are to be regarded with distrust and disfavor”; *Spottiswood v. Weir*, 80 Cal. 451, holding that new trial was properly refused; to same effect in *People v. Demasters*, 109 Cal. 608, and *Frye v. Ferguson*. 6 S. Dak. 398. Cited in *State v. Brooks*, 23 Mont. 161, quoting *People v. Demasters*, 109 Cal. 607; *State v. Haworth*, 26 Utah, 311, motion for new trial on ground of newly discovered evidence properly denied when new evidence is purely cumulative; *State v. Stowe*, 3 Wash. 210, holding refusal of new trial an abuse of discretion; *East v. McKee*, 14 Ind. App. 49, holding new trial was properly refused.

**General Citation.**—*Hoban v. Sanford, etc. Co.*, 64 N. J. L. 437.

**49 Cal. 253-258. FLEMMING v. WESTERN PACIFIC COMPANY.**

**Contributory Negligence** of driver of wagon, injured by train at railway crossing, in failing to stop and listen, was proximate cause of damage, and nonsuit should have been granted p. 257.

Cited in *Lambert v. Southern Pac. R. R. Co.* 146 Cal. 236, it is contributory negligence, as matter of law, for one who is very deaf deliberately to drive team on railroad crossing without looking to see if train was approaching, where track was visible for over quarter of mile, and he could easily have avoided collision; concurring opinion in *Clark v. Bennett*, 123 Cal. 282 (and distinguished) noted under *Shea v. Potrero etc. Co.*, 44 Cal. 416; *Green v. Southern Cal. Ry. Co.*, 138 Cal. 3 holding nonsuit improperly denied in case of person on track; *Blackburn v. S. P. Co.*, 34 Or. 223, 224, holding plaintiff barred by contributory negligence under facts stated; and cf. *Carter v. Central etc. Co.*, 72 Vt. 196, holding verdict properly directed for defendant; *Chicago etc. Ry. v. Andrews*, 130 Fed. 73, applying rule where plaintiff stepped upon railroad crossing at small station directly in front of moving train; *Fernandez v. Sacramento Co.*, 52 Cal. 50, holding that question of contributory negligence of laborer in excavation, injured by negligence of conductor of passing horse car, should have been left to jury; *Strong v. Sacramento Co.*, 61 Cal. 329, holding that driver of wagon injured by passing train was not guilty of contributory negligence as matter of law or fact. Affirmed on similar facts in *Glascock v. Central Pacific Co.*, 73 Cal. 141. Cited in *Overacre v. Blake*, 82 Cal. 83, holding a notary not liable to a mortgagee for neglect in taking acknowledgment of wrong person as mortgagor, where fraudulent mortgagor was introduced to notary by mortgagee's agent; *Nagle v. California Southern Co.*, 88 Cal. 92, holding that injury to passenger from getting off train before it reached a station was due to his own neglect, and nonsuit was proper; *Kenna v. Central Pacific Co.*, 101 Cal. 31, holding nonsuit properly granted, where laborer near railway track was killed by passing train through his own negligence; *Pepper v. Southern Pacific Co.*, 105 Cal. 400, holding that failure of driver of wagon to stop and listen before crossing track was cause of his being killed by train, and setting aside verdict for plaintiff; *Van Praag v. Gale*, 107 Cal. 443, holding nonsuit properly refused in a suit for injuries from falling through a trap-door, for the question of contributory negligence was doubtful. Cited in the following cases, holding that failure of driver of wagon to stop and listen before crossing track was cause of his injury from passing train: *Chicago Co. v. Crisman*, 19 Colo. 35; *Chicago Co. v. Fisher*, 49 Kan. 485; *Jensen v. Michigan Co.*, 102 Mich. 180; *Henze v. St. Louis Co.*, 71 Mo. 641; *Durbin v. Oregon Co.*, 17 Oreg. 11, 11 Am. St. Rep. 782; *Northern Pac. Co. v. Holmes*, 3 Wash. Ter. 210. Cited in dissenting opinion in *Van Anken v. Chicago Co.*, 96 Mich. 324, a majority of the court holding that whether failure to stop and listen in such case was contributory negligence was for the

jury; to same effect in Bunting v. Central Pacific Co., 14 Nev. 359, and Cohen v. Eureka Co., 14 Nev. 392; Mau v. Morse, 3 Colo App. 382, holding on demurrer that death of a man was caused by his own negligence in looking down an elevator shaft; Gratiot v. Missouri Co., 116 Mo. 465, holding there was no contributory negligence of a man walking over a railway crossing, who was hit by a train going at an improper speed; Kennon v. Gilmer, 4 Mont. 453, holding that negligence of a passenger in jumping from a runaway coach was proximate cause of his injury; Solen v. Virginia Co., 13 Nev. 121, 140, holding that where a man crossing a track was injured by an engine, refusal of nonsuit was proper, and verdict for plaintiff correct; Patnode v. Harter, 20 Nev. 307, holding that in case of injury to a miner from disobeying rules of mine, nonsuit was properly granted; Candelaria v. Atchinson Co., 6 N. Mex. 275, holding that in suit for injury to a man walking on railway track, the court properly directed verdict for defendant; and notes on this point in 71 Am. Dec. 239, and 90 Am. Dec. 784.

**49 Cal. 258-260. MONTGOMERY v. ROBINSON.**

Sheriff's Deed reciting enough to show his authority, is evidence, p. 260.

Cited in note on sheriff's sales in 99 Am. Dec. 448.

**49 Cal. 260-262. GREEN v. SWIFT.**

Wife's Separate Property.—Husband's attorney in fact cannot join in wife's deed, unless authorized expressly or by necessary implication, p. 262.

Affirmed in Gagliardo v. Dumont, 54 Cal. 500, 501, as to conveyance of homestead.

**49 Cal. 266-269. GATES v. LANE.**

Injunction Refused against execution on void judgment, because there was an adequate remedy by motion, p. 269.

Cited in Cohen v. Gray, 70 Cal. 86, refusing injunction against condemnation proceedings, because statute authorizing them had been repealed. Affirmed in Luco v. Brown, 73 Cal. 5; 2 Am. St. Rep. 774. Cited in Scamman v. Bonslett, 118 Cal. 99, holding that where an amendment rendered a decree void, it was sufficient reason for quashing an execution issued thereon. Distinguished in San Juan Co. v. Finch, 6 Colo. 220, holding injunction the proper remedy against execution on a void judgment, saying that the decision in the principal case was on the ground that there was another remedy.

**49 Cal. 269-272. MAHON v. SAN RAFAEL COMPANY.**

Ejectment lies to recover possession of a toll road, p. 272.

Cited in *Montgomery v. Santa Ana Co.*, 104 Cal. 196, 43 Am. St. Rep. 98, holding ejection did not lie by an abutting owner to recover part of a street condemned for right of way by a railroad.

Errors in Implied Findings must be specified in statement for new trial, p. 272.

Affirmed in *Rosina v. Trowbridge*, 20 Nev. 116.

**49 Cal. 273-274. HEMSTREET v. WASSUM.**

Repeal of Statute repeals amendments, p. 274.

Cited in *Goodwin v. Buckley*, 54 Cal. 297, holding that an amendment, to take effect at a future day, may be repealed before it takes effect; *People v. Salvador*, 71 Cal. 16, 17, holding that a penal statute, taking effect on the same day as the new penal code, was not repealed thereby. Distinguished in *County v. County*, 142 Cal. 56, construing statutes as to boundaries.

**49 Cal. 274-277. HOARE v. HINDLEY.**

Statute of Frauds does not cover contract to be performed within a year, p. 277.

Affirmed in *Treat v. Hiles*, 68 Wis. 355, 60 Am. Rep. 864.

Chance Verdict.—Affidavit of defendant disregarded, for he was not in jury-room, p. 277.

Cited in *Pawnee Co. v. Adams*, 1 Colo. App. 252, holding that a chance verdict was impeachable by affidavits of jurors; in *Hunt v. Elliott*, 77 Cal. 591, to same effect; and notes on this point in 1 Am. Dec. 39, and 24 Am. Dec. 479. Distinguished in *Flood v. McClure*, 3 Idaho, 593, affidavit of juror is competent evidence to show verdict obtained by resort to chance.

**49 Cal. 278-285. LARUE v. FRIEDMAN.**

Fraudulent Probate Proceedings may be enjoined, p. 284.

Cited in *Bergin v. Haight*, 99 Cal. 56, ordering judgment for plaintiff in action to quiet title, because defendant claimed under a fraudulent probate sale.

**49 Cal. 285-288. HIMMELMANN v. CAHN.**

Street Assessment.—Notice for proposals must be posted five official days, p. 287.

Affirmed in *Brooks v. Satterlee*, 49 Cal. 289.

Street Assessment must contain description of property, p. 288.

Cited in *Whiting v. Quackenbush*, 54 Cal. 309, holding description sufficient.

49 Cal. 290-292; 19 Am. Rep. 645. **WILBUR v. LYNDE.**

Note of corporation to its trustees is void as being against public policy, p. 292.

Cited in *Pacific Vinegar & Pickle Works v. Smith*, 145 Cal. 366, 368, where president of corporation purchased its notes outright and caused corporation by himself as president to become endorser thereof to himself individually, guaranteeing payment of notes without authority of corporation, he cannot sue on indorsement; *Davis v. Rock Creek Co.*, 55 Cal. 365, 36 Am. Rep. 43, holding that president of corporation cannot issue its note to a firm of which he is a member; *In re Evans*, 22 Utah, 377, noted under *President etc. of San Diego v. San Diego etc. Co.*, 44 Cal. 113; *Wallace v. Oceanic etc. Co.*, 25 Wash. 149, denying right of corporate president to rescind its contract, if the rescission would be to his personal advantage; *Wyman v. Bowman*, 127 Fed. 274, contract between corporation and majority of directors whereby latter loans money to former to pay its debts, some of which are owing to latter, and whereby former gives latter preference over other creditors, is voidable at option of creditors or stockholders. Distinguished in *Seeley v. San Jose Co.*, 59 Cal. 25, holding that where a director paid a debt of his corporation at president's request, note of corporation to him for amount paid was valid. Cited in *Smith v. Los Angeles Assn.*, 78 Cal. 293, 12 Am. St. Rep. 54, holding void corporation's note made by president to himself; *Graves v. Mono Lake Co.*, 81 Cal. 320, 321, holding that resolutions of directors of mining company, voting money for their salaries and for money advanced by them to the company were illegal; *Wickersham v. Crittenden*, 93 Cal. 29, holding that president and cashier of bank were not authorized to loan bank's money to a director for the president's benefit, or to increase their own salaries. Cited in *Chouteau v. Allen*, 70 Mo. 338, holding that pledge of corporate assets by directors of a corporation was fraudulent and an innocent purchaser was not protected; *Hope v. Valley City Co.*, 25 W. Va. 806, holding deed of trust from corporation to its directors void; *Union Trust Co. v. Nevada Co.*, 10 Saw. 132, 20 Fed. Rep. 88, holding void an over-issue of corporate bonds to directors; *Lippincott v. Shaw Co.*, 25 Fed. Rep. 582, holding that note of an embarrassed corporation to its president and directors was void, and its form was sufficient notice to a bank taking it; *Santa Ana Co. v. San Buenaventura*, 65 Fed. Rep. 327, holding void the contract of town trustees with a water company; because one of the trustees was interested in the water company; *Doe v. Northwestern Co.*, 78 Fed. Rep. 67, holding that notes made by a corporation to its president for back pay were void. Distinguished in *Bassett v. Monte Christo Co.*, 15 Nev. 302, holding that a trust deed and bonds issued by a corporation to a director, were not void as against a later judgment lien, though voidable at the election of the beneficiary; and *Borland v. Haven*, 13 Saw. 589, 37 Fed. Rep. 406, holding that note

of corporation to a director, as security for loan obtained by corporation on his indorsement, was valid.

General Citation.—*Porter v. Winona etc. Grain Co.*, 78 Minn. 213.

**49 Cal. 293-294. NOONAN v. HOOD.**

Findings of Referee, supported by evidence, are not disturbed on appeal, p. 294.

Affirmed in *Briggs v. Hiles*, 87 Wis. 447.

Costs Refused on modification of coin judgment, because no application to modify was made in lower court, p. 294.

Affirmed in *Knox v. Gerhauser*, 3 Mont. 281.

**49 Cal. 294-297. FISCHER v. BERGSÖN.**

Declarations by Occupant of Land, to strengthen his claim, are inadmissible in suit for the land by his administrator, p. 297.

Cited in *Western Union Oil Co. v. Newlove*, 145 Cal. 775, evidence of declarations of lessor under whom plaintiff claims as owner, made in his favor are inadmissible in action involving boundary line; *Rulofson v. Billings*, 140 Cal. 458, noted under *Rice v. Cunningham*, 29 Cal. 500; dissenting opinion in *People v. Blake*, 60 Cal. 511, a majority of the court holding that in proceedings to declare land to be a street, evidence as to declarations of defendant's predecessors, that the land was a street, was admissible.

**49 Cal. 301-302. CURTISS v. SPRAGUE.**

Statute of limitations is considered pleaded, where a counterclaim is barred by it, p. 302.

Cited in *Janes v. Throckmorton*, 57 Cal. 386, holding that plaintiff need not anticipate an affirmative defense for his reply to it is "pledged by operation of law"; *Alspaugh v. Reid*, 6 Idaho, 225, where statute of limitations of foreign state is set up in answer, it is error to render judgment of dismissal on pleadings; *Colton Co. v. Raynor*, 57 Cal. 589, holding that plaintiff could introduce the same proof to countervail new matter pleaded in answer to cross-complaint, as if he had filed a replication; *Rankin v. Sisters*, 82 Cal. 95, holding instructions properly given on an issue raised by the affirmative defense, for it was deemed denied by plaintiff; *Granger's Assn. v. Clark*, 84 Cal. 204, holding that a replication traversing new matter in answer was unnecessary; *Williams v. Dennison*, 94 Cal. 543, to the point that "any proper evidence" is admissible to overcome an affirmative defense; *Sterling v. Smith*, 97 Cal. 346, holding that where necessity for proof of fraud by plaintiff appears only after filing of answer, findings on such issue are properly made; *Moore v. Copp*, 119 Cal. 433, holding that evidence in avoidance of new matter in answer is admissible.

**49 Cal. 302-306. MITCHUM v. STANTON.**

**Undertaking in Replevin.**—Sureties are not bound to pay value of property unless judgment is rendered for return, p. 306.

Affirmed in Thomas v. Irwin, 90 Ind. 561. Cited in Lee v. Hastings, 13 Neb. 511, holding that sureties are not liable unless return cannot be had, and stipulation of attorneys that there should be no return was not binding; Capital etc. Co. v. Learned, 36 Or. 552, 78 Am. St. Rep. 797, but holding surety estopped, in action against him on bond, from disputing value of property as stated in judgment for the return.

**49 Cal. 306-308. TORMEY v. PIERCE.**

**Amended Complaint** is unnecessary, where order striking out some plaintiffs is part of judgment-roll, p. 308.

Cited in Ligare v. California Southern Co., 76 Cal. 612, holding it "somewhat doubtful" whether an amended complaint superseded the original, where the only change was in substituting real for fictitious names of defendants.

**Terms of Amendment** are in court's discretion, p. 308.

Cited in Clune v. Sullivan, 56 Cal. 250, refusing to compel lower court to proceed with trial, for it was within its discretion to order costs paid as condition of amendment, and its order has not been obeyed.

**49 Cal. 308-309. BLUMENBERG v. ADAMS.**

**Wife Abandoned** in another state may contract in this, p. 309.

Cited in notes on this point in 37 Am. Dec. 710, 50 Am. Dec. 127, and 64 Am. St. Rep. 869.

**49 Cal. 313-314. FREEBORN v. NORCROSS.**

**Replevin.**—Interest on value of property, and damages, cannot both be allowed, p. 314.

Cited in Kelly v. McKibben, 54 Cal. 194, holding interest properly allowed as damages; to same effect in Schmidt v. Nunan, 63 Cal. 374; Johnson v. Fraser, 2 Idaho, 378, holding that where verdict was for both damages and interest, either may be admitted in entering judgment. Affirmed in Rena v. Kingsbury, 39 Mo. App. 245.

**49 Cal. 314-323. FRINK v. LE ROY.**

**Mortgagee in Possession**, under agreement to apply rents to mortgage debt, cannot be ejected by mortgagor's vendee while debt is unpaid, p. 322.

Cited in Hooper v. Young, 140 Cal. 280, on point that mortgagor cannot sue mortgagee in possession in ejectment before debt is paid. Distinguished in Boggs v. Douglass, 105 Iowa, 347, when possession was not

obtained by owner's consent; Warder v. Enslen, 73 Cal. 294, holding that occupancy of mortgagee in possession must be adverse for five years after breach of condition by mortgagor, to bar right of latter to redeem. Affirmed in Spect v. Spect, 88 Cal. 443, 444, 22 Am. St. Rep. 318, 319, holding that the rule applies even though debt is barred by statute of limitations; also in Fee v. Swingly, 6 Mont. 600, and Brundage v. Home Assn., 11 Wash. 287.

**49 Cal. 323-325. CUNNINGHAM v. SAN JOAQUIN COUNTY.**

Sheriff or Constable is entitled to mileage for traveling outside his county, p. 324.

Affirmed in Allen v. Napa Co., 82 Cal. 189, 190.

Mileage is properly claimed for going to arrest prisoner and taking him before magistrate, p. 324.

Affirmed in Allen v. Napa Co., 82 Cal. 192; Nelson v. Breen, 98 Cal. 246, holding same rule applies under County Government Act of 1889, section 201, subdivision 14; Warner v. Fremont Co., 4 Idaho, 595, under Laws of 1891, page 174, section 2, subdivision 18, sheriff entitled to mileage for taking prisoner from place of arrest before magistrate, whether prisoner arrested with or without warrant.

**49 Cal. 325-331. AMESTI v. CASTRO.**

Former Judgment in Ejectment does not bar later suit on different title, p. 330.

Cited in Graves v. Hebron, 125 Cal. 403, 404, noted under Caperton v. Schmidt, 26 Cal. 479; Boyle v. Wallace, 81 Ala. 355, holding that a former judgment in statutory action to recover mortgaged land was no bar to a later suit to recover chattels on the land; note on writ of possession in 39 Am. Dec. 311; note on judgment in ejectment, in 85 Am. Dec. 209.

**49 Cal. 331-338. McGARRAHAN v. NEW IDRIA COMPANY.**

Patent is invalid unless authorized by statute, p. 335.

Cited in United States v. San Pedro etc. Co., 4 N. Mex. 299, noted under Parker v. Duff, 47 Cal. 554, and also citing main case as to conclusiveness of patent.

Recitals in Patent are conclusive, p. 335.

Cited in note on this point in 20 Am. Dec. 277.

Appeal Cannot be Dismissed by lower court while it is pending in appellate court, p. 336.

Affirmed in Younger v. Pagles, 60 Cal. 519, holding that "conclusive presumption is that the appeal is still pending, in the absence of a direct finding to the contrary." Cited in Corrine Co. v. Johnson, 5

Utah, 150, holding that appellant cannot deprive appellate court of jurisdiction by delaying to file transcript.

**49 Cal. 336-339. PHELPS v. MAXWELL'S CREEK COMPANY.**

Mechanic's Lien.—Personal judgment cannot be entered against owner out of possession, p. 338.

Cited in Russ Co. v. Garretson, 87 Cal. 596, holding personal judgment not necessary to support the lien.

Notice to officers of corporation is notice to the company, p. 338.

Cited in Montecito Valley Co. v. Santa Barbara, 144 Cal. 597, as to notice to corporate officers of adverse user.

Mechanic's Lien is enforceable against estate of corporation, where its president knew of work ordered by lessee, but corporation failed to give notice that it would not be responsible, p. 339.

Cited in West Coast Co. v. Newkirk, 80 Cal. 279, holding estates of owner and lessee both liable for work ordered by latter; Hurlbert v. New Ulm Works, 47 Minn. 85, holding that statutory notice to owner had been given; Mutual Aid Co. v. Gashe, 56 Ohio St. 296, holding that lien for work ordered by vendee of premises was enforceable only against his interest, and must be postponed to vendor's lien for purchase money; Whittle v. Vanderbilt Co., 83 Fed. Rep. 53, holding that notice to two directors of a corporation was not notice to a corporation, as to a trust; and note in 61 Am. Dec. 700, as to owner's liability.

Notice of Lien must state name of person to whom materials were furnished, p. 339.

Cited in Madera Co. v. Kendall, 120 Cal. 184, holding that notice, faulty in this respect, could not be amended.

**49 Cal. 340-341. COLEMAN v. GILMORE.**

Statement for New Trial must specify particulars wherein verdict is against evidence, p. 341.

Affirmed in Tootle v. Petrie, 8 S. Dak. 26.

**49 Cal. 342-346. PEOPLE v. BARRIC.**

Corporation Owning Property Stolen.—Proof of de facto existence is sufficient, p. 344.

Cited in Miller v. People, 13 Colo. 168, holding that some proof of de facto existence must be given; State v. Thompson, 23 Kan. 340, 33 Am. Rep. 166, holding de facto existence may be proved by general reputation. Affirmed in Butler v. State, 35 Fla. 247; Thalheim v. State, 38 Fla. 202; State v. Collens, 37 La. Ann. 609; State v. Habib, 18 R. I. 559.

Accessory after the fact is not an accomplice and corroboration is unnecessary, p. 344.

Cited in *People v. Chadwick*, 7 Utah, 138, ruling similarly under local statutes.

**Confession** must be voluntary and free from inducement, p. 345.

Cited in *People v. Thompson*, 84 Cal. 606, holding a confession not voluntary; to same effect in *People v. Wolcott*, 51 Mich. 615, and *Bram v. United States*, 168 U. S. 560, note in 6 Am. St. Rep. 246, on this point.

**Criminal Appeal from Judgment.**—If defendant does not move for new trial, but court orders it, he cannot plead twice in jeopardy, p. 346.

Affirmed in *People v. Travers*, 77 Cal. 178. Cited in *People v. Lee Yune Chong*, 94 Cal. 386, 387, holding that defendant cannot be discharged for failure of verdict to find degree of offense, and court may order new trial of its own motion, without putting defendant twice in jeopardy; *People v. Murray*, 89 Mich. 292, 28 Am. St. Rep. 308, holding that where a conviction was set aside on certiorari, defendant had not been in jeopardy; *State v. Thompson*, 10 Mont. 562, holding that on a second trial, obtained on defendant's motion, he could not plead former conviction; and note on this point in 77 Am. Dec. 697.

**General Citation.**—*State v. Missio*, 105 Tenn. 225.

#### 49 Cal. 346-347. **GALLARDO v. REED.**

**Sustaining Demurrer.**—If this is final disposition of case, clerk must enter appropriate judgment unless otherwise directed, p. 347.

Cited in *Lang v. Superior Court*, 71 Cal. 492, holding that where demurrer was sustained without leave to amend, the court could not, two years later, grant a rehearing.

#### 40 Cal. 347-350. **CHRISTIAN COLLEGE v. HENDLEY.**

**Mutual Promise of Subscribers** to a building fund are sufficient consideration to support suit for subscription, p. 350.

Distinguished in *Grand Lodge v. Farnham*, 70 Cal. 160, holding that such subscription is "a mere offer," revocable at any time before acceptance, and death of subscriber revokes it. Affirmed in *West v. Crawford*, 80 Cal. 32, as to stock subscriptions on organizing corporation; and *Higert v. Trustees*, 53 Ind. 329, as to building-fund subscription.

**Promise Alleged** must be proved, p. 350.

Cited in *Sigourney v. Zellerbach*, 55 Cal. 440, to the point that pleadings must be sufficient to warrant relief demanded.

#### 49 Cal. 353-354. **PEOPLE v. LON ME.**

**Revised Statute**, substituted for former laws, impliedly repeals them, p. 354.

Affirmed, as to an irrigation statute, in Charnock v. Rose, 70 Cal. 192.

**Official Reporters.**—Statute on subject construed, p. 354.

Cited in Stevens v. Truman, 127 Cal. 169, sustaining constitutionality of amendment of 1880 to section 274, Code of Civil Procedure.

**49 Cal. 354-355. McDONALD v. FETT.**

**Surety on Attachment Bond.**—His liability is limited by terms of bond, p. 355.

Affirmed in Carter v. Mulrein, 82 Cal. 169, 16 Am. St. Rep. 100, as to surety on injunction bond; and Elder v. Kutner, 97 Cal. 493, as to surety on attachment bond.

**49 Cal. 356-358. CADIERQUE v. DURAN.**

**Purchase of State Land.**—What pleadings and proof are required in contested case, pp. 357, 358.

Cited in Polk v. Sleeper, 143 Cal. 74, noted under Hinckley v. Fowler, 43 Cal. 64; Cronin v. Bear Creek etc. Min. Co., 3 Idaho. 618, complaint in action under United States Revised Statutes, section 2326, to contest application for mining patent must show plaintiff has filed adverse claim within period prescribed by section 2325, and brought action within time thereafter allowed by section 2326; Lane v. Pferdner, 56 Cal. 124, holding that burden of proof is on each party to establish his own right; Aurrecochea v. Sinclair, 60 Cal. 549, holding that a claimant must allege that he made requisite proof before land department to entitle him to certificate, and complied with statutory requirements entitling him to a patent; Dillon v. Saloude, 68 Cal. 270, holding that each party is an actor, and must allege facts showing his right; to same effect in Cushing v. Keslar, 68 Cal. 477, and Gilson v. Robinson, 68 Cal. 543; Reese v. Thorburn, 78 Cal. 117, holding bad a complaint that failed to allege filing of statutory affidavit; Prentice v. Miller, 82 Cal. 573, holding that the rule that each party is an actor does not change the rule that material allegations not denied are taken as true; Anthony v. Jillson, 83 Cal. 300, holding that in a contest for mineral lands under federal statutes, each party must "establish his right against the government as well as against his adversary."

**Filing Application to Purchase state land** gives applicant "no right which he can transfer to another," p. 358.

Cited in People v. Blake, 84 Cal. 614, holding that deed of an applicant, made before receipt of his certificate of purchase, did not convey after-acquired title of grantor; and to same effect in Anderson v. Yoakum, 94 Cal. 228, 28 Am. St. Rep. 121, as to deed by applicant before filing application.

**49 Cal. 359-362. WOOD v. CURREY.**

**Objection to Injunction on ground of adequate remedy at law, is waived by answering on the merits without moving to dismiss,** p. 361.

Affirmed in Thompson v. Laughlin, 91 Cal. 318; Broadway etc. Co. v. Walters, 128 Cal. 169, noted under Bibend v. Kreutz, 20 Cal. 110.

**49 Cal. 362-369. CAMPBELL v. BUCKMAN.**

**Rule Requiring Express Findings is not complied with by statement that no evidence was given by either party on an issue,** p. 367.

Cited in Golson v. Dunlap, 73 Cal. 161, holding that if no evidence is given on an issue finding should be against party on whom was burden of proof; to same effect in Vanderslice v. Matthews, 79 Cal. 278; Fabian v. Collins, 3 Mont. 229, holding that where there is no finding on an issue the court implies one to support the judgment; Drainage District v. Crow, 20 Oreg. 538, to the point that there must be findings on all material issues; Maynard v. Locomotive Engineer, 14 Utah, 462, holding it must affirmatively appear that findings support the judgment.

**Fraud in Obtaining Patent.**—If this is urged by pre-emptor in suit against him based on patent quaere whether suit should be stayed till land department determines pre-emption claim, p. 367.

Cited in McTarnahan v. Pike, 91 Cal. 543, holding that if question of validity of entry is pending in land department, quaere, whether certificate of purchase issued thereon is *prima facie* evidence of title.

**49 Cal. 369-374. HAWES v. STEBBINS.**

**Freehold in Futuro.**—Deed creating such is void, p. 372.

Cited in Wilhart v. Salmon, 146 Cal. 447, where deed delivered absolutely to third party in escrow to be delivered to grantees named on death of grantor, granted all grantor's interest in land, together with rents issues and profits thereof, grantees took emblems and grain rental from unharvested grain crops. Distinguished in Chandler v. Chandler, 55 Cal. 270, holding that equity could decree formal conveyance of fee to grantee, and reconveyance by him for grantor's life. Cited in notes on this point in 55 Am. Dec. 414, and 63 Am. Dec. 243.

**49 Cal. 374-382. BRANSON v. CARUTHERS.**

**Recitals in Tax Decree, as to service and default, are proof of those facts,** p. 380.

Affirmed in McKoy v. Morrison, 61 Cal. 364. Cited in Amy v. Amy, 12 Utah, 311, holding that recital of due service in divorce decree raised presumption that court had sufficient proof of it; and note in 94 Am. Dec. 766.

**Delivery and Acceptance of Deed** are sufficiently proved by its production by grantee's attorney, p. 380.

Affirmed in *Ward v. Dougherty*, 75 Cal. 243, 7 Am. St. Rep. 154. Cited in *Campbell v. Carruth*, 32 Fla. 271, holding possession by grantee prima facie evidence of delivery.

**Conflicting Evidence.**—New trial granted, where appellate court disbelieves evidence on which a finding was made below, p. 382.

Cited in *Mattock v. Goughnour*, 11 Mont. 273, holding that inherent improbability of evidence is ground for reversal of judgment; *Fuller v. Northern Pacific Co.*, 2 N. Dak. 222, setting aside verdict as being against truth and weight of evidence.

**General Citation.**—*Hoagland v. Hoagland*, 19 Utah, 116.

**49 Cal. 384-386. PEOPLE v. JACOBS.**

**Impeaching Your Own Witness.**—If his testimony, though unexpected, is not unfavorable, proof of contrary statements by him, out of court, is inadmissible, p. 385.

Cited in *People v. DeWitt*, 68 Cal. 586, 588, a majority of the court holding that evidence as to contradictory statements of witness was inadmissible under sections 2049 and 2052 of the Code of Civil Procedure; *People v. Wallace*, 89 Cal. 164, holding evidence of statement of a witness at time of murder to be hearsay and inadmissible; *People v. Creeks*, 141 Cal. 532, discussing rules as to impeachment of adverse witness in case of surprise; *State v. Bartmess*, 33 Or. 115, but holding proof of contradictory statements admissible, under facts stated, within court's discretion; *In re De Gottardi*, 114 Fed. 334, holding certain evidence inadmissible; citing main case also at page 340, on point that new trial lies for errors as to admission of such evidence. Distinguished in *Davies v. Oceanic Co.*, 89 Cal. 284, holding that allowing plaintiff to ask his own witness about contradictory statements was immaterial, for no further testimony was offered on this point. Cited in *People v. Mitchell*, 94 Cal. 558, holding that proof of contradictory statement is admissible only when witness has given evidence damaging to party calling him; *Estate of Kennedy*, 104 Cal. 431, holding that in proceedings to contest a will, attorney for contestant was improperly allowed to testify as to contradictory statements of his own witness; *People v. Conkling*, 111 Cal. 624, to the point that only where testimony is injurious are code provisions as to impeachment applicable; *People v. Crespi*, 115 Cal. 55, holding that failure of witness to admit what was asked was no ground for impeachment, for "he was apparently questioned for the sole purpose of impeachment." Affirmed in *Adams v. State*, 34 Fla. 196. Cited in *Hurley v. State*, 46 Ohio St. 339, holding that if witness gives unfavorable testimony, he may be asked about other statements, but they cannot be proved by other evidence; to the

contrary in State v. Steeves, 29 Oreg. 105, holding that such statements can be proved by other evidence; Mercer v. State, 41 Fla. 282; and notes on this point in 15 Am. Dec. 97, 98; 60 Am. Dec. 750; 74 Am. Dec. 398.

**49 Cal. 387. HIMMELMANN v. SATTERLEE.**

**Order of Publication** of street assessment must be by board of supervisors, p. 387.

Cited in Napa v. Easterby, 61 Cal. 517, to the point that publication of city ordinances must be ordered by board of trustees.

**49 Cal. 388-392. PEOPLE v. SWENSON.**

**Demurrer to Indictment**, for assault with intent to kill, not having been taken, objection that offense is not sufficiently described cannot be raised on motion in arrest of judgment, p. 390.

Cited in People v. Rodley, 131 Cal. 250, applying rule to alleged defects in indictment for perjury; People v. Villarino, 66 Cal. 230, holding that objections to an information after a plea of not guilty cannot be availed of at trial or on motions for new trial or arrest of judgment; State v. Bloodsworth, 25 Oreg. 89, holding that objection to indictment cannot be raised by motion to dismiss at trial; United States v. Cannon, 4 Utah, 135, holding that failure to demur to indictment is waiver of objection.

**Indictment Held Sufficient** on charge of assault with intent to murder, p. 390.

Cited in People v. Mesa, 93 Cal. 584, holding sufficient an indictment for assault with intent to rape; People v. Chuey Ying Git, 100 Cal. 439, 440, holding an information for robbery sufficient; and to same effect as the principal case in State v. Lynch, 20 Oreg. 391, and State v. McDonald, 14 Utah, 177.

**Verdict of guilty as charged is sufficient**, p. 390.

Cited in People v. Tillet, 135 Cal. 62, noted under People v. McCarty, 48 Cal. 559.

**49 Cal. 396-398. SOUTHERN PACIFIC R. R. CO. v. WILSON.**

**Condemnation Statute** must be strictly followed, p. 398.

Cited in City v. Fidelity etc. Co., 22 Wash. 156, holding proceedings void for noncompliance with statute.

**49 Cal. 398-402. HILL v. ELDRED.**

**Mortgage**.—Assignment of certificate of purchase of land, by way of security for a debt, operates as an equitable mortgage, p. 401.

Cited in San Jose Bank v. Bank, 121 Cal. 542, noted under Page v. Rogers, 31 Cal. 300; Higgins v. Manson, 126 Cal. 468, 469, 77 Am. St.

Rep. 193, holding such mortgage created by deposit of title deeds; 4 Am. St. Rep. 703, extended note, treating of equitable mortgages; so in First Nat. Bank v. Caldwell, 4 Dill. 321, note treating of deposit of title deeds as security for debt.

**Interest.**—Agreement to pay more than legal rate must be in writing, p. 401.

Cited in Tucker v. Randall, 10 S. Dak. 583, noted under Goldsmith v. Sawyer, 46 Cal. 209.

#### 49 Cal. 402-407. EX PARTE AH FOOK.

**Constitutional Law.**—“Due process of law” defined, p. 406.

Cited in Hite v. Hite, 124 Cal. 393, 71 Am. St. Rep. 86, on point that hearing must be one that is practicable and reasonable in the particular case; County v. Spencer, 126 Cal. 673, 77 Am. St. Rep. 219, sustaining power given to horticultural commissioners under act of 1881 to declare particular places to be nuisances; Lent v. Tillson, 72 Cal. 425, in approval, sustaining constitutionality of act providing for the widening of Dupont street in San Francisco; so in Light v. Canadian County Bank, 2 Oklahoma, 550, discussing right to jury trial; Indianapolis v. Holt, 155 Ind. 234.

#### 49 Cal. 407-413. PEOPLE v. BISSELL.

**Office and Officer.**—Vacancy in office exists only when there is no incumbent holding over to discharge its duties, pp. 411-413.

Cited to same effect in People v. Hammond, 66 Cal. 658; People v. Tyrrell, 87 Cal. 479, holding that the bare expiration of the term of office does not create a vacancy; Rosborough v. Boardman, 67 Cal. 118, holding that a public office does not become vacant except upon the happening of one of the events mentioned in section 996 of the Political Code; and so in People v. Edwards, 93 Cal. 157; and cited in approval of the ruling stated in the following cases: People v. Osborne, 7 Colo. 612; State v. Murphy, 32 Fla. 153, 195; State v. Rareshide, 32 La. Ann. 938; Smoot v. Somerville, 59 Md. 89; State v. Boyd, 31 Neb. 731; State v. Boucher, 3 N. Dak. 399; State v. Elliott, 13 Utah, 480; Territory v. Ashenfelter, 3 N. Mex. 575 (denying power of governor to remove at will where the tenure of office is fixed); State v. Henderson, 4 Wyo. 551, in nearly all of which cases similar statutes underwent construction.

#### 49 Cal. 413-414. HANCOCK v. BOWMAN.

**Street Assessment.**—To enforce lien of, all owners of the property assessed must be made parties defendant, p. 414.

Affirmed in Diggins v. Reay, 54 Cal. 526; Driscoll v. Howard, 63 Cal. 440; and Robinson v. Merrill, 87 Cal. 12. Explained in Phelan v. Dunne,

72 Cal. 231, and holding that under act of April 1, 1872, the personal representatives of a deceased owner are not necessary parties defendant.

Judgment is not void or erroneous because attorney's name attached to complaint is printed, pp. 413, 414.

Cited to same effect, *Lizare v. California etc. R. R. Co.*, 76 Cal. 611, holding that affixing seal of court is a sufficient adoption by the clerk of a printed signature.

**49 Cal. 414-421. PEOPLE v. STOCKTON AND COPPEROPOLIS RAIL-ROAD COMPANY.**

Taxation.—Statement of property furnished to assessor by agent of corporation is binding, p. 420.

Cited to same effect in *Lake County v. Mining Co.*, 68 Cal. 16; *Brusie v. Gates*, 96 Cal. 268; *Hamacker v. Commercial Bank*, 95 Wis. 363, applying principle of estoppel.

Admissions in pleading bind the party, p. 420.

Cited in *Western Ranches v. Custer Co.*, 89 Fed. 577, 579, noted under *Lee v. Evans*, 8 Cal. 424.

Assessment Record.—Entries in book containing original list and assessment are not official records, p. 421.

Cited in *Allen v. McKay*, 139 Cal. 101, on point that assessment does not date from listing by owner and sworn valuation by him before assessor; *Savings & Loan Society v. San Francisco*, 146 Cal. 680, argued.

**49 Cal. 421-425. LANE v. McELHANY.**

Fees.—Sheriff's fees in keeping property must be certified by the court, p. 424.

Affirmed in *Shumway v. Leakey*, 73 Cal. 282; and approved in *Nash v. Muldoon*, 16 Nev. 410; *First Nat. Bank v. Kickbusch*, 78 Wis. 222.

**49 Cal. 425-429. PEOPLE v. PERDUE.**

Verdict of manslaughter, though informal, sustained, p. 427.

Cited to same effect in *People v. Nichols*, 62 Cal. 522, informality in recording verdict; *Johnson v. Visher*, 96 Cal. 314, holding that a party will not be heard to object to a verdict for the first time upon appeal, if it is susceptible of a construction which may have a lawful effect relevant to the pleadings.

Venue.—Application for change of, on ground that a fair and impartial trial cannot be had, is addressed to the sound discretion of the court, p. 427.

Cited in *State v. Pomeroy*, 30 Oreg. 20, in approval.

Notes Cal. Rep.—157.

**49 Cal. 433-435. EX PARTE WHITE.**

Extradition.—Governor has no authority to surrender fugitive unless judicial proceedings have been commenced against him, p. 434.

Approved in *Ex parte Lorraine*, 16 Nev. 64; *Smith v. State*, 21 Neb. 558. Cited in 57 Am. Dec. 399, extended note, discussing subject at length.

Same.—Act authorizing arrest and detention of fugitive, to afford an opportunity for his demand, is constitutional, p. 435.

Affirmed in *Ex parte Cubreth*, 49 Cal. 436. Cited in extended notes to 57 Am. Dec. 392; and 46 Am. St. Rep. 417.

**49 Cal. 436-437. EX PARTE CUBRETH.**

Extradition.—Constitutionality of act authorizing arrest and detention of fugitive sustained, p. 436.

Cited in *Kurtz v. State*, 22 Fla. 42, 1 Am. St. Rep. 176, in approval. Cited in 57 Am. Dec. 392; 32 Am. Rep. 358; and 46 Am. St. Rep. 417, extended notes, fully discussing the subject.

Same.—Statutory mode of procedure must be observed in order to legalize arrest and detention, p. 437.

Approved in *Cunningham v. Baker*, 104 Ala. 170, 53 Am. St. Rep. 34. So, to same effect, in *Simmons v. Vandyke*, 138 Ind. 383, 46 Am. St. Rep. 413, holding arrest and detention upon telegrams to be unauthorized. Cited in 57 Am. Dec. 398, extended note, where the subject is discussed.

**49 Cal. 438-446. CENTRAL PACIFIC RAILROAD COMPANY v. YOLAND.**

Public Lands.—Grant to Central Pacific Railroad gave title to odd sections included in boundaries of Mexican grant, afterward rejected, pp. 444, 445.

Followed in *Central Pac. R. R. Co. v. Robinson*, 49 Cal. 448; *Kaiser v. McLaughlin*, 49 Cal. 452. Overruled in *McLaughlin v. Fowler*, 52 Cal. 205, following *Newhall v. Sanger*, 92 U. S. 761. Referred to in *United States v. Central Pac. R. R. Co.*, 8 Saw. 91, 11 Fed. Rep. 456; *United States v. McLaughlin*, 12 Saw. 195, 30 Fed. Rep. 157, in approval of ruling stated.

**49 Cal. 446-449. CENTRAL PACIFIC RAILROAD CO. v. ROBINSON.**

Public Lands.—Land grant to Central Pacific Railroad Company, p. 448.

Followed in *Kaiser v. McLaughlin*, 49 Cal. 452. Overruled in *McLaughlin v. Fowler*, 52 Cal. 205. Referred to in *United States v. McLaughlin*, 12 Saw. 195, 30 Fed. Rep. 157, in approval.

**Same.**—State selections of lieu lands before survey by the United States held void, p. 448.

Cited in *United States v. Curtner*, 14 Saw. 546; 38 Fed. Rep. 9, in approval.

**49 Cal. 449-452. KAISER v. McLAUGHLIN.**

**Public Lands.**—Grant of land to Central Pacific Railroad Company, p. 451.

Overruled in *McLaughlin v. Fowler*, 52 Cal. 205. Referred to in *United States v. McLaughlin*, 12 Saw. 195, 30 Fed. Rep. 157, in approval. See two preceding cases and citations.

**49 Cal. 452-453. PEOPLE v. ALIBEZ.**

Indictment charging defendant with the murder of three persons, charges three offenses, p. 453.

Approved in *People v. Majors*, 65 Cal. 146, 52 Am. Rep. 302. So, to same effect, in *Joslyn v. State*, 128 Ind. 162; 25 Am. St. Rep. 427. Cited in 58 Am. Dec. 241, 242; 58 Am. Dec. 540, in extended notes, discussing the subject.

**49 Cal. 454. HALL v. CENTRAL PACIFIC RAILROAD COMPANY.**

**Venue.**—Motion for change of denied, it appearing that the convenience of witnesses required the cause to be tried in the county where pending, p. 454.

Cited to same effect in *Reavis v. Cowell*, 56 Cal. 592, holding the matter to be one within the discretion of the court; *Jones v. Swank*, 54 Minn. 264, in approval of ruling stated.

**49 Cal. 455. PEOPLE v. CLARK.**

**Appeal.**—Transcript in criminal case must show that notice of appeal was served on attorney of adverse party, p. 455.

Affirmed in *People v. Bell*, 70 Cal. 34; *People v. Colon*, 119 Cal. 669; and approved in *People v. Fennell*, 4 Utah, 115.

**49 Cal. 463-465. EX PARTE DALTON.**

**Criminal Law.**—Deduction for good behavior must be taken from entire period, and not from the end of first term when sentence is for two terms, p. 465.

Cited in *In re Greenwold*, 77 Fed. Rep. 595, and ruling recognized as the law of California relative to the subject. Distinguished in *Ex parte Clifton*, 145 Cal. 187, where accused was convicted of two distinct crimes and sentenced at same time therefor for two distinct terms, one to commence on termination of other, credits for good behavior computed on each term separately.

**General Citations.**—In re Parker, 18 Colo. 531; Matter of Wilson, 11 Utah, 119, as authority sustaining cumulative sentences.

**49 Cal. 465-467. EX PARTE HARKER.**

**Ne Exeat.**—District courts had no power to issue writ of, p. 467.

Cited in 14 Am. Dec. 561, extended note, where the subject is discussed.

Legislature may prescribe the procedure by which jurisdiction is to be exercised, p. 467.

Cited in In re Jessup, 81 Cal. 470, 482, in approval, but denying the power of the legislature to take away or defeat the exercise of jurisdiction and affirming the power of the supreme court to grant hearings by orders of the court entered upon its minutes.

**49 Cal. 469-473. CORY v. HYDE.**

**Specific Performance.**—Petition for decree compelling administrator to convey must allege that contract was in writing, in order to give the probate court jurisdiction, p. 470.

Cited in Reagan v. Justice's Court, 75 Cal. 255, as an exception to the rule that an agreement which is required by statute to be in writing, if in other respects properly pleaded, will be presumed, for the purpose of testing the sufficiency of the pleading, to have been in writing; 68 Am. Dec. 761, extended note, discussing the subject.

**Statutes.**—It is not to be presumed that a statute contains meaningless phrases having no significance, p. 472.

Approved in Read v. Rahm, 65 Cal. 343, and applied to statutory provisions relative to declaration of cash value of homestead.

**49 Cal. 473-478. GALLAGHER v. RILEY.**

**Mexican Grant.**—Final survey of confirmed grant is conclusive as to boundaries of tract confirmed against one claiming under the grant, p. 477.

Referred to in De Guyer v. Banning, 167 U. S. 743, as to conclusiveness of patent. Distinguished in Stoneroad v. Stoneroad, 4 N. Mex. 61, 63, holding court not concluded from determining correct boundaries in action by party claiming under Mexican grant to recover lands outside boundaries shown by the survey.

**General Citation.**—Stuart v. Kirley, 12 S. D. 258.

**49 Cal. 478-485. PEOPLE v. NALLY.**

**Constitutional Law.**—Act submitting to a popular vote the question of creation of new county is constitutional, p. 479.

Affirmed in *People v. McFadden*, 81 Cal. 494, 15 Am. St. Rep. 70, maintaining constitutionality of act providing for creation of county of Orange. Cited in *People v. Fleming*, 10 Colo. 558, in approval of the principle of the decision; *State v. Pond*, 93 Mo. 631, sustaining constitutionality of local option act, Sherwood, J., dissenting, commenting on the principal case, p. 670; 53 Am. Dec. 472, extended note, treating of the subject at length.

Constitutional provision in statute will be sustained, unless so united with an invalid provision that a presumption arises that the legislature would not have adopted the one without the other, p. 482.

Cited in *Ex parte Frazer*, 54 Cal. 97, in approval, construing act regulating practice of medicine; *People v. McFadden*, 81 Cal. 496, 15 Am. St. Rep. 71, construing act providing for formation of county of Orange.

#### 49 Cal. 485-490. PEOPLE v. BELL.

Insanity as defense in criminal case is to be established by prisoner by preponderating proof, p. 488.

Approved in *State v. Lewis*, 20 Nev. 354. So in *State v. Grear*, 29 Minn. 225, and applied to defense of irresponsible drunkenness; *Kelch v. State*, 55 Ohio St. 148, 150, 60 Am. St. Rep. 681, 683, holding that the burden of proof rests on the accused to establish his insanity. Cited in notes to 36 Am. Dec. 410; 97 Am. Dec. 176; 76 Am. St. Rep. 93.

Evidence.—Accused may show good character to raise a doubt, without regard to whether the case is doubtful otherwise, p. 489.

Approved in *People v. Doggett*, 62 Cal. 28, 29; *Shropshire v. State*, 81 Ga. 52; and cited, discussing the subject in 53 Am. Dec. 134, note.

Evidence of Good Character is admissible in question of defendant's guilt, p. 489.

Cited in *People v. French*, 137 Cal. 219, noted under *People v. Ashe*, 44 Cal. 288.

#### 49 Cal. 490-496. MATTER OF ESTATE OF DURHAM.

Estate of Decedent.—Sale made under naked power in will must be made in all respects as if ordered by the court, p. 495.

Cited in *In re Pearsons*, 98 Cal. 613, as to power of court to vacate sale; *Bennallock v. Richards*, 125 Cal. 433, quoting *In re Pearsons*, 98 Cal. 613; *Bank v. Rice*, 143 Cal. 273, holding title not to pass on sale by executor as such without confirmation; *Estate of Walker*, 6 Utah, 373, 374, noted under *Norris v. Harris*, 15 Cal. 255. Referred to in *Bennalack v. Richards*, 116 Cal. 408, as to distinction between mere power in will authorizing a sale by executors, and the devise of a legal estate in trust to carry out provisions of the will.

**49 Cal. 497-506. McCauley v. Harvey.**

Statute of Limitations does not run against a constructive trust in favor of a tenant in common until adverse possession, p. 506.

Cited in Snider v. Johnson, 25 Oreg. 331; Fawcett v. Fawcett, 85 Wis. 338, 39 Am. St. Rep. 847; and Lakin v. Sierra etc. Min. Co., 11 Saw. 246, 25 Fed. Rep. 347, as authority that the statute does not begin to run against a cestui que trust in possession until the date of his ouster therefrom.

**49 Cal. 506-510. Welch v. Huse.**

Wills.—Grant of right to graze stock bequeathed does not restrict the right to the identical stock, p. 510.

Affirmed in Hill v. Den, 54 Cal. 24.

Wills are to be liberally construed so as to effectuate the intention of the testator, p. 509.

Approved in Estate of Fair, 132 Cal. 566, 84 Am. St. Rep. 105, stating general rules for construction of wills; In re Rogers, 94 Cal. 531, construing clause in will as a conditional bequest; Bailey v. Brown, 19 R. I. 682, construing words "survive" and "survivor."

**49 Cal. 510. Gallardo v. Atlantic Etc. Co.**

Bill of Exceptions should not be settled in absence of evidence of notice thereof to adverse party, and proof of service held insufficient, p. 511.

Cited in Witter v. Andrews, 122 Cal. 3, on first point, holding settlement properly refused when no previous notice of presentation was given under Code of Civil Procedure, section 650, and on second point in Mohr v. Byrne, 131 Cal. 290, holding proof of service of notice of appeal insufficient.

General Citation.—Plano Mfg. Co. v. Person, 11 S. D. 542.

**49 Cal. 512-517. Dubordieu v. Butler. See State v. Nelson, 105 Wis. 116.****49 Cal. 517-522. Coleman v. San Rafael Turnpike Road Company.**

Quieting Title.—Facts set forth showing possession sufficient on which to sue to quiet title, pp. 520, 521.

Approved in Goldberg v. Taylor, 2 Utah, 490, and principle of decision applied in the particular case.

Corporation cannot hold land in the name of another which it cannot hold in its own name, and when it cannot hold the legal title to land, it cannot take a beneficial interest in it, p. 522.

Cited in 94 Am. Dec. 387, extended note, on "capacity of corporations to take title to realty."

**49 Cal. 522-523. DUBORDIEU v. BUTLER.**

Mandamus will not lie to compel city treasurer to pay claims not audited and approved as provided by ordinance, p. 523.

Ruling approved in *Foster v. Angell*, 19 R. I. 288.

**49 Cal. 523-525. KELLY v. MACK.**

New Trial.—Statement or bill of exceptions must particularly specify errors relied on, and wherein the evidence is insufficient to justify the judgment, p. 525.

Approved in *Wisse v. Burton*, 73 Cal. 167; *Maskowitz v. Pimentel*, 83 Cal. 451; and *De Molera v. Martin*, 120 Cal. 548; *Bell v. Staacke*, 141 Cal. 191, quoting *De Molera v. Martin*, 120 Cal. 547; *Wasatch Irr. Co. v. Fulton*, 23 Utah, 470, findings of fact not disturbed for insufficiency of evidence where objections do not specify in what particulars the evidence is insufficient.

Ownership of Land is proved *prima facie* by its possession, p. 525.

Cited in *Hewitt v. San Jacinto etc. Dist.*, 124 Cal. 191, holding such *prima facie* proof sufficient as to wife's ownership of land occupied by herself and husband.

Possession.—One who has public land inclosed by a fence, and has a shed on it, and cuts hay on it, but does not reside thereon, has possession, pp. 524, 525.

Cited to same effect in *Webber v. Clark*, 74 Cal. 15; and so in *Gildehaus v. Whiting*, 39 Kan. 713, holding that where there is no adverse possession, the possession follows the property in the land, and is in him who has the title.

**49 Cal. 525-540. UMBARGER v. CHABOYA.**

Construction.—Boundary line in deed construed, pp. 538, 539.

Cited in *Parkinson v. McQuaid*, 54 Wis. 480, in approval; 30 Am. Dec. 739, extended note, discussing subject of boundaries.

**49 Cal. 541-546. MATTER OF ESTATE OF WEBB.**

Trusts.—Equity will give no assistance toward perfecting a voluntary contract for the creation of a trust, p. 545.

Cited to same effect in *Pope v. Burlington Sav. Bank*, 56 Vt. 291, 48 Am. Rep. 784, in which case the transaction was held to be neither a gift nor a trust. So, as authority to same effect, extended notes to 56 Am. Dec. 754; and 34 Am. St. Rep. 197, 203.

**Same.**—A voluntary completed trust is valid and may be enforced in equity, p. 545.

Approved and applied in Adams v. Lambard, 80 Cal. 435, case of agreement to reconvey; Connecticut River Sav. Bank v. Ahnee, 64 Vt. 576, 33 Am. St. Rep. 946, case of a father depositing money in bank in the name of his son, designating himself as trustee. Cited in 23 Am. Dec. 428, extended note, discussing subject of specific performance of voluntary agreements.

**General Citation.**—In 95 Am. Dec. 290, extended note, as authority that, in equity, the consideration of an instrument may be impeached, although a seal be affixed.

#### 49 Cal. 546-550. IN THE MATTER OF MARKET STREET.

**Taxation.**—Tax upon specific property can be supported only upon the ground that the property taxed is benefited by the expenditure of the money, p. 549.

Cited in Lent v. Tillson, 72 Cal. 441, dissenting opinion of Paterson, J., as authority that a statute which imposes an assessment in excess of special benefits is unconstitutional. So, in Davidson v. New Orleans, 34 La. Ann. 176, holding that judgment for a drainage tax will not be enforced where it is shown that the property was injured by the alleged drainage.

#### 49 Cal. 550-551. MATTER OF ESTATE OF WRIGHT.

Executor or administrator, as such, cannot appeal from an order of distribution, p. 551.

Approved in Rosenberg v. Frank, 58 Cal. 420, dissenting opinion of Myrick, J. So in Roach v. Coffey, 73 Cal. 282; Estate of Murphy, 145 Cal. 467, executor cannot urge that petitioning legatees had forfeited rights to legacies because of violation of provision in will that contesting legatees should take nothing by will; McCabe v. Healy, 138 Cal. 90, on point that administrator is not a necessary party to action to enforce constructive trust against heirs, based on decedent's contract; In re Jessup, 80 Cal. 626, holding that an administrator cannot litigate the claim of one heir against another; so in Goldtree v. Thompson, 83 Cal. 422; and Jones v. Lamont, 118 Cal. 503; so in In re Dewar's Estate, 10 Mont. 425; Merrick v. Kennedy, 46 Neb. 269, in approval. Ruling limited in In re Welch, 106 Cal. 429, asserting the doctrine that wherever an order or decree involves a construction of the proper exercise of the duties of a trustee, or presents a question as to the right or power of the trustee to comply with it, or wherever obedience to it might subject him to liability, even where the order is one merely for the payment of funds, the trustee may appeal therefrom.

**49 Cal. 552-556. COVENY v. HALE.**

**New Trial.**—Notice must be filed within time limited, or the motion will be denied, p. 555.

Cited to same effect in *Clark v. Perry*, 17 Colo. 57, holding that the provisions of the statute relative thereto are mandatory.

Insufficiency of the evidence to support the judgment is not proper ground for, p. 556.

Approved in *Maskewitz v. Pimentel*, 83 Cal. 451, holding also that it is not ground for a new trial that “the judgment is against law.”

**Decision** defined, p. 555.

Approved in *Clifford v. Allman*, 84 Cal. 532, following rule.

Distinguished in *Bliss v. Grayson*, 25 Nev. 343, defining term as used in local statutes.

**Exceptions.**—Objection to decision of court, on ground of insufficiency of evidence to sustain it, must specify the particulars in which such evidence is alleged to be insufficient; p. 555.

Cited to same effect in *San Francisco v. Pacific Bank*, 89 Cal. 24; and *Cummings v. Ross*, 90 Cal. 71; *Nichols etc. Co. v. Stangler*, 7 N. Dak. 105, noted under *Moyes v. Griffith*, 35 Cal. 556; *Wasatch Irr. Co. v. Fulton*, 23 Utah, 469, findings of fact not disturbed on appeal for insufficiency of evidence where objections do not specify in what particulars evidence is insufficient.

**Findings.**—Findings should be of an ultimate fact, or of such probative facts as that the ultimate fact necessarily follows, p. 555.

Ruling approved in *People v. Hagar*, 52 Cal. 189; *Biddel v. Brizzolara*, 56 Cal. 381; *Walker v. Buffandeau*, 63 Cal. 315; *Coglan v. Beard*, 65 Cal. 63; *Lewis v. Adams*, 70 Cal. 404; *Water Co. v. Richardson*, 72 Cal. 601; *Souter v. Maguire*, 78 Cal. 545; *Miller v. Luco*, 80 Cal. 265; *Bull v. Bray*, 89 Cal. 288, 292, 293; *McCray v. Burr*, 125 Cal. 638, holding finding of probative facts sufficient as to issue of damages; *Synnott v. Shaughnessy*, 2 Idaho, 115, holding the finding in the particular case to be sufficiently responsive to the issue; *Chicago etc. Ry. Co. v. Dunleavy*, 129 Ill. 142, applied to special verdict.

Mere recital of evidence, not conclusively establishing the fact in issue is insufficient as a finding, p. 556.

Approved in *O'Connor v. Frasher*, 53 Cal. 436; *Biddel v. Brizzolara*, 56 Cal. 383; *Packard v. Johnson*, 57 Cal. 184 (case of insufficient finding of an ouster); *Younger v. Pagles*, 60 Cal. 520; *Anthony v. Jillson*, 83 Cal. 299 (in which case the finding amounted merely to a legal proposition).

**Evidence.**—General objection to papers offered in evidence that they are irrelevant, immaterial, and not proof of the fact in issue, is not well taken if some of the papers are admissible. p. 556.

Cited as authority to same effect, in *Board of Education v. Keenan*, 55 Cal. 645, 648.

**General Citation.**—*Churchill v. Baumann*, 95 Cal. 545, as authority that a finding of affirmative facts which are inconsistent with an averment which the answer denies is a sufficient finding that the averment is not true.

#### 49 Cal. 557-559. EX PARTE HURL.

**Taxation.**—City may require license tax for retailing spirituous liquors, and require payment of it every ninety days, pp. 558, 559.

Cited in *County v. Eikenberry*, 131 Cal. 468, sustaining county tax of thirteen dollars per month, although city had also imposed fifty dollars monthly license; *Santa Barbara v. Stearns*, 51 Cal. 501, as authority that a license fee for the transaction of any business is a "tax"; *San Jose v. San Jose etc. R. R. Co.*, 53 Cal. 481, as authority that the legislature has power to tax occupations, and to authorize municipal corporations to tax them; so, to same effect, in *Ex parte Mount*, 66 Cal. 450; *In re Guerrero*, 69 Cal. 95, to same effect as the ruling stated; *Ex parte Haskell*, 112 Cal. 417, sustaining imposition upon traveling salesmen of a license of fifty dollars per quarter.

License tax by a municipal corporation need not be uniform, p. 559.

Deferred to as authority in *McGrath v. City of Newton*, 29 Kan. 369; *City of Newton v. Atchison*, 31 Kan. 136, 47 Am. Rep. 489, sustaining validity of a license tax upon merchants, graduated by the average amount of their stock. Cited in *State v. French*, 17 Mont. 59, applied to laundry license; *State v. Harrington*, 68 Vt. 631, in approval of ruling stated.

#### 49 Cal. 560-563. PEOPLE v. VASQUEZ.

**Jury.**—Decision of court upon challenge to juror for actual bias is final, p. 562.

Affirmed in *People v. Taing*, 53 Cal. 603; *People v. Riley*, 65 Cal. 108; *People v. Goldenson*, 76 Cal. 346; *People v. Bemmerly*, 87 Cal. 120. Approved in *Yates v. State*, 26 Fla. 501, as to discretion of trial court in such cases; *State v. Hing*, 16 Nev. 309; *State v. Gray*, 19 Nev. 218, in approval.

**Instructions.**—Court may instruct the jury that testimony has been introduced tending to prove a certain matter, p. 562.

Affirmed in *People v. Perry*, 65 Cal. 569; *Morris v. Lachman*, 68 Cal. 113; *People v. Giancoli*, 74 Cal. 644, instructions as to flight of person suspected as tending to prove a consciousness of guilt; *People v. Cummings*, 113 Cal. 90, the instruction being identical with that in the cited case. Approved in *Territory v. Scott*, 7 Mont. 411, instruction concerning threats and previous difficulties as tending to prove malice; *Hogan*

v. Shuart, 11 Mont. 508, and holding that instructions assuming the existence of facts not controverted are proper; State v. Loveless, 17 Nev. 428, in approval; and so in State v. Brown, 28 Oreg. 164. Cited in extended notes to 72 Am. Dec. 545; 14 Am. St. Rep. 37, discussing the subject.

**Murder.**—When homicide is committed in perpetration of a felony, it may be murder in first degree without specific intent to kill, p. 563.

Cited in People v. Lawrence, 143 Cal. 156, approving instruction copied from main case. Ruling approved in State v. Hopkirk, 84 Mo. 288; Stephens v. State, 42 Ohio St. 153; and State v. Johnson, 7 Oreg. 211, holding that where one intending to kill another shoots at him, and missing his aim kills a third person, he is equally guilty as though he had killed the person at whom he aimed.

#### 49 Cal. 563-566. FOX v. BOARD OF SUPERVISORS.

**Board of Supervisors.**—Authority of, in ordering an election for removal of county seat, must be measured by the statute, p. 565.

Cited in People v. Town of Berkeley, 102 Cal. 305, and applied to jurisdiction of board of trustees in the reorganization of a chartered municipality; so, in State v. Eggleston, 34 Kan. 721; and Rickey v. Williams, 8 Wash. 487, both cases pertaining to removal of county seat.

#### 49 Cal. 577-580. PEOPLE v. CLEVELAND.

**Evidence.**—Sufficient corroboration of testimony of accomplice to sustain a conviction for larceny, p. 580.

Approved in People v. Grundell, 75 Cal. 305, instance of sufficient corroboration of a charge of stealing a steer. Cited in 71 Am. Dec. 678, extended note on subject.

**Continuance.**—Application for properly denied, where it is shown that the attendance of the alleged absent witness could not be procured in a reasonable time, p. 580.

Ruling approved in People v. Lewis, 64 Cal. 403.

**Instructions** should be considered as a whole, p. 580.

Approved in People v. Morine, 61 Cal. 370; People v. Armstrong, 114 Cal. 574; Territory v. Evans, 2 Idaho, 398; Spies v. People, 122 Ill. 246; 3 Am. St. Rep. 456; State v. Hanson, 25 Oreg. 404; and State v. McCoy, 15 Utah, 141.

#### 49 Cal. 581-584. PEOPLE v. GETTY.

**Evidence.**—Possession of money recently stolen, as evidence of larceny, pp. 583, 584.

Cited in 70 Am. Dec. 447, 449, 450, extended note, discussing subject at length.

**Bill of Exceptions** embodying the whole of the reporter's notes will not be considered and may be stricken from the files, 584.

Approved in *People v. Sprague*, 53 Cal. 423, refusing to settle proposed bill of exceptions because "reprehensible" in form; *Frazer v. Superior Court*, 62 Cal. 50; *Valleau v. Superior Court*, 62 Cal. 290, applied to statements on motion for new trial; *January v. Superior Court*, 73 Cal. 540, in which case the proposed bill of exceptions consisted merely of a transcript of the reporter's notes of the evidence and proceedings; *Winters v. Buck*, 121 Cal. 280, but holding judge not warranted in refusing to settle proper bill presented thereafter; *Wild v. Union Pac. Ry.*, 23 Utah, 270, following rule; *State v. Napton*, 28 Mont. 339, referee is justified in refusing to settle a bill of exceptions which recites, "The following testimony was taken before the referee (clerk will here insert testimony)"; *Territory v. Stone*, 2 Dak. Ter. 175, holding it sufficient to give the substance of the evidence; *Montana Lumber etc. Co. v. Howard*, 10 Mont. 298, in approval of the ruling. Limited in *Cohen v. Wallace*, 107 Cal. 138, 139, holding that the rule will not be extended to cases not falling strictly within the class to which it has heretofore been held to apply, and that it must be left largely to the discretion of the trial judge when settling the bill to determine the proper method to be pursued in any given case.

#### 49 Cal. 586-590. **CLARK v. CLARK.**

**Specific Performance.**—Verbal agreement to execute lease for more than a year will be specifically enforced when the lessee has fully performed on his part, pp. 589, 590.

Cited in *Cochrane v. Mining Co.*, 16 Colo. 422, case of enforcement of contract for lease; so in *Kopplin v. Kopplin*, 8 Tex. Civ. App. 629, enforcement of contract to indorse payments on note; 17 Am. St. Rep. 757, extended note, treating of effect of parole lease for more than one year.

#### 49 Cal. 590-596. **HALETT v. PATRICK.**

**Guardianship of Insane Person.**—Court may appoint any competent person even though not petitioning, p. 594.

Cited in *Guardianship of Sullivan*, 143 Cal. 465, holding service of notice of appeal on petitioner unnecessary where another person was appointed.

#### 49 Cal. 596-597. **WHITAKER v. HAYNES.**

**Costs.**—Act of 1866, allowing prevailing party five per cent on amount recovered, in certain actions tried in San Francisco, is still in force under codes, p. 597.

Approved in Wheatland Mill Co. v. Pirrie, 89 Cal. 463, but held not to include a judgment in the alternative to an action of replevin; Fanning v. Leviston, 93 Cal. 188, applied to action to enforce street assessment; Golden Gate Lumber Co. v. Sohrbacher, 105 Cal. 118, and held applicable in actions to foreclose liens of materialmen and subcontractors.

**49 Cal. 598-599. BAKER v. HOPE.**

**Judicial Knowledge.**—Court will take judicial notice that a "fence pole" is a heavy club, p. 599.

Pennington v. Caughey, 145 Cal. 11, complaint for assault and battery alleging the defendant assaulted plaintiff and kicked him in the face and body and that he thereby seriously wounded and bruised plaintiff to his damage, is sufficient as to damage; 89 Am. Dec. 697, extended note, discussing subject of "judicial notice."

**49 Cal. 599-604. ESTATE OF MARY COBB.**

Questions of construction of will cannot be raised upon hearing of petition for probate, p. 604.

Cited to same effect in Estate of Murphy, 104 Cal. 566; Barney v. Hayes, 11 Mont. 108; Estate of Pforr, 144 Cal. 125, on point that will cannot be denied probate because of invalidity of some of its provisions; Estate of Fay, 145 Cal. 87, validity of trust clause in will as to beneficiaries is not determinable on appeal from order refusing it probate.

**49 Cal. 607-610. WRIGHT v. CARPENTER.** S. C. on third appeal, 50 Cal. 556.

Inspection of premises by jury cannot be considered by them as independent evidence, and can be used only as a means of enabling them to understand and apply the testimony of the witnesses, p. 610.

Approved in People v. Milner, 122 Cal. 183, sustaining order permitting inspection, and evidence given thereat by witness who had formerly testified in designating places referred to by him; Stanford v. Felt, 71 Cal. 251, and applied in case of findings of a judge making such inspection; Close v. Railway Co., 73 Mich. 652; and Machader v. Williams, 54 Ohio St. 347, both in approval of the ruling stated. So, to same effect, in Albion Min. Co. v. Richmond Min. Co., 19 Nev. 228. Limited in City of Topeka v. Martineau, 42 Kan. 390, sustaining an instruction that the jury might take into consideration the result of their observation in connection with the testimony of the witnesses. Cited in 92 Am. Dec. 344, 345, extended note, discussing the subject.

**49 Cal. 610-612. PEOPLE v. WEST.**

**Murder.**—Instruction that burden of proof is on defendant to disprove his guilt by a preponderance of evidence is erroneous, if there is evidence on the part of the prosecution tending to show a state of facts which justify the killing, p. 611.

Cited in *People v. Hong Ah Duck*, 61 Cal. 395, holding that evidence on part of defense to disprove guilt must predominate; *People v. Elliott*, 80 Cal. 305, holding it only necessary that defendant produce sufficient proof of circumstances of mitigation or excuse to raise a reasonable doubt as to his guilt, and that instructions to the effect that he must prove them by preponderance of evidence are prejudicially erroneous, overruling on this point *People v. Hong Ah Duck*, *supra*. Disapproved in *State v. Jones*, 20 W. Va. 786, adhering to the rule that the burden of proving that the homicide was excusable rests on defendant, and must be established by a preponderance of proof.

**Same.**—In such case the provisions of the statute (Pen. Code, sec. 1105), control, p. 611.

Cited and applied in *United States v. Cannon*, 4 Utah, 134, (indictment for unlawful cohabitation).

**49 Cal. 612-618. TRISCONY v. ORR.**

**Trespass** or trover does not lie in favor of lessor of personal property during term of lease and while lessee is in actual possession, p. 617.

Cited in 1 Am. Dec. 588, note, discussing the subject. Distinguished in *Kellogg v. Burr*, 126 Cal. 41, sustaining claim and delivery by owner after contract of conditional sale to another had been rescinded; but cf. *Yukon etc. Co. v. Gratto*, 136 Cal. 542, holding trover not maintainable under facts stated.

**Fraud.**—General allegation of in pleading is insufficient, p. 17.

Approved in *People v. McKenna*, 81 Cal. 159, holding that facts constituting fraud must be pleaded with particularity both in civil and in criminal cases; *Going v. Dinwiddie*, 86 Cal. 638, as authority that allegations of mere conclusions of law tender no issue; *Rasmussen v. McKnight*, 3 Utah, 324, to same effect as ruling stated.

**Trover.**—Where actual conversion is not shown, plaintiff must allege demand and refusal, p. 617.

Ruling approved in *Crampton v. Valido Marble Co.*, 60 Vt. 303; *Shuman v. Fleckenstein*, 4 Shaw. 176.

**Pleadings** must be construed most strongly against pleader, p. 617.

Cited, in approval, in *Burke v. McDonald*, 2 Idaho, 319, dissenting opinion of Buck, J.

**49 Cal. 623-629. MEEK v. McCLURE.**

**Taxation.**—If a tax is paid under duress no protest is necessary, if the collector has notice of the facts which render the demand illegal, p. 628.

Cited in *Gill v. Oakland*, 124 Cal. 342, noted under *Bucknall v. Story*, 46 Cal. 589; 45 Am. Dec. 162, extended note, where the subject is discussed.

Protest, when necessary, must state the grounds upon which the party paying the money claims that the demand is illegal, p. 628.

Cited in *Smith v. Farrelly*, 52 Cal. 81, sustaining sufficiency of protest in the particular case; *De Fremery v. Austin*, 53 Cal. 383, in approval; 45 Am. Dec. 164, extended note, discussing the subject.

**General Citations.**—In *Rushton v. Burke*, 6 Dak. Ter. 482; *Jones v. Duras*, 14 Neb. 44; *Stephen v. Daniels*, 27 Ohio St. 540; *Davis v. Otoe Co.*, 55 Neb. 681; 70 Am. Dec. 676, note; and 222 Am. Rep. 520, note, all in discussion of the right to recover back money paid under coercion or duress.

**49 Cal. 629-632. PEOPLE v. SHEPARDSON.**

Evidence of previous good character of defendant is relevant, and is to be considered by the jury in connection with the other facts of the case, p. 631.

Ruling approved, *Shropshire v. State*, 81 Ga. 592. Cited in *People v. French*, 137 Cal. 219, noted under *People v. Ashe*, 44 Cal. 288; *State v. Van Vuran*, 25 Utah, 16, following rule.

**49 Cal. 632-638. PEOPLE v. PARTON.**

**Evidence.**—A “confession,” admissible in evidence only after proof that it was voluntary, is restricted to an acknowledgment of guilt, and the word does not apply to a statement made by defendant tending to establish his guilt, pp. 637, 638.

Ruling approved in *People v. Wreden*, 59 Cal. 396; *People v. Velarde*, 59 Cal. 461; *People v. LeRoy*, 65 Cal. 614; *People v. Hickman*, 113 Cal. 86; *People v. Ammerman*, 118 Cal. 32; *Mora v. People*, 19 Colo. 262; *People v. Miller*, 122 Cal. 87, 91, and *Lee v. State*, 102 Ga. 226, noted under *People v. Strong*, 30 Cal. 151; *Fletcher v. State*, 90 Ga. 471 (distinguishing between admission of main fact, and that of some subordinate fact which could be true whether the main fact existed or not); *State v. Crowder*, 41 Kan. 110; *State v. Jackson*, 95 Mo. 651; *Taylor v. State*, 37 Neb. 796; *State v. Heidenreich*, 29 Oreg. 383 (distinguishing between the words “confession” and “admission”); *State v. Douglass*, 20 W. Va. 787; *State v. Picton*, 51 La. Ann. 629. Cited in 6 Am. St. Rep. 242, extended note, discussing subject of admissibility of confessions in evidence.

**49 Cal. 638-642. LOS ANGELES v. LOS ANGELES CITY WATER WORKS CO.**

See 177 U. S. 576; *Grant v. Bartholomew*, 57 Neb. 680.

**49 Cal. 643-652. PEOPLE v. GEIGER.**

**Conspiracy.**—If the evidence tends to show a conspiracy, the declaration or act of one coconspirator before the offense is admissible as the declaration or act of all, p. 649.

Cited as authority to same effect in *People v. Brown*, 59 Cal. 352; *People v. Stevens*, 68 Cal. 115, in which case the evidence did not tend to prove the conspiracy, and was held insufficient as a foundation for other evidence on the subject; *People v. Dixon*, 94 Cal. 257, in approval. So, to same effect, in *Baker v. State*, 7 Tex. Crim. App. 613, 614; *Cox v. State*, 8 Tex. Crim. App. 302.

Challenge to grand jury by defendant in custody, must be taken when impaneled, before indictment, p. 52.

Referred to in *People v. Phelan*, 123 Cal. 567, following rule; *People v. Travers*, 88 Cal. 236, as not being in conflict with the holding that after a grand jury has been discharged, a defendant against whom an indictment has been found cannot have the jurors reassembled in court, formally challenged and examined on their voir dire, on the ground that the jury was not in session when he was held to answer, and that he had no opportunity to challenge the jurors. Approved in *State v. Corcoran*, 7 Idaho, 231, where accused was under arrest and present in court at time of impanelment of grand jury and declines to challenge individual grand jurors, he cannot afterward have indictment set aside for reason that he had good ground for challenge.

**49 Cal. 652-653. PEOPLE v. AH DAT.**

**Dying Declarations** are not admissible in evidence unless declarant believes that his dissolution is actually impending, p. 653.

Approved in *People v. Taylor*, 59 Cal. 649, holding it to be a primary fact to be proved by the party offering such declarations in evidence, that they were made under a sense of impending death.

**49 Cal. 654-655. PEOPLE v. BOWEN.**

**Criminal Law.**—On trial for assault with intent to commit rape, declarations of defendant as to misconduct with other young girls are inadmissible, p. 655.

Affirmed in *People v. Stewart*, 85 Cal. 175, asserting the general rule that the prosecution cannot prove the commission by the defendant of other like offenses, for the purpose of increasing the likelihood that he committed the particular offense charged.

**49 Cal. 655-658. SAN FELIPE MINING COMPANY v. BELSHAW.**

Equitable title will not support action of ejectment, p. 658.

Cited to same effect in Tarpey v. Salt Co., 5 Utah, 213; Murphy v. Crowley, 140 Cal. 149, noted under Felger v. Coward, 35 Cal. 650.

**49 Cal. 665-669. SCHWALM v. HOLMES.**

**Contracts.**—Contract to sell to a particular person only for a fixed period, is not in restraint of trade, p. 669.

Approved in Whitwell v. Continental T. Co., 125 Fed. 458, restriction of sales by manufacturer to those purchasers who decline to deal in goods of competitors is not violative of antitrust act; 92 Am. Dec. 762, extended note, discussing validity of contracts in restraint of trade.

**49 Cal. 672-676. BRANNAN v. MECHLENBURG.**

**Highways.**—Viewers must concur with petitioners as to the location of the entire road petitioned for, otherwise the board of supervisors have no jurisdiction to act, p. 676.

Affirmed in Smithers v. Fitch, 82 Cal. 156, and holding that a person who claims a right, under proceedings of the supervisors, to open a public highway must show a strict compliance with all the provisions of the statute. Cited in Lowe v. Brannan, 105 Ind. 249, as authority that the order for location of a highway must be for such a way as that described in the petition; In re Essex Avenue, 121 Mo. 101, in approval of the ruling stated.

**General Citation.**—Gascho v. Sohl, 155 Ind. 420.

**49 Cal. 676-679. ALDRICH v. STEPHENS.**

**Mortgage Foreclosure.**—If conveyance of the mortgaged property is not recorded before commencement of foreclosure proceedings, the grantee need not be made party defendant, but is bound by the decree, p. 679.

Cited as authority in Boise v. Insurance Co., 114 Ind. 484, holding to the same effect; Hager v. Astorg, 145 Cal. 550, in ejectment to recover land sold to plaintiff as mortgagee under decree for foreclosure of mortgage, defendant who was holder of unrecorded deed from mortgagor when foreclosure commenced need not be made party thereto. Explained and distinguished in Walker v. Goldsmith, 14 Oreg. 148, and the principle held to be inapplicable in the particular case.

Relief against grantee not made party should be sought by motion in the original action, and not by a new action against mortgagor and grantee, p. 679.

Notes Cal. Rep.—158.

Referred to as proper procedure in *Jeffers v. Cook*, 58 Cal. 150. Cited in 76 Am. Dec. 550, note.

**General Citation.**—*Rodgers v. Houston*, 94 Tex. 406.

**49 Cal. 679-680. PEOPLE v. COLSON.**

**Jurora.**—Action of court in allowing challenges for implied bias is not the subject of an exception, p. 680.

Affirmed in *People v. Cochran*, 61 Cal. 549; and approved in *State v. Pritchard*, 15 Nev. 79; so, to same effect, in *U. S. v. Jones*, 69 Fed. Rep. 976. Cited in 53 Am. Dec. 101, note.

**49 Cal. 680-683. EX PARTE MARKS.**

**Criminal Law.**—Bail in criminal case pending an appeal should not be allowed except under extraordinary circumstances, p. 683.

Cited in approval in *People v. Booker*, 51 Cal. 318; *Ex parte Smallman*, 54 Cal. 36; *Lybecker v. Murray*, 58 Cal. 189; *Ex parte Brown*, 68 Cal. 183; *Ex parte Smith*, 89 Cal. 80; *Ex parte Turner*, 112 Cal. 629, in all of which cases admission to bail pending appeal is held to be a matter of discretion merely, and not of right. So, to same effect in *United States v. Hudson*, 65 Fed. Rep. 75; *Leeper v. State*, 103 Tenn. 534.

**49 Cal. 684-685. PEOPLE v. STATE BOARD OF EDUCATION.**

**State Board of Education** cannot change text-books adopted as part of a uniform series, without the required notice given by authority of the board, p. 685.

Cited in *Greene v. Board of Education*, applying rule to change of penmanship system; *People v. Board of Education*, 54 Cal. 378, dissenting opinion of McKee, J., approving review on certiorari in such case; *State v. Haworth*, 122 Ind. 476, as authority for change of text-books by board of education. Distinguished in *State v. Board of Education*, 18 Nev. 181, maintaining the power of the state board of education to reconsider its action and rescind a resolution prescribing a certain series of text-books for adoption by the different school districts. Cited, also, in 40 Am. St. Rep. 42, extended note, discussing subject of "questions reviewable upon certiorari."

**49 Cal. 686. DOUGHERTY v. HENARIE.**

**Appeal.**—On rehearing, points will be restricted to first argument, p. 686.

Cited as authority in *People v. Northey*, 77 Cal. 635, and the rule extended to criminal cases; *Sweigle v. Gates*, 9 N. D. 550.

## VOLUME L.

By CHARLES T. BOONE.

Revised to include citations to Volume 147, by CHARLES L. THOMPSON.

**Landlord and Tenant.**—Forcible eviction of tenant by lessor from a part of the demised premises, suspends the entire rent during the eviction, p. 6.

Cited in *Collins v. Karatovsky*, 36 Ark. 330, to same effect; *Agar v. Winslow*, 123 Cal. 593, 69 Am. St. Rep. 89, where distinguished, noted under *Levitzky v. Canning*, 33 Cal. 299; *Talbott v. English*, 156 Ind. 305, but holding tenant not evicted under facts stated; *Dengler v. Michelissen*, 76 Cal. 127, as authority that failure on part of lessor to place the lessee in possession justifies the latter in abandoning the premises, and discharges him from liability for rent. So, to same effect in *Brandt v. Phillipi*, 82 Cal. 641; and 38 Am. St. Rep. 482, 491, extended note, discussing subject as to what justifies abandonment of leased premises by tenant.

50 Cal. 7-9. **McQUILKEN v. CENTRAL PACIFIC RAILROAD COMPANY.**

In action for negligence, contributory negligence on part of plaintiff is matter of defense to be proved by defendant, p. 8.

Cited in *Schneider v. Market St. etc. Co.*, 134 Cal. 487, noted under *Robinson v. Railroad Co.*, 48 Cal. 426; *Magee v. Railroad Co.*, 78 Cal. 433, 12 Am. St. Rep. 71, holding that complaint need not allege that the injury was done without fault of plaintiff; *Bowers v. Union Pac. R. R. Co.*, 4 Utah, 224; and *Sheff v. City of Huntington*, 16 W. Va. 317.

Trial court may direct judgment, as in case of nonsuit, if plaintiff's evidence conclusively establishes defense of contributory negligence, p. 8.

Affirmed in *Nagle v. California S. R. R. Co.*, 88 Cal. 91. Cited as authority to same effect in *Gerity v. Haley*, 29 W. Va. 103; and *Eastburn v. Railroad Co.*, 34 W. Va. 694. Cited in *Goldstone v. Merchant's etc. Co.*, 123 Cal. 627, but holding nonsuit improperly granted; *Pierce v. Great Falls etc. Co.*, 22 Mont. 449, holding nonsuit warranted.

**50 Cal. 9-11. TREADWELL v. HIMMELMANN.**

**Accord and Satisfaction.**—Execution of parol agreement to receive an assignment of liens in satisfaction of note, is valid, p. 10.

Principle of decision approved and applied in *Schultz v. Noble*, 77 Cal. 81, holding that in an action by indorser against maker of note which has been paid by the indorser, it is proper to show the circumstances under which the note was made.

**50 Cal. 11-15. HIMMELMANN v. BATEMAN.**

Lien for street improvement in San Francisco, cannot be enforced, unless the assessment and diagram intelligently describe the property assessed, p. 15.

Cited in *Blanchard v. Ladd*, 135 Cal. 216, 217, but holding diagram sufficient despite immaterial variance. Distinguished in *Gillis v. Cleveland*, 87 Cal. 219, 220, the defect not being the same, and holding that a warrant of assessment must, in order to create a lien upon the property charged, be recorded in the office of the superintendent of streets before it is delivered to the contractor or his assigns; *Whiting v. Quackenbush*, 54 Cal. 310, holding that the description in an assessment may be made by a diagram, and on such diagram, the point of a scroll is as competent as the barb of an arrow to denote north.

**50 Cal. 23-26. GALLAGHER v. MARS.**

**Vendor's Lien.**—Enforcement of is not prevented by a verbal agreement by the vendee to reconvey if he does not pay the purchase price, p. 25.

Cited in *Barr v. O'Donnell*, 76 Cal. 471, 9 Am. St. Rep. 244, holding that if land be conveyed by an absolute deed, no express trust in favor of the grantor can be raised by proof of a parol agreement by the grantees to hold the property in trust or reconvey it; *Wood v. Wood*, 124 Ind. 551, in approval of ruling stated; 4 Am. St. Rep. 705, extended note, as recognizing existence of vendor's lien in California.

**50 Cal. 26-30. SEMPLE v. COOK.**

**Ejectment.**—Under general denial, defendant may prove any fact showing that plaintiff had no right of entry when suit was brought, p. 29.

Principle of decision approved in *Stockton v. Knock*, 73 Cal. 426. So, in *Sparrow v. Rhodes*, 76 Cal. 211, 9 Am. St. Rep. 198; and *Eastman v. Gurrey*, 15 Utah, 420.

**Same.**—Possession is presumed to follow the true title, p. 29.

Ruling approved in *Labory v. Orphan Asylum*, 97 Cal. 274; *McCormick v. Sutton*, 97 Cal. 378; *Wilkins v. Pensacola City Co.*, 36 Fla. 59; *Parker v. Bains*, 59 Tex. 18.

**50 Cal. 31-38. MOODY v. PALMER.**

**Deed.**—Land described in, as bounded by a public highway or street, will be considered as bounded by the center of the street, pp. 36, 37.

Approved in *Webber v. California etc. R. R. Co.*, 51 Cal. 425; *Weyl v. Sonoma Valley R. R. Co.*, 69 Cal. 206, applied to sales of Sonoma pueblo lands made by the pueblo commissioners under act of 1868; *Macadamizing Co. v. Williams*, 70 Cal. 540, involved in question of street assessment in city of Oakland; *Watkins v. Lynch*, 71 Cal. 27; *Fraser v. Ott*, 95 Cal. 665, holding that the conveyance passes the title to the center of the highway, subject to the public easement, unless a different intent appears from the grant; 54 Am. Dec. 794, note; and 27 Am. St. Rep. 62, to the ruling stated. Distinguished in *Grand Rapids etc. R. R. Co., v. Heisel*, 38 Mich. 72, 31 Am. Rep. 314, in which case the terms of the grant indicated an intent that the general rule as stated should not apply.

**50 Cal. 38-39. SIMMONS v. KELLER.**

**Dismissal.**—Action may be dismissed for long neglect to bring case to trial, p. 39.

Approved in *Kubli v. Hawkett*, 89 Cal. 642; *Kreiss v. Hotaling*, 99 Cal. 385; *Hassey v. Homestead etc. Assn.*, 102 Cal. 613; *First Nat. Bank v. Nason*, 115 Cal. 628; and *McLaughlin v. Clausen*, 116 Cal. 489. Cited in *People v. Jeffords*, 126 Cal. 300, noted under *Dupoy v. Shear*, 29 Cal. 238; *San Jose etc. Co. v. Allen*, 129 Cal. 250, holding defendant entitled to dismissal for plaintiff's failure to file amended complaint although having received no notice of sustaining of demurrer; *Mowry v. Weisenborn*, 137 Cal. 113, 114, quoting *Kubli v. Hackett*, 89 Cal. 638, and sustaining dismissal; 95 Am. Dec. 215, note.

**50 Cal. 40-43. ESTATE OF PAGE.**

**Judgment.**—If party dies after verdict, it is proper practice to enter judgment against him by name, without presentation of probate claim therefore, p. 42.

Approved in *Fox v. Hale etc. Min. Co.*, 108 Cal. 483; and cited as authority to same effect, 93 Am. Dec. 356, extended note. Distinguished in *Vermont etc. Co. v. Black*, 123 Cal. 23, holding presentation necessary in case of vacation of prior default judgment and re-trial.

**50 Cal. 43-57. PRESTON v. HILL. 19 Am. Rep. 647.**

**Attorney and Client.**—Attorney has no power to compromise a pending action, merely by virtue of his retainer, and without the consent of his client, p. 51.

Cited in *Queirido v. Queirlo*, 129 Cal. 689, but holding objection

to admission of privileged communication waived; *Wall v. Mines*, 130 Cal. 42, holding authorized stipulation of compromise signed by attorney valid though not in form specified in section 283, Code of Civil Procedure; *Harris v. Root*, 28 Mont. 168, where contract for attorney's services in will contest provided for certain sum in case will defeated and afterward compromise effected, attorney's recovery must be on quantum meruit; *Assurance Co. v. Insurance Co.*, 68 Cal. 433, holding that an insurance company, undertaking to defend an action for itself and as agent of another insurance company, had no power to compromise and settle the claim so as to bind the latter, unless it had knowledge of the compromise, and consented to it or approved of it; *Trope v. Kerns*, 83 Cal. 558, in approval, holding that the attorney has no power to make such compromise against or without the consent of the client, if that want of consent is known to the opposite party; *Smith v. Whittier*, 95 Cal. 288, as to binding force of stipulation of attorneys, construing section 283 of the Code of Civil Procedure. So, in *Reclamation District v. Hamilton*, 112 Cal. 609, to same effect; *Knowlton v. MacKenzie*, 110 Cal. 189, denying authority of attorney to consent to modification of judgment, to prejudice of client, without the latter's consent; *Eaton v. Knowles*, 61 Mich. 632, holding that authority to compromise and settle a demand cannot be implied from authority to collect and receive payment. So, in *Watt v. Brockover*, 35 W. Va. 326, 29 Am. St. Rep. 814; *State v. California Min. Co.*, 15 Nev. 243, denying authority of attorney to give consent to a judgment for delinquent taxes, without including the penalties; *Whipple v. Whitman*, 13 R. I. 514, 43 Am. Rep. 45, in approval, holding however, that a judicious compromise made with the assent of the party in interest although without the knowledge of the plaintiff of record, will not be disturbed. Cited, to ruling stated in notes to 34 Am. Dec. 93; 76 Am. Dec. 261; 13 Am. St. Rep. 787.

#### 50 Cal. 57-60. MARKS v. SAYWARD.

**Findings.**—If facts are found outside the issues they will be disregarded, p. 60.

Ruling approved in *Rudel v. Los Angeles County*, 118 Cal. 286; *Dutro v. Kennedy*, 9 Mont. 107; and *Harris v. Lloyd*, 11 Mont. 405, 28 Am. St. Rep. 485. Cited in *Blagen v. Smith*, 34 Or. 400, refusing to consider on appeal testimony introduced on immaterial matter not in issue.

#### 50 Cal. 64-68. McLAUGHLIN v. POWELL.

**Public Lands.**—If plaintiff, in ejectment, relies on a patent which excepts all mineral lands, defendant may prove that the demanded premises are mineral lands, p. 68.

Approved in *Carr v. Quigley*, 57 Cal. 395. Cited in *McLaughlin v.*

Heid, 63 Cal. 218, dissenting opinion of Ross, J., as not sustaining Carr v. Quigley, *supra*; Chicago Quartz Min. Co. v. Oliver, 75 Cal. 198, 7 Am. St. Rep. 145, in approval of the rule. So in United Land Assn. v. Knight, 85 Cal. 486. Distinguished in Gale v. Best, 78 Cal. 240, 241, 12 Am. St. Rep. 48, as a case in which the patent itself expressly excepted "all mineral lands, should any be found to exist in the tracts" embraced by the patent.

50 Cal. 68-70. **HIMMELMANN v. SATTERLEE.**

**Street Improvements.**—Resolution of intention to macadamize a street does not include sidewalk, p. 70.

Approved in Dyer v. Chase, 52 Cal. 441. So in Partridge v. Lucas, 99 Cal. 620, holding that such resolution does not include construction of rock gutterways. Cited in Heiple v. East Portland, 13 Oreg. 103, as to meaning of word "street," in legal acceptation; Board of Public Works v. Hayden, 13 Colo. App. 45.

50 Cal. 70-75. **MAYO v. HAYNIE.**

**Tax Deed** is not conclusive evidence of title against one not a party, who paid the tax, p. 73.

Cited in Grimm v. O'Connell, 54 Cal. 524, as authority that a tax deed can have no greater effect than the law confers upon it.

50 Cal. 80-83. **ALLEN v. DAKE.**

**Land Contest.**—District courts had no jurisdiction to determine contests as to the right to purchase swamp and overflowed land, unless a contest arose in the office of the surveyor general, p. 82.

Cited in McFaul v. Pfankuch, 98 Cal. 402, holding that without the order of the surveyor general the superior court has no jurisdiction to hear or determine the rights of the parties to such contest.

50 Cal. 90-94. **NORTH PACIFIC RAILROAD COMPANY v. REYNOLDS.**

**Findings.**—If the facts are found, it must affirmatively appear that they support the judgment, p. 93.

Ruling approved in First Nat. Bank v. Irrigation District, 107 Cal. 64; so in Drainage District v. Crow, 20 Oreg. 537; Maynard v. Insurance Assn., 14 Utah, 462. Cited in Fabian v. Collins, 3 Mont. 229, as so holding, but asserting a contrary rule under Montana Civil Practice Act.

50 Cal. 94-95. **HARLAN v. PRATT.**

**Appeal.**—Where record shows that no appeal has been taken because of failure to serve notice of appeal in time, motion to dismiss will be denied, p. 95.

Cited in reviewing the California decisions on the subject, *Territory v. Harris*, 7 Mont. 430, and the ruling disapproved.

**50 Cal. 95-96. PEOPLE v. CURTIS.**

**Perjury.**—Testimony charged as perjury may be proven by parol, though required to be reduced to writing if not written in fact, p. 96.

Cited in *People v. Herbert*, 61 Cal. 546, as authority that witness may testify to statements made by defendant before the coroner's jury; *People v. Leyshon*, 108 Cal. 445, as to admissibility in evidence of depositions of witnesses taken at preliminary examination; 85 Am. Dec. 500, note, to ruling stated.

**50 Cal. 97-100. PERKINS v. GRIDLEY.**

**Sale by Executors.**—Confirmation of, without the notice required by statute, may be set aside, p. 99.

Cited in 29 Am. St. Rep. 498, extended note, treating of order confirming judicial sale.

**50 Cal. 101-103. HOUGHTON v. LEE.**

**Homestead.**—Money due from an insurance company for loss of a house on the homestead property cannot be garnished, p. 103.

Cited as authority in *Ellis v. Pratt City*, 111 Ala. 632, 56 Am. St. Rep. 78, holding that if city property, used for municipal purposes, is exempt, under the statute, from levy and sale under judicial process, insurance money, after a loss, takes the place of the property and is also exempt; *Probst v. Scott*, 31 Ark. 657, applied, exemption of chose in action from garnishment under Arkansas constitution. So, to same effect in *Carter v. Carter*, 20 Fla. 562; *Kaiser v. Seaton*, 62 Iowa, 465, as authority, holding to same effect as ruling stated; so in *Continental Ins. Co. v. Daly*, 33 Kan. 608; *Whittenberg v. Lloyd*, 49 Tex. 642; *Cameron v. Fay*, 55 Tex. 63; *Hunter v. Wooldert*, 55 Tex. 436; and *Chase v. Swayne*, 88 Tex. 222, 53 Am. St. Rep. 745; so in *Kingsland v. McGowan*, 3 Tex. Civ. App. 58, discussing the question as to when proceeds of sale of exempt property is not exempt; *Puget Sound etc. Packing Co. v. Jeffs*, 11 Wash. 472, 48 Am. St. Rep. 889, holding that the proceeds of insurance received by the insured for destruction of exempt personal property are also exempt if the insured intends to invest them in property similar to that destroyed; notes in 45 Am. St. Rep. 238, and 66 Am. St. Rep. 386. Denied in *Smith v. Ratcliff*, 66 Miss. 687, 688, 14 Am. St. Rep. 608, holding contrary to the ruling stated.

**General Citations.**—In *California Fruit Transp. Co. v. Anderson*, 79 Fed. Rep. 406, as authority that the homestead can be conveyed or encumbered only in the manner prescribed by law; *Rodgers v. First Nat. Bank*, 82 Mo. App. 382; 93 Am. Dec. 351, note, as authority that the homestead is not subject to judgment liens.

**50 Cal. 103-105. FRIEDBERG v. PARKER.**

**Wife's Separate Estate.**—Amendment of May 12, 1862, to act of 1850, defining rights of husband and wife, freed the personal estate of the wife from the rule laid down in *Maclay v. Love*, 25 Cal. 367, 85 Am. Dec. 133, p. 105.

Cited, as so holding, in 85 Am. Dec. 145, note.

**50 Cal. 106-108. WINGATE v. FERRIS.**

**Pleading.**—Complaint in equity, in action by cestui que trust against trustee, sustained as sufficient, pp. 105, 107.

Approved in *Jasper v. Hazen*, 1 N. Dak. 83, a case in most respects similar.

**Verdict in Equity Case** is only advisory to the court, and should be special, p. 108.

Affirmed in *Warring v. Freeear*, 64 Cal. 56, action to enjoin maintenance of dam across a running stream. Cited as authority to same effect in *Simpson v. Harris*, 21 Nev. 376; *Smith v. Richardson*, 2 Utah, 427; *Wasatch Min. Co. v. Jennings*, 14 Utah, 227. Cited in *Lynch v. Coviglio*, 17 Utah, 109, permitting amendment of findings in such case, though motion for new trial had been made.

**General Citation.**—*Prodzinski v. Garbutt*, 8 N. D. 195, 197.

**50 Cal. 112-115. BARRANTE v. GARRATT.**

**Findings of probative facts** will not, in general, control or modify the finding of the ultimate facts, p. 114.

Cited to same effect in *Perry v. Quackenbush*, 105 Cal. 306.

**Damages.**—Measure of, in action for conversion, is the value of the property at time of conversion, with interest; or, where the action has been prosecuted with reasonable diligence, the highest market value between the conversion and the verdict, p. 115.

Harmonized in *Kelly v. McKibben*, 54 Cal. 194, 195, pointing out distinction between an action to recover possession of personal property, with damages for its detention, and one to recover damages for its wrongful conversion. Cited in 11 Am. Dec. 528, extended note, to ruling stated.

**50 Cal. 115-116. KING v. MONTGOMERY.**

**Pleading.**—Complaint in action for maliciously suing out attachment, must aver that the writ was sued out and prosecuted without probable cause, p. 116.

Cited in *Hess v. German etc. Co.*, 37 Or. 299, noted under *Robinson v. Kellum*, 6 Cal. 399, notes, 68 Am. St. Rep. 268, and 81 Am. Dec. 479, discussing subject of malicious prosecution.

**Dismissal.**—Where plaintiff declines to amend an insufficient complaint, action should be dismissed on defendant's motion, p. 118.

Explained in Kelley v. Kriess, 68 Cal. 212, holding that if a complaint fails to state a cause of action, advantage may be taken of the defect by demurrer, by motion for judgment on the pleadings, or upon motion for a new trial. Cited, in De Toro v. Robinson, 91 Cal. 373; Hibernia etc. Soc. v. Thornton, 117 Cal. 482; and People v. Brown, 23 Colo. 430, as authority that a motion for judgment on the pleadings is proper when the complaint does not state a cause of action.

**General Citation.**—James River Nat. Bank v. Purchase, 9 N. D. 282.

#### 50 Cal. 117-120. ADAMS v. SAN FRANCISCO.

**Statutes.**—Relative to fees of officers in city and county of San Francisco, construed, pp. 118, 119.

Referred to in People v. Henshaw, 76 Cal. 449, dissenting opinion of McKinstry, J., discussing effect of act of 1885, providing for police courts in cities.

**Sheriffs.**—Duty of sheriffs to take prisoners to state prison, and insane persons to insane asylum, is an official duty, p. 119.

Cited, as so holding, in 6 Am. St. Rep. 132, extended note, discussing subject of official acts.

**Same.**—Fees received by sheriff of city and county of San Francisco for the performance of such duty must be paid into the treasury, p. 119.

Cited as authority in County of Santa Clara v. Branham, 77 Cal. 595, construing County Government Act of 1883, as amended by act of 1885, holding that the sheriff of a county has no right to retain such fees for his own use.

#### 50 Cal. 120. BUDD v. DRAIS.

Statement on motion for new trial should be settled or agreed to by the parties, and should contain specifications of the grounds upon which the moving party will rely, p. 120.

Affirmed in Drais v. Hogan, 50 Cal. 127, 128; Leonard v. Shaw, 114 Cal. 71. Cited in Machado v. Kinney, 135 Cal. 355, and Slater v. U. P. etc. Co., 8 Utah, 180, on point that motion for new trial cannot be considered in absence of proper statement properly certified.

#### 50 Cal. 121-129. DRAIS v. HOGAN.

**Husband and Wife.**—Payment by husband of judgment against wife's separate estate is a payment by the wife, p. 125.

Cited to same effect in Moore v. Jones, 63 Cal. 15.

**Married Woman** cannot bind herself by a contract to pay an attorney for procuring a divorce and a division of the common property, p. 128.

Cited in Vantilburg v. Black, 3 Mont. 464, in approval, as to inability of married woman to bind herself by contract at common law.

**Appeal.**—Loss of rights of party by failure to appeal within the time limited by statute, p. 128.

Cited in Vantilburg v. Black, 3 Mont. 469, holding that equity will not afford relief to a party who has been negligent in obtaining a legal remedy.

**Attorney is Liable** for submitting new trial motion without proper statement, and for allowing time for appeal to lapse, where complaint shows no cause of action, pp. 127, 128.

Explained in Spangler v. Sellers, 5 Fed. Rep. 890, and doctrine as to attorney's liability for negligence approved. Cited in 34 Am. Dec. 94, extended note, discussing the subject.

#### 50 Cal. 129-132. BROWN v. KENTFIELD.

**General Exception** to charge of court to jury or instructions given will not be noticed on appeal, p. 132.

Affirmed in Dixon v. Allen, 69 Cal. 529, in which case the transcript showed no specific exceptions to portions of the general charge of the court; Cavallaro v. Texas etc. Ry. Co., 110 Cal. 358, 52 Am. St. Rep. 101, but noting that the rule has no application to special instructions asked by the parties, and given or refused by the court. Approved in Bard v. Elston, 31 Kan. 276. So in Banta v. Martin, 38 Ohio St. 536, but the rule was not applied in the particular case. Cited in Jones v. Memmott, 7 Utah, 343, as following Payne v. Treadwell, 16 Cal. 242, on sufficiency of complaint in ejectment (*sed quacre*); 85 Am. Dec. 125, note.

**Nuisance.**—In an action to abate, as a nuisance, a boom across a navigable river, plaintiff must prove that the obstruction was unreasonable, p. 131.

Cited in McMenomy v. Band, 87 Cal. 139, and the rule applied where it was sought to abate, as a nuisance, a brass foundry and machinery incident thereto.

#### 50 Cal. 132-137. JAMISON v. KING.

**Pleading.**—Complaint containing averments in the alternative is ambiguous, and bad on demurrer, even if either averment states a cause of action, p. 136.

Cited to same effect in Palmer v. Utah etc. R. R. Co., 2 Idaho, 293, holding that such defects are ground of special demurrer under code of Idaho.

**Contract.**—Pre-existing debt is a valuable consideration, p. 136.

Affirmed in *Saunderson v. Broadwell*, 82 Cal. 133, holding that indebtedness of grantor to grantee was a valuable consideration for a conveyance.

**Fraud.**—Inadequacy, or failure of consideration, is not of itself sufficient to authorize the court to find fraud, as a conclusion of law, p. 136.

Cited in *Harris v. Burns*, 50 Cal. 142; *McFadden v. Mitchell*, 54 Cal. 630; *Bull v. Bray*, 89 Cal. 301, 302; *Threlkel v. Scott*, 89 Cal. 353, all in affirmance of the rule that the question of fraudulent intent is one of fact, and not of law; and approved to same effect, *Hutchinson v. First Nat. Bank*, 133 Ind. 283; 36 Am. St. Rep. 547.

#### 50 Cal. 137-140. PEOPLE v. KEITH.

**Criminal Law.**—Evidence of part of conversation of defendant, standing alone, is inadmissible, p. 139.

Approved in *People v. Irwin*, 77 Cal. 506, in which case evidence of a mere scrap of conversation overheard between the defendant and an alleged conspirator, which might possibly refer to the deceased, was held to be inadmissible; so, to same effect, *People v. Tarbox*, 115 Cal. 65.

**Witness.**—Recall of, for further examination, is a matter resting greatly in the discretion of the court, p. 140.

Cited to same effect in *People v. Moan*, 65 Cal. 536, sustaining the refusal of the court to permit the defendant to recall a witness who had already been on the stand twice.

#### 50 Cal. 140-142. HARRIS v. BURNS.

**Fraud.**—Question of fraudulent intent in sale of chattels is one of fact and not of law, p. 142.

Cited in *McFadden v. Mitchell*, 54 Cal. 630, in approval; and so in *Bull v. Bray*, 89 Cal. 302.

#### 50 Cal. 142-145. THOMPSON v. THORNTON.

**Public Lands.**—To render lands “swamp and overflowed,” within meaning of act of Congress of 1850, they must have been usually rendered unfit for successful cultivation prior to said act, p. 145.

Cited in *American Emigrant Co. v. Rogers Locomotive Works*, 83 Iowa, 615, in approval of the construction given.

General objection to evidence, insufficient, p. 145.

Approved in *Lee v. Murphy*, 119 Cal. 367. Cited in *Estate of Gregory*, 133 Cal. 138, holding obligation not sufficiently specific.

**.50 Cal. 145-153. WHITMORE v. SAN FRANCISCO SAVINGS UNION.**

**Estate of Decedent.**—Failure to present claim to executor or administrator for allowance, does not extinguish the debt, but merely takes away the remedy of the creditor, p. 149.

Cited to same effect in Bull v. Coe, 77 Cal. 63, 11 Am. St. Rep. 241, holding that the liability of a surety is not affected by the failure to present a claim against the estate of the principal debtor.

Failure to present a claim secured by deed of trust within the time fixed by the statute, does not extinguish the debt, and the executor cannot enjoin the creditor from selling the land under a power contained in the deed, p. 150.

Cited in More v. Calkins, 95 Cal. 438, 29 Am. St. Rep. 130, in approval of the doctrine; and so, to same effect, in Reid v. Sullivan, 20 Colo. 502; Farmers' L. etc. Co. v. Denver etc. R. Co., 126 Fed. 52, equity may grant relief in certain cases, where by reason of limitations claim could not be enforced in any other way; Muth v. Goddard, 28 Mont. 254, where trust deed given to secure debt authorizes trustee to sell property after default, death of grantor does not affect trustee's right to exercise power of sale; 19 Am. St. Rep. 274, extended note, discussing the subject at length.

**General Citation.**—In Savings & Loan Soc. v. Burnett, 106 Cal. 528, as authority for upholding a similar form of deed; Gage v. Riverside Trust Co., 86 Fed. Rep. 908, in approval, as to when equity will not compel a creditor to give up his securities.

**.50 Cal. 153-160. PATY v. SMITH.**

**Guardian and Ward.**—An act allowing a person by name to sell estate of infant contemplates his appointment as guardian by the probate court, and a sale by him without such appointment is void, p. 159.

Referred to in McNeil v. Polk, 57 Cal. 324; and McNeil v. Congregational Society, 66 Cal. 110, cases involving question of title to the same property. Cited in Rider v. Regan, 114 Cal. 678, dissenting opinion of Henshaw, J., as doubting the power of the legislature to direct a sale of the real estate of an infant by one other than a duly appointed guardian; the prevailing opinion sustaining, however, the constitutionality of the act of 1875, providing for a judicial proceeding to authorize the sale of the homestead, upon the insanity of either spouse, by the sane spouse alone.

**.50 Cal. 162-166. BROWN v. OLMSTED.**

**Payment.**—Express agreement must be shown to establish the fact that a bill or note of the debtor or a third person was taken by the creditor in payment of a pre-existing debt, p. 165.

Cited in *Wright v. Byrne*, 129 Cal. 617, holding original debt not satisfied by taking of new note; *Comptoir D'Escompte v. Dresbach*, 78 Cal. 20, holding further that a written receipt of payment in full does not establish a positive agreement for absolute payment when the payment is by bill or note; *Tolman v. Smith*, 85 Cal. 287, principle applied, holding that the effect of conditional payment of one mortgage by another is to suspend the remedy on the old mortgage until the maturity of the new one; *Steinhart v. National Bank*, 94 Cal. 366, 28 Am. St. Rep. 136, applied to case of check taken for antecedent debt; *Borland v. Nevada Bank*, 99 Cal. 96, 37 Am. St. Rep. 38, holding that taking the note of a third party from the debtor will be regarded as given for collateral security unless proof is made that it was given and received as payment. So in *Caldwell v. Hall*, 49 Ark. 513, 4 Am. St. Rep. 67; *Dellapiazza v. Foley*, 112 Cal. 386; *Jenne v. Burger*, 120 Cal. 447, in approval of the doctrine; so in *Godfrey v. Crisler*, 121 Ind. 205; *Knox v. Gerhauser*, 3 Mont. 275 (case of alleged payment of a promissory note by an order); *National Bank v. Jose*, 10 Wash. 192, applied where a new promissory note is taken in place of one which has become due; *Stone and Gravel Co. v. Gates Iron Works*, 124 Ill. 627, doubting whether the giving of a receipt for the amount is enough to establish such positive agreement.

**50 Cal. 166-169. CANNING v. CENTRAL PACIFIC RAILROAD COMPANY.**

New Trial.—When testimony is taken by deposition, verdict will not be disturbed on the ground that it is not sustained by the evidence, unless clearly appearing to be against the weight of evidence, p. 168.

Cited in *Blum v. Sunol*, 63 Cal. 343, as authority to same effect.

**50 Cal. 169-171. LAUGHLIN v. McGARVEY.**

Public Lands.—Recitals in certificate of purchase are not evidence of facts recited against one holding a United States patent prior to the certificate, p. 171.

Cited, as authority to same effect, in *Aurrecochea v. Sinclair*, 60 Cal. 549.

**50 Cal. 171-176. MAYO v. WOOD.**

Estoppel.—Judgment in ejectment against one holding as tenant of another does not estop a third person who afterward takes possession without any privity with the tenant or his landlord, p. 175.

Cited in 2 Am. St. Rep. 876, note, as authority that an adjudication binds only the parties to the judgment, and gives no rights either to or against third parties.

**50 Cal. 176-185. HENRY v. SOUTHERN PACIFIC RAILROAD COMPANY.**

**Appeal.**—Objection to admissibility of evidence cannot be raised for the first time in the supreme court, p. 181.

Ruling affirmed in Scott v. Sierra Lumber Co., 67 Cal. 75; In re Doyle, 73 Cal. 568.

**Negligence.**—Railroad company is bound to keep its right of way reasonably clear of dry grass or herbage, and if a fire occurs by reason of a negligent failure to do so, the company is liable, p. 181.

Cited, to same effect, in Jones v. Railroad Co., 59 Mich. 440; Diamond v. Railroad Co., 6 Mont. 589; so in 38 Am. Dec. 72, extended note, discussing subject of "liability of railroad companies for fires."

Fact that the fire was communicated from an engine of the company, with proof that this result was not probable from the ordinary working of the engine, is, *prima facie*, proof of negligence, sufficient to go to the jury, p. 182.

Cited as authority in Judson v. Giant Powder Co., 107 Cal. 560, 48 Am. St. Rep. 154, holding that negligence is *prima facie* presumed from the fact of the explosion of a nitro-glycerine factory, in the absence of evidence showing care on the part of the employees; Railway Co. v. Manufacturing Co., 27 Fla. 81, as authority that negligence will be presumed from the fact of sparks escaping from an engine, and the destruction of property resulting therefrom. So, to same effect, in Johnson v. Railway Co., 31 Minn. 59; and Gibbons v. Railroad Co., 58 Wis. 341, 57 Am. Rep. 812, note, to the ruling stated; Evansville etc. R. R. Co. v. Keith, 8 Ind. App. 71, dissenting opinion of Ross, J., as to presumption of negligence where fire originates from sparks emitted from engine.

Plaintiff may prove that prior and subsequent to the fire which caused the injury, and about that time, other fires were kindled in the vicinity of the same engine, p. 183.

Cited in Butcher v. Railroad Co., 67 Cal. 521, 522; Steele v. Pacific Coast R. R. Co., 74 Cal. 331, in approval; so in Railway Co. v. Holt, 1 Tex. Civ. App. 480; and Savannah etc. R. R. Co. v. Flannagan, 82 Ga. 589, 14 Am. St. Rep. 182, applied to evidence of the habitual high rate of speed of an engine, causing the accident, when run by the same engineer, and also to evidence of his habitual neglect to ring the bell; Dyas v. S. P. Co., 140 Cal. 305, admitting evidence of prior accident due to same insecure machinery; 38 Am. Dec. 73, note; and 67 Am. Dec. 160, note, to the ruling stated.

It may be left to jury to determine whether the spreading of a fire from one field to another is not the natural, direct, or proximate consequence of the original firing, p. 183.

Approved in Perry v. Railroad Co., 50 Cal. 581; Butcher v. Railroad Co., 67 Cal. 519; Louisville etc. Ry. Co. v. Krinning, 87 Ind. 355; and

principle approved and applied in *Billman v. Railroad Co.*, 76 Ind. 175; 49 Am. Rep. 237; *Binford v. Johnston*, 82 Ind. 428; 42 Am. Rep. 509; *Higgins v. Cherokee R. R. Co.*, 73 Ga. 164. So, to same effect, in *The Joseph B. Thomas*, 86 Fed. Rep. 665. Cited in *Clark v. S. F. Co.*, 142 Cal. 618, sustaining sufficiency of complaint for damages from such fire; 38 Am. Dec. 77, extended note; 91 Am. Dec. 58, note; and 36 Am. St. Rep. 809, 810, 824, extended note, wherein the subject of "proximate and remote cause" is very exhaustively discussed.

**General Citations.**—*McTavish v. Great Northern R. Co.*, 8 N. D. 342; *Chicago etc. Ry. Co. v. Ross*, 24 Ind. App. 228.

#### 50 Cal. 185-186. KENT v. WEST.

**Jurisdiction.**—If defendant's motion to set aside return of service of summons is denied he may answer without waiving the benefit of an exception to the order denying his motion, p. 186.

Cited, in approval of the practice, in *Black v. Clendenin*, 3 Mont. 49; *Kindake v. Myers*, 17 Oreg. 472; *Miner v. Francis*, 3 N. Dak. 553; *Lung Chung v. Railway Co.*, 10 Saw. 20, 19 Fed. Rep. 256; *McDonald v. Agnew*, 122 Cal. 450, noted under *Deidersheimer v. Brown*, 8 Cal. 339. Ruling limited in *Sealy v. California Lumber Co.*, 19 Oreg. 96, in which case it is "thought by the court that the better reason is with those authorities which hold that a party waives his objections to a defective summons or a defective service of a legal summons whether overruled or not, when he subsequently appears and defends the action."

#### 50 Cal. 187-188. DOHERTY v. ENTERPRISE MINING COMPANY.

**New Trial.**—Statement on motion for must particularly specify wherein the evidence is insufficient, p. 188.

Cited in *Wise v. Burton*, 73 Cal. 167, in which case the specifications were, however, held sufficient; *Anthony v. Jilson*, 83 Cal. 299, in approval of the rule.

#### 50 Cal. 188-190. SAN FRANCISCO v. CERTAIN REAL ESTATE.

**Street Improvement—Assessment.**—The auditor, in making a duplicate copy of assessment-roll, need not attach thereto a copy of the certificate of the mayor appended to the original roll, certifying its correctness, p. 190.

Approved in *Gillis v. Cleveland*, 87 Cal. 220. Cited in *Moffitt v. Jordan*, 127 Cal. 624, noted under *Himmelman v. Hoadley*, 44 Cal. 225.

#### 50 Cal. 190-195. HOPKINS v. WESTERN PACIFIC RAILROAD COMPANY.

**Nuisance.**—In action for damages for nuisance in street opposite

plaintiff's residence, evidence that the land would sell for less on account of the nuisance, is inadmissible, p. 194.

Cited to same effect in Severy v. Railroad Co., 51 Cal. 197, action for obstructing a street; so in Bigley v. Nunan, 53 Cal. 404; Railroad Co. v. Lockwood, 33 Fla. 592. Doubted in Railroad Co. v. Twine, 23 Kan. 590; 33 Am. Rep. 207.

**Same.**—In such action defendant is liable only for the damages actually sustained prior to the suit, p. 194.

Affirmed in Ford v. Railroad Co., 59 Cal. 292; Beronio v. Railroad Co., 86 Cal. 421; 21 Am. St. Rep. 60; and ruling approved in Brokken v. Railway Co., 29 Minn. 45. Denied in Rosenthal v. Railway Co., 79 Tex. 328; and distinguished in Cain v. Railroad Co., 54 Iowa, 263.

**General Citations.**—In Marini v. Graham, 67 Cal. 133, as authority that a private individual cannot maintain an action for obstructing a sidewalk when the injury to him is the same in kind as that sustained by the public, although it may be greater in degree. Cleveland etc. Ry. Co. v. King, 23 Ind. App. 580.

#### 50 Cal. 195-203. SACRAMENTO SAVINGS BANK v. HYNES.

**Ejectment.**—In action of, plaintiff can recover only on title held at commencement of suit, p. 200.

Cited to same effect in Sauer v. Meyer, 87 Cal. 36.

**Public Lands.**—One who seeks to have a patentee declared his trustee must connect himself with the paramount source of title, and show that he has prosecuted his claim with diligence, p. 202.

Cited as sustaining this rule in Dreyfus v. Badger, 108 Cal. 63.

So, to same effect, in 12 Am. Dec. 567, note.

**Pleading.**—Complaint for relief on ground of fraud should aver the facts which constitute the fraud, p. 202.

Approved in People v. McKenna, 81 Cal. 159, holding that facts constituting fraud must be pleaded with particularity both in civil and criminal cases; Heller v. Dyerville Mfg. Co., 116 Cal. 135, in which case general averments of a fraudulent purpose in the procurement of a decree, were held insufficient.

**Land Contest.**—Remedy for erroneous decision of land officers is by appeal, p. 203.

Cited as authority in Burling v. Thompkins, 77 Cal. 261; notes to 12 Am. Dec. 566; and 20 Am. Dec. 275.

#### 50 Cal. 203-205. CAMPBELL v. ADAMS.

**Judgment** against one sued by fictitious name without amendment is not void, and cannot be attacked collaterally, p. 205.

Notes Cal. Rep.—159.

Cited to same effect in Baldwin v. Morgan, 50 Cal. 589; Farris v. Merritt, 63 Cal. 119 (as to necessity of inserting real name of defendant when ascertained); Tyrrell v. Baldwin, 67 Cal. 3; Johnston v. San Francisco Sav. Union, 75 Cal. 140, 7 Am. St. Rep. 132; and Ex parte Fil Ki, 79 Cal. 586 (case of misnomer in entitling the name of the court upon the face of the complaint).

**50 Cal. 206. HIBBING v. HYDE.**

Malicious Prosecution will not lie unless prosecution has terminated by plaintiff's acquittal, p. 206.

Cited in Carpenter v. Nutter, 127 Cal. 63, and Dowdell v. Carpy, 129 Cal. 172; holding complaints insufficient.

**50 Cal. 210-211. SAN FRANCISCO v. McCAIN.**

Street Improvements.—Resolution of intention under act of 1870 must be published five days, exclusive of Sundays and nonjudicial days, p. 211.

Followed in People v. McCain, 51 Cal. 361, the last day of a publication of five days being Sunday, the publication was held to be insufficient. Principle of the decision approved in Burke v. Turney, 54 Cal. 487; so, in Alameda Macadamizing Co. v. Huff, 57 Cal. 332. Cited in Whitney v. Blackburn, 17 Oreg. 571, 11 Am. St. Rep. 862, as to effect of service of process on legal holiday.

**50 Cal. 211-217. HESTRES v. BRENNAN.**

Public Lands.—Power of secretary of interior in relation to, described, p. 217.

Followed in Vance v. Kohlberg, 50 Cal. 349; Weaver v. Fairchild, 50 Cal. 362. Cited in Vantangeren v. Hefferman, 5 Dak. Ter. 225, 226, as to supervisory power of secretary of interior, and holding that under the pre-emption laws of the general government, courts have no jurisdiction, until after the patent has issued, to pass upon conflicting claims arising between private persons. So, to same effect, in Swigart v. Walker, 49 Kan. 104; and Orchard v. Alexander, 157 U. S. 382. So in Jones v. Meyers, 2 Idaho, 797, 35 Am. St. Rep. 262, as to power of landoffice to cancel entries of public lands at any time before issue of patent thereon.

**50 Cal. 218-222. BURKE v. WELLS, FARGO & CO.**

Reward for arrest and conviction is not earned by mere communication of suspicion not given with view to reward, without other act of performance, pp. 221, 222.

Cited, to ruling stated, in notes to 73 Am. Dec. 639; and 26 Am. Rep. 8.

Same.—Claimant must prove that he has substantially performed the service proposed in the advertisement, p. 221.

Cited to same effect in *Lovejoy v. Railroad Co.*, 53 Mo. App. 389, 392. So in 85 Am. Dec. 749, note. Referred to in *Abel v. Pembroke*, 61 N. H. 360, and noting that the New Hampshire statute relative to rewards only authorizes compensation for what is done after the offer of the reward.

**50 Cal. 222-223. TRENOR v. CENTRAL PACIFIC RAILROAD COMPANY.**

Verdict will not be disturbed on appeal if there is any evidence to warrant it, p. 230.

Affirmed in *Wilson v. Southern Pacific R. R. Co.*, 62 Cal. 171, verdict against defendant in action for negligence; *Ware v. Walker*, 70 Cal. 593, applied to findings; so in *Brooks v. Warren*, 5 Utah, 119; *Lufkins v. Collins*, 2 Idaho, 238, in approval, and case stated as a proper one for submission to jury. Distinguished in *Canney v. South Pac. Coast R. R. Co.*, 63 Cal. 503, in which case there was no conflict of evidence.

**Decision of Court on Challenge of Juror for Bias.**—If erroneous, is an erroneous finding of fact, p. 230.

Cited in dissenting opinion in *Williams v. United States*, 93 Fed. 402, main opinion holding ruling of lower court as to competency conclusive; 9 Am. St. Rep. 746, extended note, discussing subject of challenge for bias.

**Defect of Parties** having a joint interest with plaintiff in the subject of the action must be pleaded, or the defect is waived, p. 231.

Cited, as so holding, in *Williams v. Railroad Co.*, 110 Cal. 461.

**Witness.**—Showing reputation of witness for truth and veracity, pp. 234, 235.

Cited in *People v. Sears*, 119 Cal. 271, as authority that when a defendant offers himself as a witness in his own behalf he may be asked for the purpose of impeaching his evidence, if he has been convicted of a felony, or the fact, if it exists, may be shown by the record of the judgment.

**50 Cal. 235-242. CRAWFORD v. ROBERTS.**

**Vessels.**—Owners may be sued in state courts for supplies furnished, as on their common-law liability, p. 237.

Cited in *Duffy v. Gleason*, 26 Ind. App. 182, holding proceedings for limitation of liability not available in personal action against them for collision by the vessel; *Ransberry v. N. A. etc. Co.*, 22 Wash. 478, sustaining jurisdiction of state court in action for breach of carriage by water.

**Shipping.**—Master's power is presumed, in absence of evidence to the contrary, to extend to making contracts for supplies, even at a home port, which shall bind the owners, p. 241.

Approved in *The Templar*, 59 Fed. Rep. 206.

**Payment.**—If several notes are given in payment, and only a part of them are paid, the original debt is revived as to the unpaid notes, p. 242.

Cited in *Comptoir D'Escompte v. Dresbach*, 78 Cal. 20, as authority that the acceptance of a note for a debt does not discharge the debt unless expressly agreed to be payment; 41 Am. St. Rep. 762, extended note, discussing subject of "waiver of mechanics' liens by taking notes, or other securities."

**50 Cal. 242-243. TATE v. CITY OF SACRAMENTO.**

**Dedication.**—Burden of proof is on public authorities to show that land in the occupation of the defendant has been dedicated, p. 243.

Cited in *Hayward v. Mauzer*, 70 Cal. 480; *Demartini v. San Francisco*, 107 Cal. 407, in affirmance of the rule. So to same effect, in *Oglesby v. Santa Barbara*, 119 Cal. 116.

**50 Cal. 243-244. RUSSELL v. DENNISON.** S. C. fully reported, 45 Cal. 337-342.

**Damages.**—Verdict of seven thousand dollars for a malicious prosecution held to be excessive in the particular case, p. 244.

Cited in *Phelps v. Cogswell*, 70 Cal. 203, action for malicious prosecution, in which a verdict for plaintiff for four thousand dollars was reduced to one thousand dollars; *Davis v. Southern Pac. Co.*, 98 Cal. 18, as authority for the practice of denying a new trial when the plaintiff remits part of verdict.

**50 Cal. 244-247. DUNNE v. MASTICK.**

**Interest.**—Legislature has power to impose a rate of interest on past indebtedness, p. 247.

Cited in *Cummins v. Howard*, 63 Cal. 505, in affirmance.

**50 Cal. 248-250. FINNEY v. BERGER.**

**Public Lands.**—Application to purchase sixteenth or thirty-sixth section, filed before plat of survey is approved by United States surveyor general, is unauthorized and void, p. 249.

Ruling approved in *Medley v. Robertson*, 55 Cal. 399. So, to same effect, in *Garfield v. Wilson*, 74 Cal. 178; *Prentice v. Miller*, 82 Cal. 572; *Baker v. Jamison*, 54 Minn. 28.

**50 Cal. 250-254. HUSSMAN v. WILKE.**

**Evidence.**—Rule that written instrument cannot be contradicted by

parol is confined to controversies between the parties to the instrument or those claiming under them, p. 254.

Cited in *Robinson v. Mosley*, 93 Ala. 74; *Bank of California v. White*, 14 Nev. 376; *Clapp v. Banking Co.*, 50 Ohio St. 541; *Johnson v. Portwood*, 89 Tex. 249, as an authority in point; *Moyle v. Congregational Soc.*, 16 Utah, 79, noted under *Smith v. Moynihan*, 44 Cal. 53; *Central Coal etc. Co. v. Good*, 120 Fed. 799, following rule.

#### 50 Cal. 254-257. CROOKS v. TULLY.

**Indorser.**—Contract of one who indorses a promissory note after it falls due, as additional security to prevent legal proceedings against payee and indorser, is that of guarantor, and is fatally defective, unless the writing express the consideration, p. 257.

Referred to in *Smith v. Mott*, 76 Cal. 172, in which case an agreement was held to amount to a pledge, and was not within the statute of frauds; *Rogers v. Schulenburg*, 111 Cal. 284, noting that the case was decided before the adoption of the codes, and that it is not now necessary that the consideration be expressed in writing.

**Same.**—Guarantor of promissory note is entitled to notice of nonpayment, p. 257.

Referred to, as stating the law before the adoption of the codes, in *Chafoin v. Rich*, 77 Cal. 477, but noting, that under the code the general rule is that guarantors are liable immediately upon default of the principal without demand or notice. So, to same effect, in *First Nat. Bank v. Babcock*, 94 Cal. 103, 28 Am. St. Rep. 96.

#### 50 Cal. 258-265. LAWRENCE v. BALLOU.

**Statute of Limitations.**—A foreign corporation having a managing agent in the state, who exercises his authority openly as such, may claim the benefit of the statute, p. 264.

Cited as authority to same effect in *King v. National M. and E. Co.*, 4 Mont. 8; so in 36 Am. Dec. 73, extended note; *Smith v. Pilot Min. Co.*, 47 Mo. App. 417; and *Nat. Bank v. Huntington*, 129 Mass. 448, as authority that the residence of a corporation is where it exercises its corporate functions and franchises; *Harrigan v. Home, etc. Co.*, 128 Cal. 540, applying rule to foreign insurance company, and holding act (Stats. 1871-72, p. 826) inapplicable to such company as to designation of agent when Political Code sections are complied with; *Burns v. White Swan etc. Co.*, 35 Or. 308, but holding general rule as to statute inapplicable to action to foreclose mechanic's lien, under local statutes; *Turcott v. Railroad*, 101 Tenn. 109, 70 Am. St. Rep. 664, holding action so barred although corporation has not filed its charter as required by local statutes.

**Limitation runs in favor of a defendant until he is made a party, p. 264.**

Ruling approved in *Jeffers v. Cook*, 58 Cal. 151. So, to same effect, in *Wilson v. Holt*, 91 Ala. 209. Cited in *Matteson v. Wagner*, 147 Cal. 746, when supplemental complaint bringing in new party not filed till after four years of purchase and nothing in supplemental complaint showing lis pendens filed, action is barred as to new party; *Farris v. Merritt*, 63 Cal. 119, as authority that the burden of proof is on defendant to establish his statutory right in such case.

**50 Cal. 265-276. HOADLEY v. SAN FRANCISCO. S. C. 70 Cal. 320. Affirmed, 124 U. S. 645.**

**Dedication.**—Act confirming a void ordinance laying out public squares is a dedication without further acceptance by the public, p. 273.

Cited in *People v. Holladay*, 68 Cal. 444; *People v. Holladay*, 93 Cal. 245; 27 Am. St. Rep. 189; and *San Francisco v. Mooney*, 106 Cal. 587, in approval. Cited, as so holding, in 27 Am. Dec. 568, extended note, on "dedication to public use."

If squares in a city are dedicated to public use, the use rests in the public, and not in the city or its inhabitants, p. 274.

Cited in *La Societa etc. v. San Francisco*, 131 Cal. 174, holding municipal grant of cemetery lands void; *Harter v. San Jose*, 141 Cal. 662, on point that dedication of public park is complete on passage of act of dedication without formal acceptance; *Schneider v. Hutchinson*, 35 Or. 257, 76 Am. St. Rep. 478, but holding alienation of school lands valid under local statutes; *City of Llano v. Llano County*, 5 Tex. Civ. App. 138, in approval.

**Statute of Limitations,** as to pueblo lands in San Francisco, did not commence running till passage of act of Congress, July 1, 1864, granting and relinquishing the title to the city, p. 273.

Cited in *Emeric v. Alvarado*, 64 Cal. 609.

Statute does not run against lands dedicated to public use for a road, street, or public square, p. 275.

Cited in *Holladay v. San Francisco*, 124 Cal. 358, as to public park, citing main case also, pages 355, 357 as to effect of Van Ness ordinance as to which see, also, *City v. Sharp*, 125 Cal. 536, 537; *S. P. Co. v. Hyatt*, 132 Cal. 244, 246, applying rule to right of way granted to railroad company; *London etc. Bank v. City*, 90 Fed. 701, as to lands dedicated for public street; *Proctor v. San Francisco*, 100 Fed. 351, holding complaint insufficient to establish trust in lands held by city as pueblo lands; *People v. Pope*, 53 Cal. 451, holding that no one can acquire by adverse occupation, as against the public, the right to obstruct a street dedicated to public use. So, to same effect, in *Reed v. Mayor etc.* 92 Ala. 349; *Ex parte Taylor*, 87 Cal. 95; *Bowen v. Wendt*, 103 Cal. 238. So in *Visalia v. Jacob*, 65 Cal. 438; 52 Am. Rep. 304, 305, and

Hoadley v. San Francisco, 70 Cal. 324; San Leandro v. Le Breton, 72 Cal. 177, holding that a private citizen cannot acquire title by adverse possession to land which has been dedicated to public use as a street; County of Yolo v. Barney, 79 Cal. 378, 380, 12 Am. St. Rep. 154-156, applied to land purchased by the board of supervisors for the erection thereon of a county hospital; San Francisco v. Itsell, 80 Cal. 59, holding that the city of San Francisco holds its public squares in trust for the public, and the municipal authorities cannot dispose of them by way of compromise or otherwise. So, to same effect, in Ames v. San Diego, 101 Cal. 394; Territory v. Deegan, 3 Mont. 87, in approval of the ruling. So in Moose v. Carson, 104 N. C. 434, 17 Am. St. Rep. 682; Buntin v. Danville, 93 Va. 200; Grogan v. Town of Hayward, 6 Saw. 503; 4 Fed. Rep. 166; and London etc. Bank v. Oakland, 86 Fed. Rep. 35. Cited, in notes discussing the subject, in 26 Am. Dec. 102; 27 Am. Dec. 569; 32 Am. Dec. 721; 1 Am. St. Rep. 844; and 14 Am. St. Rep. 278, 281. Distinguished, and held inapplicable to lands of the city not held in trust, or dedicated to a public use, in San Francisco v. Straut, 84 Cal. 125 (beach and water lot property); Ames v. San Diego, 101 Cal. 394 (pueblo lands, such as house lots). So, to same effect, in Pacific Gas Imp. Co. v. Ellert, 64 Fed. Rep. 434.

**General Citations.**—In 91 Am. Dec. 546, note, as to the period of limitation applicable in respect to lands to which the city of San Francisco holds the title. Referred to in Sawyer v. San Francisco, 50 Cal. 375, as to the distinction claimed by respondent to exist between the two cases; San Francisco v. Sullivan, 50 Cal. 605, as determining all the questions arising in the latter, except the question as to the maintenance of ejection by the city; San Francisco v. Holladay, 76 Cal. 20, as showing the basis of plaintiff's claim to the lands in controversy; Patrick v. Y. M. C. A. 120 Mich. 192.

#### 50 Cal. 276-280. STEWART v. NEVINS.

**Equitable Relief.**—Case stated, holding that an action for a reconveyance could not be maintained, but that the party must sue for an accounting, pp. 279, 280.

Cited in Moulton v. Holmes, 57 Cal. 341, as to right to accounting. Distinguished in Green v. Brooks, 81 Cal. 332, treating of right to accounting.

#### 50 Cal. 282-284. PACIFIC MAIL STEAMSHIP COMPANY v. BOARD OF SUPERVISORS.

**Taxation.**—Power of board of equalization, pp. 283, 284.

Referred to in 56 Am. Dec. 527, extended note, as discussing, but not deciding, the question whether steamers registered and owned in New York were taxable in California.

**50 Cal. 284-285. SAN MATEO WATER WORKS v. SHARPSTEIN.**

**Eminent Domain.**—Order putting plaintiff into possession of the land pending condemnation proceedings, is void, p. 285.

Cited in Steinhart *v.* Superior Court, 137 Cal. 578, noted under Davis *v.* Railroad Co., 47 Cal. 517; Sanborn *v.* Belden, 51 Cal. 269, holding that if such order is made, and acted upon, it is a taking of private property for a public use. So in Callahan *v.* Dunn, 78 Cal. 370; Coburn *v.* Goodall, 72 Cal. 505, 1 Am. St. Rep. 79, in affirmance of the ruling. So in Coburn *v.* Townsend, 103 Cal. 235; and Vilhac *v.* Railroad Co., 53 Cal. 212, to same effect; Lamb *v.* Schottler, 54 Cal. 324, as authority that private property cannot be taken for public use without just compensation being simultaneously made.

**50 Cal. 285-289. O'BRIEN v. CHAMBERLAIN.**

**Sale.**—Fact of lack of change of possession may be considered by the jury in determining whether the sale was fraudulent as to creditors, p. 289.

Approved in Davis *v.* Drew, 58 Cal. 159. Cited in Matteucci *v.* Whelan, 123 Cal. 315, 69 Am. St. Rep. 62, holding section 3440, Civil Code, inapplicable to execution sale to plaintiff in action against his debtor.

**50 Cal. 289-293. FRANKLIN v. MERIDA. 95 Am. Dec. 129.**

**Judgment,** if rendered in favor of a party during his lifetime, may be entered after his death, p. 293.

Affirmed in In re Cook, 77 Cal. 230, 11 Am. St. Rep. 275, applied to a judgment of divorce; People *v.* Lenon, 79 Cal. 632, holding that if a prisoner is present in court when judgment is rendered, and the clerk neglects to enter it at the time, the court may afterward order it entered *nunc pro tunc*, without the prisoner's presence; Edwards *v.* Hellings, 103 Cal. 207, holding that the statute of limitations runs upon a judgment from the time of its entry, and not from its rendition. Cited in Selders *v.* Boyle, 5 Kan. App. 455, on point that clerk may enter judgment on verdict, without notice to defendant, although entry not made immediately under local statute; Young *v.* Young, 165 Mo. 632, 635, but holding judgment entered *nunc pro tunc* after defendant's death invalid, when nothing had before been done except announcement by judge at trial that he would grant a certain judgment; 4 Am. St. Rep. 831, note, to the ruling stated.

**Same.**—If execution correctly refers to a judgment so as to identify it, an error in reciting the day on which it was rendered is immaterial, p. 293.

Cited, as so holding, in 13 Am. Dec. 203, note.

**50 Cal. 293-294. BLUM v. BROWNSTONE BROTHERS.**

Appeal does not lie from order of probate court refusing to quash an execution, p. 294.

Cited as authority in Lutz v. Christy, 67 Cal. 457; In re Ward, 83 Cal. 620, and applied to an order refusing to vacate decree of distribution. Harmonized in People v. Jordan, 65 Cal. 650, discussing appellate jurisdiction of supreme court.

**50 Cal. 295-298. MOYLE v. CONNOLLY.**

**Division Line.**—A partition fence erected under a written agreement between adjoining landowners fixes the line, and estops the parties from afterward contesting it, p. 297.

Cited in Cooper v. Vierra, 59 Cal. 283; Johnson v. Brown, 63 Cal. 393; White v. Spreckels, 75 Cal. 616, in approval of the doctrine. Nathan v. Dierssen, 134 Cal. 285, noted under Sneed v. Osborn, 25 Cal. 630; Dierssen v. Nelson, 138 Cal. 398, quoting White v. Spreckels, 75 Cal. 610. Distinguished in Quinn v. Windmiller, 67 Cal. 464, in which case the parties erected a division fence under an agreement that when the true line was ascertained the fence should be placed thereon.

**50 Cal. 298-299. CITY OF LOS ANGELES v. SIGNORET.**

**Pleading.**—Matters of substance cannot be left out of complaint, and the defect supplied by reference to an exhibit attached to and made part of complaint, p. 299.

Explained in Lambert v. Haskell, 80 Cal. 612, 613, as merely establishing the doctrine that matters of substance which are preliminary or collateral to the instrument pleaded cannot be supplied by the recitals of the instrument, and as not being in conflict with the rule that it is good pleading to set forth in full an instrument upon which the action or defense is founded. So, to same effect, in Ward v. Clay, 82 Cal. 505, action on promissory note; Whitby v. Rowell, 82 Cal. 636, action to foreclose mortgage, and copy of mortgage annexed to complaint as an exhibit, to which the complaint referred, held sufficient. Cited in Estate of Cook, 137 Cal. 191, applying rule to petition for probate sale; Burkett v. Griffith, 90 Cal. 542, 25 Am. St. Rep. 157, as authority sustaining the rule that "whatever is an essential element to a cause of action must be presented by a distinct averment, and cannot be left to an inference to be drawn from the construction of a document attached to the complaint." So, to same effect, in McCaughey v. Schutte, 117 Cal. 225, 59 Am. St. Rep. 178, complaint in ejectment merely averring evidentiary facts; Aultman v. Siglinger, 2 S. Dak. 446, holding that a complaint not stating a cause of action by its averments, without reference to its exhibits, is bad on demurrer. So, in Johnson v. Home Ins. Co., 3 Wyo.

143; and Penrose v. Insurance Co., 66 Fed. Rep. 254, actions on insurance policies. Referred to in Quirk v. Clark, 7 Mont. 233, discussing but not deciding the question; Stephens v. Insurance Co., 14 Utah, 270, as to use and purpose of exhibits in pleading; Cave v. Gill, 59 S. C. 258.

#### 50 Cal. 299-303. FORDE v. EXEMPT FIRE COMPANY.

Administrator may maintain an action to recover back real estate conveyed by the decedent in his lifetime for purpose of defrauding his creditors, p. 302.

Cited in Aigeltinger v. Einstein, 143 Cal. 615, stating essentials of such action, notes to 52 Am. Dec. 118; 90 Am. Dec. 291, in discussing the subject at length.

**Statute of Limitations.**—Such action may be commenced within three years after the creditors recover judgment against the estate, p. 302.

Cited as authority in Ohm v. Superior Court, 85 Cal. 548, 20 Am. St. Rep. 247; Brown v. Campbell, 100 Cal. 645, 38 Am. St. Rep. 320, holding that the statute does not bar an action by the creditor of an estate until three years after the judgment establishing his claim.

#### 50 Cal. 303-304. CAMERON v. SMITH.

**Limitation.**—General statute of limitations applies to a cause of action concerning the wife's separate estate, where she may sue alone, p. 304.

Ruling approved in Garland County v. Gaines, 47 Ark. 562; King v. Merritt, 67 Mich. 217. Cited in Hershy v. Latham, 42 Ark. 307, but held inapplicable in the particular case; 36 Am. Dec. 71, extended note, reviewing the authorities upon the subject.

#### 50 Cal. 304-306. PEOPLE v. SIMPSON.

**Arson.**—Indictment may aver that building burned by tenant was owned by landlord, p. 305.

Cited to same effect in Avant v. State, 71 Miss. 81; 81 Am. Dec. 70, extended note, discussing subject of arson.

**Same.**—Proof of payment of rent is sufficient proof of landlord's ownership, p. 306.

Cited in Kiernan v. Terry, 26 Oreg. 501, action to recover rent, and ruling approved as authority.

**Same.**—Evidence that a wooden partition annexed to a building was charred by fire, and in one place burned through, is a sufficient burning to constitute arson, p. 306.

Cited in 81 Am. Dec. 67, extended note, as so holding.

Verdict will not be disturbed on appeal when the evidence is circumstantial and conflicting, p. 306.

Cited as authority, to same effect, in *Territory v. Stone*, 2 Dak. Ter. 172.

**General Citations.**—*Lipschitz v. People*, 25 Cal. 267; *State v. Spiegel*, 111 Iowa, 705.

#### 50 Cal. 306-308. EX PARTE LAMSON.

**Arrest and Bail.**—Party imprisoned is not entitled to discharge for failure of plaintiff to advance a weekly sum for support, if the jailer provides support, p. 307.

Cited as authority in *Stroheim v. Deimel*, 77 Fed. Rep. 805, 809, construing the Illinois statute, and holding it sufficient for the plaintiff to pay the defendant's board in advance for several weeks, in one payment, and that he need not make a separate payment for each week.

#### 50 Cal. 310-315. CHIPMAN v. HASTINGS.

**Cotenancy.**—One tenant in common may maintain an action against a mere trespasser for the possession of the whole property, p. 314.

Cited to same effect in *Newman v. Bank of California*, 80 Cal. 370, 371, 372, 13 Am. St. Rep. 170, 171, 172, holding further that the recovery of judgment in such case, and its subsequent enforcement, inure to the benefit of the other cotenants; *Mitchell v. Campbell*, 19 Oreg. 210, as to point relative to adverse possession, but holding that such is not the rule in Oregon.

#### 50 Cal. 315-317. LAIRD v. WATERFORD.

**Forcible Entry.**—One who abandons real property cannot complain that an entry thereon was forcible, p. 316.

Cited, as so holding, in 18 Am. Dec. 148, extended note, discussing subject of forcible entry.

#### 50 Cal. 325-328. AGER v. DUNCAN.

**Contracts.**—Court will not enforce an executory contract founded on the mutual turpitude of the parties, or, if executed, will not aid either party to escape its consequences, p. 327.

Cited in *Hays v. Windsor*, 130 Cal. 234, refusing to award possession under bill of sale made to defraud creditors; dissenting opinion in *Harcrow v. Gardiner*, 69 Ark. 15, discussing event of fraudulent transfer under various state statutes; *Block v. Latham*, 63 Tex. 419; *Davis v. Sittig*, 65 Tex. 502, in approval of the doctrine; 82 Am. Dec. 428, note; and 3 Am. St. Rep. 737, extended note, wherein the authorities bearing upon the subject are collected and collated. Criticised in *McCausland v. Ralston*, 12 Nev. 214, 28 Am. Rep. 792, where it is said that the opinion in the principal case is not entitled to any special weight upon the question.

50 Cal. 328-333. **KING v. LAGRANGE.** S. C. 61 Cal. 221, 230, and the decision on the former appeal declared to be the law of the case.

**Husband and Wife.**—Husband cannot devise the community property so as to defeat the wife's interest therein, and a conveyance by the executor under a power of sale in the will is inoperative to transfer such interest, p. 332.

Cited in *Smith v. Olmstead*, 88 Cal. 589, and the rule held applicable also to the interest of the children of the testator.

Will should be read as applying only to the property of the testator over which he had the power of testamentary disposition, p. 332.

Cited in *Estate of Wickersham*, 138 Cal. 363, 139 Cal. 656, noted under *Beard v. Knox*, 5 Cal. 256; *In re Gilmore*, 81 Cal. 242, 243, 22 Am. St. Rep. 340, 341, in approval of the rule.

**Essence of Election or Ratification** is, that it was done with full knowledge of the party's rights, p. 332.

Cited to same effect, in *Hill v. Finigan*, 77 Cal. 275, 11 Am. St. Rep. 284, case of ratification by a pledgor of a purchase of the pledge by the pledgee at his own sale; *Brown v. Rouse*, 104 Cal. 676, case of ratification of a loan; *Carpe v. Crowl*, 149 Ill. 481; *Pratt v. Douglass*, 38 N. J. Eq. 539, both in approval of the ruling.

50 Cal. 337-339. **CHRISTY v. SULLIVAN.** 19 Am. Rep. 655.

**Ignorance of Law.**—Money paid for county warrants, illegal on their face, cannot be recovered back, p. 339.

Cited in *Merchant's Nat. Bank v. Spates*, 41 W. Va. 31, 56 Am. St. Rep. 831, holding that the assignee of a void county order cannot recover from the assignor the amount paid for the assignment, unless due diligence is used without effect against the debtor; notes to 10 Am. Dec. 327; 81 Am. Dec. 140; 12 Am. St. Rep. 130; 55 Am. St. Rep. 507, discussing subject of "ignorance of law."

50 Cal. 340-344. **FORBES v. SAN RAFAEL TURNPIKE COMPANY.**

**Turnpike Company.**—Majority of stockholders may ratify a note executed by the board of directors without authority, p. 343.

Cited in *Seeley v. San Jose etc. Lumber Co.*, 59 Cal. 25, as to power of board of directors or stockholders to ratify acts of president.

50 Cal. 344-345. **PATTERSON v. BOARD OF SUPERVISORS.**

**Injunction.**—Appellate court will not reverse or modify action of court below in granting or continuing a preliminary injunction, except in case of palpable error or abuse of discretion, p. 345.

Cited in *Efford v. Railroad Co.*, 52 Cal. 279; *White v. Nunan*, 60 Cal.

407; *Bigelow v. Los Angeles*, 85 Cal. 618; *Grannis v. Lorden*, 103 Cal. 473, all in affirmance; and ruling approved in *Washington etc. R. R. Co. v. Navigation Co.*, 2 Idaho, 407; *Marks v. Weinstock*, 121 Cal. 55, affirming order refusing to dissolve such injunction.

**50 Cal. 346-349. VANCE v. KOHLBERG.**

**Evidence.**—Patent for land, issued by United States, may be proved by production of a certified copy of its record, without proof of loss of original, p. 348.

Cited in *Grant v. Oliver*, 91 Cal. 164, and the rule as stated held to be changed by section 1851 of the Code of Civil Procedure, as it existed prior to the amendment of 1889.

**Pre-emption.**—Land department has power to annul action of register and receiver in allowing a pre-emptor to prove up and pay for land, and in issuing to him a certificate of purchase, p. 349.

Cited to same effect in *Parsons v. Venzke*, 4 N. Dak. 457, 50 Am. St. Rep. 671; *Vantongeren v. Hefferman*, 5 Dak. Ter. 226; *Jones v. Meyers*, 2 Idaho, 797, 35 Am. St. Rep. 262. See *Hestres v. Brennan*, 50 Cal. 211, ante.

**50 Cal. 360-363. WEAVER v. FAIRCHILD.**

**Official Duties** are presumed regularly performed, p. 362.

Cited in *C. P. etc. Co. v. McCann*, 126 Cal. 555, as to register's refusal to file declaratory pre-emption statement, citing main case also (page 554) on point that pre-emption claim does not attach before entry in local land office; *Powers v. Hitchcock*, 129 Cal. 328, as to issuance of certificate of election by county clerk.

**50 Cal. 363-364. RAFETTO v. FIORI.**

**Trespass.**—Action for trespass on land will not lie when plaintiff is totally dispossessed, and defendant is in adverse possession, p. 364.

Affirmed in *Felton v. Justice*, 51 Cal. 530; *Heilbron v. Heinlen*, 72 Cal. 374. Examined in *Fabian v. Collins*, 3 Mont. 222, sustaining complaint in action to enjoin diversion of water. Overruled in *Reiner v. Schroeder*, 146 Cal. 415, action to quiet title may be maintained by owner out of possession.

**50 Cal. 365-366. HAM v. CUNNINGHAM.**

Attachment is dissolved by death of defendant after levy on his property, p. 366.

Followed in *Ham v. Henderson*, 50 Cal. 369; principle of decision approved and applied in *Day v. Superior Court*, 61 Cal. 494. Cited in 89 Am. Dec. 57, note, to ruling stated.

**50 Cal. 370-376. SAWYER v. SAN FRANCISCO.**

**New Trial.**—Under Practice Act, new trial notice might be served within ten days after written notice of rendering decision, when the case was tried by the court, p. 375.

Cited in *Mallory v. See*, 129 Cal. 358, noted under *Borland v. Thornton*, 12 Cal. 446; *Biagi v. Howes*, 86 Cal. 472, construing section 659 of the Code of Civil Procedure, and holding that a party intending to move for a new trial, where the trial was by the court without a jury has a right to wait for a notice in writing of the decision from the adverse party before giving notice of his intention, and this is so, although he was present in court when the decision was rendered, and waived findings, and asked for a stay of proceedings on the judgment. So, to same effect, in *Keane v. Murphy*, 19 Nev. 97, construing section 197 of the Nevada Practice Act.

**Pueblo Lands.**—Effect of act of March 11, 1858, concerning pueblo lands in San Francisco, and to ratify and confirm certain city ordinances, pp. 375, 376.

Approved in *Hoadley v. San Francisco*, 70 Cal. 324. Cited in *Holladay v. San Francisco*, 124 Cal. 357, 358; *San Francisco v. Sharp*, 125 Cal. 536, 538, and *La Societa etc v. San Francisco*, 131 Cal. 174, noted under *Hoadley v. San Francisco*, 50 Cal. 265; *San Francisco v. Itsell*, 90 Cal. 59, and holding that the legislature has no power to ratify a city ordinance disposing of land granted to the city to be held in trust for the public; *San Francisco v. Bradbury*, 92 Cal. 416; *People v. Holladay*, 93 Cal. 245, 251; 27 Am. St. Rep. 189, 194; *San Francisco v. Mooney*, 106 Cal. 597; *San Francisco v. Burr*, 108 Cal. 462, all in approval of the construction given to said act of 1858. Approved, as to matter of dedication of street to public use in *Territory v. Deegan*, 3 Mont. 87. See *Hoadley v. San Francisco*, 50 Cal. 265, ante.

**General Citation.**—First Nat. Bank of Rapid City v. McCarthy, 13 S. D. 363.

**50 Cal. 376-383. WADE v. DERAY.**

**Decree in Partition** has no other effect than to sever the unity of possession, and does not vest in either of the cotenants any new or additional title, p. 380.

Affirmed in *Mound City etc. Assn. v. Philip*, 64 Cal. 495; *Christy v. Spring Valley Water Works*, 68 Cal. 75; *Richardson v. Loupe*, 80 Cal. 503; and doctrine approved in *Simmons v. Spratt*, 26 Fla. 463; *Avery v. Akins*, 74 Ind. 290; *Utterback v. Terhune*, 75 Ind. 367; *Gullett v. Miller*, 106 Ind. 77; *Board of Commissioners v. Wiley*, 10 Oreg. 90; cited in *Cunha v. Hughes*, 122 Cal. 113, 68 Am. St. Rep. 29, holding community character of property not changed by such decree; *Rose v. Mesmer*, 142 Cal. 328, discussing effect of such decree upon water rights involved in the action;

**Pacific Bank v. Hannah**, 90 Fed. 79, holding title of persons not affected when not made parties to the action.

**Deed.**—When descriptions in are repugnant, effect will be given to the description which is the most definite and certain, p. 382.

Approved, as a rule of construction, in **Board of Commissioners v. Wiley**, 10 Oreg. 89. So, to same effect, in **Arambula v. Sullivan**, 80 Tex. 621. Cited in 30 Am. Dec. 736, note.

**General Citation.**—**Whitsett v. Wamock**, 159 Mo. 24.

**50 Cal. 383-385. DEVILLE v. SOUTHERN PACIFIC RAILROAD COMPANY.**

**Contributory Negligence.**—Question of is one of law for the court, when there is no controversy as to the facts, and the course which common prudence dictates can be readily discerned, p. 385.

Cited as authority in **Fernandes v. Railway Co.**, 52 Cal. 50. So in **Van Praag v. Gale**, 107 Cal. 443, in which case, however, the question of plaintiff's contributory negligence was held to be one of fact for the jury; **Louisville etc. R. R. Co. v. Eves**, 1 Ind. App. 231, a case similar in its facts; **Moore v. Railway Co.**, 126 Mo. 276; **Candelaria v. Railway Co.**, 6 N. Mex. 275; and **Patnode v. Harter**, 20 Nev. 307, 311, in approval of the doctrine; 36 Am. Rep. 612, note.

**50 Cal. 385-388. SULZBERGER v. SULZBERGER.**

**Homestead** may be set apart out of separate estate of husband, though disposed of by will, p. 387.

Cited, to same effect, in **In re Davis**, 69 Cal. 460. So in **In re Lahiff**, 86 Cal. 153; **Estate of Huelsman**, 127 Cal. 277, confirming order setting aside property absolutely to widow notwithstanding devise of one-half to children of decedent; **Estate of Levy**, 141 Cal. 652, on point that rights of creditors and beneficiaries are subordinate to rights of family to a home.

Probate homestead is to be set apart in pursuance of the statute in force at the time the order setting it apart is made, p. 388.

Affirmed in **Sheehy v. Miles**, 93 Cal. 294. Approved in **In re Estate of Thorn**, 24 Utah, 213, order settling estate of decedent must be made in accordance with statute in force when orders made.

Acceptance by widow of letters testamentary and fact that she was residuary legatee is not waiver of right to probate homestead, p. 388.

Approved in **Estate of Firth**, 145 Cal. 239, holding devise to wife of deceased husband's residence does not affect her right to probate homestead in his other separate property though devised to others.

**50 Cal. 388-411. PRYOR v. DOWNEY.** 19 Am. Rep. 656.

Petition by executor or administrator for sale of real estate must

set forth all the material facts required by the statute, otherwise the probate court acquires no jurisdiction to order the sale, p. 398.

Cited in *Pryor v. Madigan*, 51 Cal. 179, 180; *Hill v. Den*, 54 Cal. 22, as to validity of sale by executors; *Ex parte Kearny*, 55 Cal. 217, discussing jurisdiction of police court of city and county of San Francisco; *Estate of Boland*, 55 Cal. 315, in affirmance of the ruling stated. So in *Richardson v. Butler*, 82 Cal. 176; 16 Am. St. Rep. 103; *Burris v. Kennedy*, 108 Cal. 345, discussing probate jurisdiction of superior court; *Willis v. Pauly*, 116 Cal. 581, holding that the court gets jurisdiction to order such sale only by compliance with the provisions of the code, one of which requires a verified petition; *Estate of Packer*, 125 Cal. 397, 73 Am. St. Rep. 59, noted under *Brenham v. Story*, 39 Cal. 179; *Wallace v. Grant*, 27 Wash. 135, under Ballinger's Code, section 6257, order of court authorized administrator to mortgage realty is void when based on petition showing affirmatively that personalty has not been exhausted, but merely that petitioner has sold all personalty that he deems advisable to sell at that time; 70 Am. Dec. 710, note; and 79 Am. Dec. 22, note, to the ruling stated. Distinguished in *Braly v. Reese*, 51 Cal. 460, 461, case of guardian's sale of a minor's property made by order of an alcalde; *Ganahl v. Soher*, 68 Cal. 97, involving question of limitation of action by heirs of deceased intestate to recover real estate sold by one acting as his administrator, but whose appointment as such was invalid; *Emerson v. Ross*, 17 Fla. 132, no petition being required under the Florida statute.

Sale by administrator who has given no bond is void, even if confirmed by the probate court, p. 399.

Cited in *Dennis v. Bint*, 122 Cal. 43, 68 Am. St. Rep. 20 (but cf. dissenting opinion, page 47), noted under *Estate of Hamilton*, 34 Cal. 464; *Power v. Lenoir*, 22 Mont. 178, applying rule to acts of guardian who has not qualified; 79 Am. Dec. 66, note; *Hatch v. Ferguson*, 68 Fed. Rep. 47, as to necessity of bond by guardian. Distinguished in *Gray v. State*, 78 Ind. 76, 41 Am. Rep. 551, holding that the surety on a guardian's bond, executed to enable him to sell his ward's real estate is estopped, after the sale and receipt of the money, to deny his appointment as guardian.

Under California probate practice, no such officer as an executor de son tort is recognized, p. 399.

Cited in *Bowden v. Pierce*, 73 Cal. 463, as authority to the ruling stated. So, to same effect, in *Rozelle v. Harmon*, 29 Mo. App. 581, 583, under Missouri probate practice.

**Judgment.**—Legislature has no power to validate a judgment entered by a court without jurisdiction, pp. 400-411.

Cited in *Reis v. Lawrence*, 63 Cal. 138, as authority that the legislature can never, by retrospective proceedings, cure a defect of jurisdiction in the proceedings of courts. So, to same effect, in *Robertson v. Bradford*,

70 Ala. 388; *Sidway v. Lawson*, 58 Ark. 122; *Israel v. Arthur*, 7 Colo. 11; *Yeatman v. Day*, 79 Ky. 190; *Wells, Fargo & Co. v. Clarkson*, 5 Mont. 342; *Grady v. Dundon*, 30 Oreg. 338; notes to 5 Am. Dec. 315; 10 Am. Dec. 131, 133; 79 Am. Dec. 796; and 79 Am. St. Rep. 86.

Probate Sale can be ordered only on grounds existing at time of decedent's death, p. 409.

Cited in *Estate of Newlove*, 142 Cal. 380, noted under *Brenham v. Story*, 39 Cal. 179.

General Citation.—*Finders v. Bodle*, 58 Neb. 61.

**50 Cal. 412-415. SHERWOOD v. MEADOW VALLEY MINING COMPANY.**

Corporation.—Certificate of stock in a corporation are not negotiable securities, in a commercial sense, p. 415.

Approved in *Barstow v. Savage Min. Co.*, 64 Cal. 392, 49 Am. Rep. 707, holding that a bona fide purchaser of stolen certificates of stock acquires no title as against the true owner; *Graves v. Mining Company*, 81 Cal. 326, in affirmance of ruling stated; *Swim v. Wilson*, 90 Cal. 129; 25 Am. St. Rep. 112, holding that a stockbroker who sells stock certificates indorsed in blank, and received by him for sale from one who had stolen them, is guilty of a conversion thereof, and is liable to the true owner of the stock for its value; *Craig v. Land and Water Co.*, 113 Cal. 14, 54 Am. St. Rep. 320, holding a purchaser of stock certificates takes subject to all equities in favor of the corporation. Cited in 14 Am. Dec. 427, note; 3 Am. St. Rep. 200, note, to ruling stated. Limited in *Winter v. Belmont Min. Co.*, 53 Cal. 432, in which case it was held that the purchaser of a stolen certificate of stock acquired a valid title to the stock. So, to same effect, in *Keller v. Manufacturing Co.*, 43 Mo. App. 93.

**50 Cal. 415-417. PEOPLE v. THRALL.**

Evidence.—Defendant cannot be convicted of crime on his extra-judicial statements or confessions alone, p. 416.

Cited in *People v. Jones*, 123 Cal. 68, noted under *People v. Jones*, 31 Cal. 566; *People v. Tapia*, 131 Cal. 651, holding instructions on subject of corpus delicti wrongfully refused; *People v. Simonsen*, 107 Cal. 348, holding that all the elements of crime must be made to appear before defendant's confessions are admissible for any purpose; notes in 78 Am. Dec. 254, 258; 6 Am. St. Rep. 251.

**50 Cal. 417-420. WHITE v. SAN RAFAEL AND SAN QUENTIN RAIL-ROAD COMPANY.**

Pleading.—If cause is tried upon theory that the answer denies the Notes Cal. Rep.—160.

allegations of the complaint, plaintiff will not be permitted to object to sufficiency of the denials for the first time in the appellate court, p. 419.

Cited, as in principle, on authority in *Erkins v. Ayer*, 58 Cal. 313. So in *Alhambra etc. Water Co. v. Richardson*, 72 Cal. 599, and holding that the rule extends to affirmative defenses as well as to denials; *People v. Swift*, 96 Cal. 168, in approval; and so in *Toulouse v. Burkett*, 2 Idaho, 267. Distinguished in *Ortega v. Cordero*, 88 Cal. 226, and held inapplicable, the decision having been based upon the principle of equitable estoppel.

**Contract.**—Provision for order in writing from an engineer will prevent allowance for extra work upon a verbal order, p. 420.

Explained and distinguished in *Truckee Lodge v. Wood*, 14 Nev. 306, in which case there was no agreement, as in the principal case, which precluded all kinds of proof save one.

**General Citation.**—*Atlantic etc. Ry. Co. v. Delaware Const. Co.*, 98 Va. 512.

#### 50 Cal. 420-422. **BLOOD v. FAIRBANKS.** S. C. 48 Cal. 171.

**Witnesses.**—Party to action against executor or administrator upon a claim against the estate cannot be a witness, and the rule applies as well to all nominal parties to the action, p. 422.

Cited in *Stuart v. Lord*, 138 Cal. 677, noted under *Bagley v. Eaton*, 10 Cal. 147; *Rice v. Rigley*, 7 Idaho, 132, plaintiff in an action against an administrator to establish a resulting trust in land cannot be witness as to matters occurring before death of decedent; *Chase v. Evoy*, 51 Cal. 620, holding that the rule does not prohibit an executor or administrator from calling a party to the action to testify in behalf of the estate; *Moore v. Schofield*, 96 Cal. 487, 489, in approval. So in *Burton v. Baldwin*, 61 Iowa, 285; and *McRae v. Holcomb*, 46 Cal. 311, restricting the rule to the parties to the record. Cited in 1 Am. St. Rep. 211, note.

#### 50 Cal. 422-425. **DALTON v. HAMILTON.**

**Bill in Equity** to compel a conveyance, which alleges facts showing that the plaintiff has the legal title already, upon which he may recover in ejectment, contains no equity, p. 424.

Cited in *Northern Pac. Ry. Co. v. Cannon*, 46 Fed. Rep. 238, in approval of the rule.

**Deed** by which grantor bargains, sells, and conveys, carries with it an after-acquired title of the grantor, p. 425.

Cited to same effect in *Green v. Green*, 103 Cal. 110, case of a conveyance of title in fee simple absolute, expressly purporting to convey all after-acquired title of the grantor; 58 Am. Dec. 588, note.

**50 Cal. 429-433. POWERS v. JACKSON.**

**Deed.**—Reference in to a recorded plat, for a particular description of the land conveyed, incorporates said plat into its descriptive part, p. 432.

Cited to same effect in *People v. Blake*, 60 Cal. 508, in which case the deed referred to a map; *Miller v. Land Co.*, 44 Kan. 357, reference in deed to government patents; *McDonald v. Payne*, 14 Ind. 364, as to what may be referred to as monuments in descriptive part of deed; 30 Am. Dec. 739, 741, note.

If the deed describes the land by adopting the corner of a subdivision according to the United States survey, as a starting point, such corner is a monument and will control, pp. 432, 433.

Cited in *Miller v. Grunsky*, 141 Cal. 456, noted under *Colton v. Seavay*, 22 Cal. 496; *Kern Oil Co. v. Crawford*, 143 Cal. 305, discussing methods of government survey of public lands; *Parkinson v. McQuaid*, 54 Wis. 479, holding that starting point must control the other descriptions in the deed.

**General Citation.**—In *Segar v. Babcock*, 18 R. I. 205, as authority that it is safer to adhere to the line marked by ownership than to the line marked by possession.

**50 Cal. 433-435. MEREDITH v. BOARD OF SUPERVISORS.**

**Office.**—If filled, de facto, writ of mandate does not lie to try title thereto, pp. 434, 435.

Approved in *Kennedy v. Board of Education*, 82 Cal. 493, dissenting opinion of Fox, J., in which case it is held that mandamus is the proper remedy to restore a teacher in the public schools to a right given by express law, from which he is unlawfully precluded, and another teacher placed in the position; *French v. Cowan*, 79 Me. 437, in approval. So in *Biggs v. McBride*, 17 Oreg. 652. Cited in 12 Am. Dec. 29.

**General Citation.**—In *People v. Hayne*, 83 Cal. 124, 17 Am. St. Rep. 221, as authority that the supreme court may adopt the opinion of the trial judge as its own.

**50 Cal. 435-438. BERRY v. SAN FRANCISCO AND NORTH PACIFIC RAILROAD COMPANY.**

**Trespass.**—In action for trespass committed by destroying plaintiff's fences, he cannot recover for injury done to grain growing on his land by cattle of a third person, for any period after the original entry and trespass, p. 437.

Cited to same effect in *Durgin v. Neal*, 82 Cal. 598, holding that a defendant charged with negligence is only liable for such damages as are directly and proximately caused by his negligence; 73 Am. Dec.

149, note; 36 Am. St. Rep. 832, extended note, discussing subject of "proximate and remote cause in cases involving wrongful acts."

**General Citation.**—In *Tregambo v. Mill and Min. Co.*, 57 Cal. 504, as to time of settlement of bill of exceptions, but apparently a mis-citation.

**50 Cal. 438-441. POLHEMUS v. HEIMAN.**

Verdict cannot be impeached by affidavit of juror, p. 441.

Affirmed in *Clark v. His Creditors*, 57 Cal. 639; Cited in *Siemsen v. Oakland etc. Ry.*, 134 Cal. 497, noted under *Boyce v. Stage Co.*, 25 Cal. 463; *People v. Flynn*, 7 Utah, 384, noted under *Wilson v. Berryman*, 5 Cal. 46; *Fredericks v. Judah*, 73 Cal. 607, holding that such affidavits can only be resorted to for the purpose of impeaching a verdict determined by resort to chance; *People v. Kloss*, 115 Cal. 579, in affirmance; *State v. Crutchley*, 19 Nev. 369, approved as a general rule. So in *Murphy v. Murphy*, 1 S. Dak. 321. Cited in 24 Am. Dec. 479, note.

**Custom.**—Proof of, cannot supersede an express warranty, p. 441.

Cited in *Hughes v. Bray*, 60 Cal. 287, excluding evidence of custom on sales of grain by sample.

**Accounts.**—Account rendered under mistake of fact does not become an account stated by failure to object, p. 441.

Cited in 62 Am. Dec. 90, extended note, treating of subject of "account stated."

**50 Cal. 444-446. HIGGINS v. MAHONEY.**

**Bill of Exception.**—When objected to by opposite party as presented too late for settlement, the court must incorporate a clause showing an extension of time excusing delay, or the bill cannot be considered by the appellate court, even if settled, p. 446.

Cited in *Tregambo v. Mill and Min. Co.*, 57 Cal. 504, as to presentation and settlement of bill of exceptions; *Wheeler v. Karnes*, 125 Cal. 53, so refusing to consider new trial statement; *Estate of Kruger*, 130 Cal. 625, holding attorney negligent for failure to have bill prepared in such proper form; *Evans v. Baggs*, 4 N. Mex. 148, holding stipulation of attorneys extending time to file bill nugatory when made after statutory time had expired; *Burns v. Napton*, 26 Mont. 364, following rule; *Connor v. Motor Road Co.*, 101 Cal. 431, in approval. So in *Henry v. Merquie*, 106 Cal. 148; *Stufflebeam v. Montgomery*, 2 Idaho, 769, as to waiver of objections to settlement of bill of exceptions; *Evans v. Boggs*, 3 N. Mex. 518; and *Johnson v. Railroad Co.*, 1 N. Dak. 357, as to authority of the court to settle bill of exceptions after statutory time has elapsed.

**Dismissal.**—If action is improperly dismissed by plaintiff, defendant's remedy is by appeal from the judgment, p. 446.

**Affirmed in Westbay v. Gray, 116 Cal. 668.** Cited, discussing the remedy in such case, in Insurance Co. v. Weber, 2 N. Dak. 246.

**50 Cal 447-449. PEOPLE v. GRANICE.**

**Alteration of Record.**—Duty of party to bring to the attention of the court any alteration of the record of a pending proceeding, p. 448.

Cited in Pacheco v. Beck, 52 Cal. 34, dissenting opinion of McKinstry, J., as to what constitutes the record.

**Indictment.**—Consent of defendant cannot subject him to trial for crime not charged, p. 448.

Cited in People v. Arnett, 126 Cal. 681, reversing conviction for assault with deadly weapon when not alleged.

**50 Cal. 449-450. PEOPLE v. CLOONAN.**

Evidence necessary to corroborate testimony of accomplice, need not tend to establish the precise facts testified to by the accomplice, p. 450.

Approved in People v. Grundall, 75 Cal. 305; so in People v. Barker, 114 Cal. 620, holding that the strength or credibility of the corroborating evidence is for the jury; State v. Streeter, 20 Nev. 407, to same effect; State v. Kent, 4 N. Dak. 597; State v. Hicks, 6 S. Dak. 328; Jones v. State, 3 Tex. Crim. App. 579; Same v. Same, 4 Tex. Crim. App. 531, all in approval of the ruling stated; People v. Compton, 123 Cal. 412, but holding instruction erroneous as given; 71 Am. Dec. 678, extended note, discussing subject of "evidence of accomplices."

**50 Cal. 456-460. DUSSOL v. BRUGUIERE.**

**Contribution.**—Sureties jointly paying may maintain a joint action for contribution against the surety who failed to pay his proportion, p. 459.

Cited in 10 Am. St. Rep. 646, extended note, discussing right of one surety to enforce contribution from cosurety.

**50 Cal. 462-465. GOLDSTEIN v. BLACK.**

**Witnesses.**—Expert in handwriting must be qualified by acquired skill, and scientific knowledge. Mere opportunity for observation will not qualify an expert, p. 465.

Cited in Fort Worth etc. R. R. Co. v. Thompson, 2 Tex. Civ. App. 173, in approval of the ruling; 66 Am. Dec. 242, extended note, treating of expert testimony.

**50 Cal. 465-468. REED v. YBARRA.**

**Statute of Limitations.**—As respects an action of ejectment for land embraced within a Mexican grant, the statute does not commence to run until the patent issues, p. 468.

Cited as authority to same effect in *De Miranda v. Toomey*, 51 Cal. 165; *Emeric v. Alvarado*, 64 Cal. 609; *Riverside Land etc. Co. v. Jansen*, 66 Cal. 302; *Wilhoit v. Tubbs*, 83 Cal. 288; *Adams v. Hopkins*, 144 Cal. 27, holding action not barred.

**50 Cal. 469-471. PEOPLE v. TURLEY.**

Instructions to jury must be applicable to the facts of the case, p. 470.

Cited in *People v. Murback*, 64 Cal. 371, instructions to jury on trial for murder; *People v. Chavez*, 103 Cal. 408, trial for rape, and the court held justified in refusing to instruct the jury that the defendant might be convicted under the information of an assault with intent to commit rape; *People v. Chaves*, 122 Cal. 140, holding instruction on manslaughter properly refused when defendant was guilty of murder, if at all; *People v. Fellows*, 122 Cal. 240, noted under *People v. Welch*, 49 Cal. 174; *Territory v. McAndrews*, 3 Mont. 182, holding that the action of the court below in giving or refusing instructions will not be reviewed unless the evidence, or sufficient of it to show their applicability, is properly embraced in the record; *Territory v. Gay*, 2 Dak. Ter. 142, holding that matters of fact, as to which the court is not permitted to charge the jury, are facts contested, or in some degree sought to be established by evidence.

**Manslaughter.**—No words of reproach are sufficient provocation to reduce offense of intentional homicide with a deadly weapon from murder to manslaughter, p. 471.

Cited to same effect in *Henning v. State*, 106 Ind. 401.

Judgment will be affirmed, where no substantial rights of a defendant convicted of a criminal defense have been interfered with, p. 471.

Cited in *Ex parte Bernert*, 62 Cal. 528, as sustaining the rule that the supreme court will not, on appeal, reverse a judgment for error, unless the defendant appealing has been prejudiced. Cited in *People v. Reggel*, 8 Utah, 25, noted under *People v. Brotherton*, 47 Cal. 388.

**50 Cal. 471-473. RUSH v. McDERMOTT.**

**Executor and Administrator.**—Consent of administrator to laying out and opening a highway across the land of the estate confers no right and is void, p. 473.

Examined and distinguished in *Davis v. Ford*, 15 Wash. 117, case of an unauthorized sale of timber by an administratrix, who was held to be estopped from taking advantage of its invalidity, the purchaser having acted in good faith, and having paid a valuable consideration.

**50 Cal. 474-476. HEWLETT v. OWENS. S. C. 51 Cal. 570.**

Tenancy in Common.—Agreement to pasture sheep and divide the proceeds of wool makes the parties tenants in common of the wool, p. 476.

Cited to same effect in Beezley v. Crossen, 14 Oreg. 477, the terms of the agreement being similar.

Replevin does not lie in favor of tenant in common of personal property against cotenant or his vendee, p. 476.

Affirmed in Hewlett v. Owens, 51 Cal. 571, holding further that the rule is also applicable to trover. Cited in Hill v. Seager, 3 Utah, 380, in approval of the ruling.

**50 Cal. 476-477. FRASER v. THRIFT.**

Execution.—Court has no power to make an order directing sheriff to enforce execution by levying on a particular piece of property, p. 477.

Principle of decision approved and applied in Broderick v. Brown, 68 Fed. Rep. 346, case of levy of attachment by United States marshal.

**50 Cal. 478-480. TOMPKINS v. CRANE.**

Evidence.—Declarations of grantor of real property are not admissible in evidence against the grantee unless made while holding the title, p. 479.

Cited in Emmons v. Barton, 109 Cal. 670, and applied to statements of deceased husband concerning title to property made after the execution of a conveyance of the property to his wife. Distinguished in Sperry v. Wesco, 26 Oreg. 489, the grantor being in possession and holding title when the declarations were made.

**50 Cal. 480-482. PEOPLE v. THOMPSON.**

Criminal Law.—Corroborating evidence in addition to that of an accomplice is not sufficient to convict, if it merely tends to raise a suspicion of the guilt of accused, p. 481.

Cited in People v. Morton, 139 Cal. 727, holding corroboration insufficient; People v. McLean, 84 Cal. 482, holding that such corroborating evidence need not be strong; People v. Smith, 98 Cal. 218, in which case the evidence was held to be too weak to sustain the verdict of guilty; so in People v. Koenig, 99 Cal. 576; People v. Main, 114 Cal. 634; and State v. Jarvis, 18 Oreg. 365, case of conviction of crime of incest; State v. Spencer, 15 Utah, 155, in approval, as to nature of corroborating evidence required.

**50 Cal. 482-484. HEARNE v. SOUTHERN PACIFIC RAILROAD COMPANY.**

**Negligence.**—Person crossing railroad track upon a public highway is bound to exercise proper care to avoid trains, and if he does not do so, and for that reason is injured, he cannot recover damages, p. 484.

Cited to same effect in Louisville etc. R. R. Co. v. Webb, 90 Ala. 196; Haas v. Grand Rapids etc. R. R. Co., 47 Mich. 408; Candelaria v. Railway Co., 6 N. Mex. 275, approving definition of contributory negligence; Hunter v. Montana etc. Co., 22 Mont. 532, holding contributory negligence established under facts stated; 90 Am. Dec. 781, extended note, as to duty of traveler on highway at railroad crossing.

**50 Cal. 485-492. HARTMAN v. REED.**

**Executive Conveyance** cannot be Set Aside as for failure of consideration, in absence of fraud, on the sole ground of nonperformance by the vendee of a contract made at the time of its execution as the consideration of the conveyance, pp. 488, 489.

Cited in Lawrence v. Gayetty, 78 Cal. 134, 12 Am. St. Rep. 36, in affirmance of the ruling; so, Martin v. Splivalo, 69 Cal. 614; Richter v. Union etc. Co., 129 Cal. 372, but holding rule inapplicable to executory contracts; Downing v. Rademacher, 133 Cal. 224, 85 Am. St. Rep. 162, but distinguished, construing agreement to work mine and share proceeds.

**Statute of Limitations.**—Grantor may disseise grantee and plead limitation against him, p. 489.

Cited in Lord v. Sawyer, 57 Cal. 67, holding that the execution of a bargain and sale deed does not prevent the grantor from afterward taking and holding the land conveyed adversely to the grantee, or from acquiring title by the statute of limitations.

**Cloud on Title.**—In action to set aside deed as a cloud upon plaintiff's title, it must clearly appear that the claim set up under such deed is, in fact, in hostility to such title, p. 491.

Ruling approved in Archbishop of San Francisco v. Shipman, 69 Cal. 590, and holding that a sale under a judgment for the foreclosure of a lien would not create a cloud upon the title or in any manner affect the rights of one owning the fee and in the actual possession of the land, but not a party to the judgment, and that a court of equity will not enjoin the sale at his instance.

**50 Cal. 493-496. COLEMAN v. BOARD OF SUPERVISORS.**

**Aid to Railroad.**—Board of supervisors may authorize railroad company to diverge from proposed line after aid is voted to build the road on such line, p. 496.

Cited in 98 Am. Dec. 672, extended note, discussing subject of municipal bonds and defenses thereto, fully reviewing the authorities.

**50 Cal. 496-498. UTTENDORFFER v. SEAGERS.**

**Trespass.**—Gravamen of action, trespass *quare clausum*, is the alleged possession of plaintiff, at time of entry by defendant, and the latter may prove, under a general denial, that a tenant of the former was in the actual possession, p. 498.

Cited to same effect in Heilbron v. Heilbron, 72 Cal. 374, discussing the question, "What must a tenant show in order to maintain an action of *quare clausum*?" Rogers v. Duhart, 97 Cal. 505, explained and limited, holding that in an action to recover damages for injuries to real property, the allegation of possession by plaintiff is immaterial and may be treated as *surplusage*. So, to same effect in Arneson v. Spawn, 2 S. Dak. 284, 39 Am. St. Rep. 794. Cited in McGonigle v. Atchison, 33 Kan. 738, as to complaint or petition in trespass, but held inapplicable under Kansas Code of Procedure; 85 Am. Dec. 323, extended note, treating of "remedy for injuries to real estate held adversely to plaintiff."

**50 Cal. 498-502. MARTIN v. PARSONS. S. C. 49 Cal. 94.**

**Equitable Relief.**—Equity will not permit a party to take advantage of his own wrongful act, p. 502.

Cited in 54 Am. St. Rep. 240, extended note, discussing subject of relief in equity.

**50 Cal. 502-503. CALDWELL v. PARKS.**

**Appeal.**—Bill of exceptions which is a mere rescript of the testimony by question and answer, with the objections taken and the ruling thereon, will not be considered, p. 503.

Ruling affirmed in Valleau v. Superior Court, 62 Cal. 290, and Wild v. Union Pac. Ry., 23 Utah, 270.

**50 Cal. 505-506. WILMINGTON CANAL AND RAILROAD COMPANY v. DOMINGUEZ.**

**Findinga.**—Finding of jury in eminent domain case cannot be disregarded by the court, p. 506.

Approved in Cummings v. Peters, 56 Cal. 597, as to submission of issue of fact to jury in eminent domain case; Zigler v. Menges, 121 Ind. 108, 16 Am. St. Rep. 364, to same effect.

**General Citation.**—In Lorenz v. Jacob, 63 Cal. 75, as authority that the right of eminent domain cannot be exercised in favor of owners of mining claims, to enable them to obtain water for working their claims, though the intention may also be to supply water to others for mining and irrigation.

**50 Cal. 506-507. SAN FRANCISCO v. BRADER.**

Bail Bond in criminal case is an undertaking for the direct payment of money upon which an attachment may issue, p. 507.

Cited in County of Monterey v. McKee, 51 Cal. 255, as applicable to official bond of county treasurer.

**50 Cal. 508-509. JONES v. SHAY.**

Tenant at will may maintain action of forcible entry and detainer if forcibly dispossessed, p. 509.

Cited in Carteri v. Roberts, 140 Cal. 167, holding entrant by owner's permission a tenant at will, though contract or lease was void. 18 Am. Dec. 148, note.

**50 Cal. 509-511. CLARK v. MINNIS.**

Mandate.—Writ of will not issue commanding a justice of the peace to certify a cause to the district court for trial. The party has his remedy by appeal, p. 510.

Cited in Clark v. Crane, 57 Cal. 634, refusing mandamus to compel a superior court to settle a statement on motion for new trial.

**50 Cal. 511-520. HIBBERD v. SMITH.**

Docketing Judgment.—Omission to write Christian name of judgment debtor, or to arrange names alphabetically on docket, will not impair lien of judgment, p. 517.

Cited in Dyke v. Bank of Orange, 90 Cal. 402, where designation of amount of judgment in judgment docket, though informal, held sufficient to create a lien.

Judgment Lien attaches, notwithstanding execution of a deed, if not delivered until after docketing, p. 518.

Cited in Eby v. Foster, 61 Cal. 286, in approval, but holding that the premises did not become subject to the lien of the judgment in the particular case.

Lien of foreclosure judgment for deficiency does not attach to other land until deficiency is reported, though the judgment was docketed when rendered, pp. 518, 519.

Cited, to same effect in Blum v. Keyser, 8 Tex. Civ. App. 678; McKeon v. Savings Bank, 118 Cal. 340. Referred to in Frost v. Meetz, 52 Cal. 671, as holding, in effect, that the return of the sheriff, showing the sum for which the mortgaged premises had been sold, authorized the clerk to issue execution against the general property of the judgment debtor, for the balance of the mortgage debt, and that the docket of the judgment, made prior to the return, constituted a lien on the general real estate of the defendant from the filing of the return.

Execution not issued in name of people, or directed to sheriff, is amendable, and not void, p. 519.

Cited in *Van Cleave v. Bucher*, 79 Cal. 602, and so holding as to writ of execution not showing specifically the amount of the judgment or the amount due thereon; *Pecotte v. Oliver*, 2 Idaho, 231, as to writ directed to an improper officer; *State v. Cassidy*, 4 S. Dak. 62, as to error in venue of execution.

#### 50 Cal. 520-521. ROBERTS v. TREADWELL.

**Pleading.**—In action on contract to pay money, complaint must allege that defendant has not paid the indebtedness for the recovery of which the action is brought, p. 521.

Cited, as to necessity of alleging nonpayment in *Harmon v. Ashmead*, 60 Cal. 441, action to foreclose mechanics' liens; *London etc. Ins. Co. v. Liebes*, 105 Cal. 208, action for money had and received; *Ryan v. Holliday*, 110 Cal. 337, action to foreclose mortgage securing a note; *Tomlinson v. Ayres*, 117 Cal. 571, action to foreclose chattel mortgages; *Hurley v. Ryan*, 119 Cal. 72, action upon contract to recover money; *Penrose v. Winter*, 135 Cal. 291, and *Knox v. Buckman etc. Co.*, 139 Cal. 599, noted under *Frisch v. Calder*, 21 Cal. 71; *Hershfield v. Aiken*, 3 Mont. 449, action to recover on promissory note; and *Vogel v. Walker*, 3 Utah, 229, action by mortgagee against trespasser for depreciating mortgage security.

#### 50 Cal. 523-525. WATSON v. SAN FRANCISCO AND HUMBOLDT BAY RAILROAD COMPANY.

**Complaint.**—When assailed on ground that several causes of action are not separately stated, or that one of them is against public policy, its sufficiency cannot be tested by motion to dismiss, or by motion for judgment on the pleadings, p. 524.

Approved in *Wasatch Irr. Co. v. Fulton*, 23 Utah, 470, following rule; *Kelley v. Kriess*, 68 Cal. 212, pointing out how objection may be taken to complaint which fails to state facts constituting a cause of action.

Evidence will not be reviewed in appellate court, unless bill of exceptions specifies the particulars in which it is alleged to be insufficient to sustain the verdict, p. 524.

Cited in *San Francisco v. Pacific Bank*, 89 Cal. 24, in approval of the ruling.

**Judgment.**—Where complaint does not allege an agreement to pay in gold coin, the court cannot render a judgment so payable, although verdict of jury is for gold coin, p. 525.

Cited to same effect in *Chamberlin v. Vance*, 51 Cal. 82, where the jury assessed the damages for plaintiff in gold coin in action of slander; so in *Patochi v. Railroad Co.*, 52 Cal. 91, verdict in gold coin in action

for injury to person; Marquard v. Wheeler, 52 Cal. 446; Bedford v. Woodward, 158 Ill. 133; Hancock v. Buckley, 18 Mo. App. 465, in approval, as sustaining the rule that if the verdict of a jury goes beyond the issues, it is void pro tanto, and the surplus matter may be disregarded in entering judgment.

#### 50 Cal. 525-527. ANDERSON v. MAYERS.

**Statute of Limitations.**—When a new cause of action is pleaded, a new action is commenced as respects limitation, p. 527.

Cited to same effect in Jeffers v. Cook, 58 Cal. 151, where supplemental complaint was filed naming new parties defendant; Brown v. Rouse, 104 Cal. 675; Cited in Frost v. Witter, 132 Cal. 428, 84 Am. St. Rep. 59, but distinguished, holding no new cause of action pleaded in amendment; Tully v. Tully, 137 Cal. 68, holding action for fraud barred when first alleged in amended complaint. Distinguished in Miner etc. Co. v. Wagner, 177 Mass. 406, allowing amendment to complaint under local statutes; Schwartz v. Stock, 26 Nev. 157, where in suit against executrix conversion by defendant alleged, but by amendment conversion by defendant's testator alleged, and exclusive control of property maintained by deceased for more than four years prior to amendment, suit was barred; Batterton v. Fuller, 6 S. Dak. 268; Bowen v. Needles Nat. Bank, 79 Fed. Rep. 50, as authority for introduction of new cause of action by amendment, in the particular case.

#### 50 Cal. 528-530. SCHOEN v. HOUGHTON.

**Bona Fide Purchaser.**—Purchaser of note before due, but after release executed by payee to payor, is a bona fide holder, although he purchased on speculation, and might have ascertained on inquiry that the release had been given, p. 530.

Cited in notes to 26 Am. Dec. 157; 84 Am. Dec. 402, discussing subject of bona fide holder.

#### 50 Cal. 532-533. THOMPSON v. SPENCER.

**Quitclaim Deed.**—What title acquired by, and when takes effect by relation. p. 533.

Referred to, as bearing upon the subject, in Brown v. Warren, 16 Nev. 235, the facts being nearly similar.

#### 50 Cal. 534-539. SAN BUENAVENTURA COMMERCIAL MINING AND MANUFACTURING COMPANY v. VASSAULT.

**Corporations.**—Unless stockholders are all present and consent, notice of annual election must be given, although the day is fixed in the by-law, p. 537.

Cited in Thompson v. Williams, 76 Cal. 155, 9 Am. St. Rep. 189,

holding invalid an assessment levied at an adjourned meeting, convened without notice given to the absentees at the regular meeting. So in *Smith v. Dorn*, 96 Cal. 83, holding void a conveyance of the property of the corporation by the board of directors at a special meeting, not called in compliance with the requirements of the by-laws; *Hill v. Mining Co.*, 119 Mo. 26, as to necessity of notice of special meeting of directors.

**50 Cal. 539-543. MAWSON v. MAWSON.**

**Homestead.**—Probate court, in case of death of husband, or wife, may set apart a homestead for use of survivor or minor children, if none had been selected prior to the death, and may adopt a method of doing so, pp. 541, 542.

Cited to same effect in *Estate of McCauley*, 50 Cal. 546. *Hardwick v. Block*, 128 Cal. 673, holding homestead so set apart to widow in absence of minor children prior to amendment of 1881 to be her absolute property free from claims of husband's heirs at her death; *Comstock v. County of Yolo*, 71 Cal. 602, as authority for adoption by board of supervisors of any suitable mode of procedure for levying a tax for road purposes; *Kearney v. Kearney*, 72 Cal. 597, as to proceedings to set apart the homestead; so in *In re Burdick*, 76 Cal. 645; *In re Walkerly*, 81 Cal. 581; *Somers v. Somers*, 81 Cal. 615, dissenting opinion of Thornton, J.; *Toby v. Railroad Co.*, 98 Cal. 496, mortgage foreclosure, approving mode of proceeding adopted by the court to ascertain deficiency; *In re Schmidt*, 94 Cal. 337, 339, construing section 1468 of the Code of Civil Procedure, as amended in 1881, holding that it was the intention of such amendment to change the rule declared in the principal case, and to take from the court the power to set apart homesteads selected from the separate property of the deceased, except for a limited period. So, to same effect, in *In re Walkerly*, 108 Cal. 655, 49 Am. St. Rep. 112.

In whom homestead vests after death of husband or wife, p. 543.

Cited in *In re Ackerman*, 80 Cal. 210, 13 Am. St. Rep. 117, holding that if declared upon community property it vests absolutely in the survivor; so in *Sanders v. Russell*, 86 Cal. 120; 21 Am. St. Rep. 27; and *Collins v. Scott*, 100 Cal. 451. Examined in *In re Walkerly*, 108 Cal. 655, 49 Am. St. Rep. 112, and the effect of the amendment to section 1468 of the Code of Civil Procedure, adopted in 1881, pointed out.

**50 Cal. 544-546. ESTATE OF McCUALEY.**

**Homestead** may be set apart by the probate court for the use of the widow, if none was selected during lifetime of deceased husband, and the court may adopt a mode of doing so, p. 546.

Cited in *Estate of Burton*, 63 Cal. 37, in approval. So, to same effect, in *In re Walkerly*, 81 Cal. 581.

**Same.**—Order setting aside homestead does not destroy or impair any lien on the property, p. 546.

Cited, as so holding, in *Bonner v. Minnier*, 13 Mont. 279, dissenting opinion of De Witt, J.

**Appeal** may be taken from a portion of an order, p. 546.

Cited as authority in *In re Davis' Estate*, 11 Mont. 14, appeal from order denying motion for change of venue.

#### 50 Cal. 549-554. **CARPENTIER v. BENHAM.**

**Complaint.**—Under prayer for general relief, no relief can be granted in equity beyond that authorized by the facts stated, p. 552.

Cited in *Ellis v. Rademacher*, 125 Cal. 558, noted under *Hicks v. Murray*, 43 Cal. 522, and *Raun v. Reynolds*, 11 Cal. 19; *McPherson v. Weston*, 64 Cal. 280, as sustaining the rule that a complaint which states a sufficient cause of action, at law or in equity, is not demarable as not stating facts sufficient to constitute a cause of action. Cited in *Cummings v. Cummings*, 75 Cal. 442, in affirmance of ruling stated; *Noonan v. Nunan*, 76 Cal. 49, as authority that a party cannot be allowed to claim relief inconsistent with his pleading.

#### 50 Cal. 554-556. **CITY OF STOCKTON v. WHITMORE.**

**Street Improvements.**—City council has no jurisdiction to contract for less work than that specified in the resolution of intention, p. 555.

Approved, and principle of decision applied, in *McBean v. Redick*, 96 Cal. 192; *Treanor v. Houghton*, 103 Cal. 58, 59; and *Construction Co. v. Loevy*, 64 Mo. App. 438. Cited in *Fay v. Reed*, 128 Cal. 359, on point that proceedings are in *invitum* and void unless statute is strictly followed; *Kutchin v. Engelbret*, 129 Cal. 637, 638, noted under *Dougherty v. Hitchcock*, 35 Cal. 512.

#### 50 Cal. 556-558. **WRIGHT v. CARPENTER.**

**View by Jury.**—Jurors are not authorized to view any other property than that which is in litigation, and which the court directs them to view, p. 557.

Cited in 92 Am. Dec. 344, note, where the authorities bearing on the subject are collected.

**Same.**—Jury cannot, in such case, use the result of their examination as independent evidence in the case, pp. 557, 558.

Referred to in *Stanford v. Felt*, 71 Cal. 252, approving the rule.

#### 50 Cal. 558-560. **HAWKINS v. HAWKINS.**

**Contracts.**—One who enters into a written contract with another, between whom and himself no relation of especial confidence exists, and he signs the writing without reading it, or having it read to him,

cannot avoid liability although its terms differ from the contract as agreed on verbally, and the fact that he is illiterate does not change the rule, p. 560.

Ruling approved in *Senter v. Senter*, 70 Cal. 623, but held inapplicable where one party makes false and fraudulent representations as to material facts, preventing the opposite party from seeking the information which he did not possess, and which, but for such representations, he might have obtained; *Placer etc. Bank v. Freeman*, 126 Cal. 95, holding drawers of draft not exempted from liability thereon, under facts stated; *Meyer v. Haas*, 126 Cal. 564, but setting aside release when attained by fraud; and cf. *Calmon v. Sarraillé*, 142 Cal. 641, holding rule in main case inapplicable where fiduciary relation existed; *Sellwood v. Henneman*, 36 Or. 578, but holding showing of confidential relation unnecessary when gravamen of action is mutual mistake; *Metropolitan Loan Assn. v. Esche*, 75 Cal. 518, applied, refusing reformation of instrument so as to omit a particular clause, on the ground that it was inserted through actual mistake. So, to same effect, in *Crane v. McCormick*, 92 Cal. 181. Doctrine approved and applied in the following cases: *Willard v. Ostrander*, 46 Kan. 595; *Nicol v. Young*, 88 Mo. App. 453; *Kleinsorge v. Rohse*, 25 Oreg. 54; *Taylor v. Feckenstein*, 12 Saw. 248, 30 Fed. Rep. 103; *Hazard v. Griswold*, 21 Fed. Rep. 180. Distinguished in *Wilson v. Moriarty*, 77 Cal. 597, action to rescind contract of lease, the plaintiff being a person of very weak intellect, who could neither read nor write, and the complaint alleging that the defendant acted throughout with a fraudulent intent; s. c. 88 Cal. 213, on appeal from the judgment reforming the lease, and from an order denying the defendant's motion for a new trial. Cited in *Berwin v. Galveston etc. Inv. Co.*, 20 Tex. Civ. App. 430; 32 Am. St. Rep. 386, extended note, discussing subject of "carelessness as bar to relief."

**50 Cal. 561-574. PEOPLE v. BOARD OF SUPERVISORS OF SAN LUIS OBISPO COUNTY.**

Legislature has Power to enact a law requiring boards of supervisors to issue and sell county bonds to raise money for improvement of county roads, p. 564.

Cited in extended notes to 80 Am. Dec. 732; and 35 Am. St. Rep. 334, treating of powers of municipal corporations; *Board of Education v. Aberdeen*, 56 Miss. 526, as to powers of the legislature, and holding that a municipal charter is not a contract within the sense of the federal constitution, between the municipality and the state.

**50 Cal. 574-578. FRONT STREET ETC. RAILROAD COMPANY v. BUTLER.**

Covenants which are to be performed at different times are independent, p. 577.

Cited in *Bank of Woodland v. Duncan*, 117 Cal. 415, in which case an oral agreement made by a chattel mortgagee was held to be independent of the contract evidenced by the mortgage, and could not operate to release the lien or nullify the effect of the latter.

**Conditions Precedent.**—Courts are disinclined to construe stipulations in a contract as conditions precedent, unless compelled by the language of the contract plainly expressed, p. 577.

Ruling approved and applied in *Deacon v. Blodget*, 111 Cal. 418. Cited in *Antonelle v. Lumber Co.*, 140 Cal. 315, 319, holding stipulation to be a covenant and on point that conditions precedent are not favored; *Southern Pac. R. R. Co. v. Allen*, 112 Cal. 461, as authority sustaining the rule that if a day be appointed for the payment of money, and the day is to happen, or may happen, before the thing which is the consideration of the money, an action will lie for the money; for it appears that the party relied upon his remedy, and did not intend to make the performance a condition precedent; *Weinreich v. Weinreich*, 18 Mo. App. 370, holding that a conveyance upon condition that, after the grantor's death, the grantor should pay another person a certain sum, expresses a condition subsequent; *Stilwell v. Railroad Co.*, 39 Mo. App. 226, in approval, construing a deed so as not to create a condition subsequent. Examined and distinguished in *McLaughlin v. Clausen*, 85 Cal. 327, in which case the completion of the road was, by the terms of the contract, made an absolute condition precedent; and the court say in respect to the principal case, that if it "can be construed as against the view here taken, we are satisfied that it should be overruled."

**Contract to Build Street Railway.**—Fact that railway company failed to build its road on the line of a street within the time agreed is not an excuse for the nonpayment of the money subscribed for its construction, but the subscribers may recoup the damage thereby sustained, p. 578.

Cited to same effect in *Williams v. Railroad Co.*, 82 Tex. 560; *Seley v. Railroad Co.*, 2 Tex. Civ. App. 68; 40 Am. Dec. 332, extended note, discussing subject of "recoupment in case of breach of contract." Distinguished in *Green v. Dyersburg*, 2 Flipp. 498, Fed. Cas. No. 575b, holding stipulation in railroad aid bonds to be a condition precedent and city not liable thereon.

**50 Cal. 578-581. PERRY v. SOUTHERN PACIFIC RAILROAD COMPANY.**

**Negligence.**—Whether injury is the proximate result of negligence is a question of fact for the jury, p. 581.

Cited to same effect, in approval of the ruling, in *McNamara v. Railroad Co.*, 50 Cal. 585. So in *Jacksonville etc. R. R. Co. v. Manufacturing Co.*, 27 Fla. 116; *St. Johns etc. R. R. Co. v. Ransom*, 33 Fla. 414;

Louisville etc. R. R. Co. v. Krinning, 87 Ind. 353; Union Pac. R. R. Co. v. Gilland, 4 Wyo. 408; and Fitzhugh v. Townsend, 59 Mich. 440, cases similar in their facts. Cited, reviewing the authorities, in Penna. Co. v. Whitlock, 99 Ind. 257, 50 Am. Rep. 78, and holding that where a person accidentally but negligently sets fire to his own building, and the wind carries the flames to another's building and consumes it, the former is not liable; Chicago etc. Co. v. Bailey, 19 Ind. App. 168, applying rule to failure of railroad to remove combustible material from right of way; Chicago etc. Ry. Co. v. Ross, 24 Ind. App. 228; 36 Am. St. Rep. 824, extended note, discussing subject of "proximate and remote causes in cases involving wrongful acts." See Henry v. Southern Pac. R. R. Co., 50 Cal. 176, ante.

**50 Cal. 585-589. BALDWIN v. MORGAN.**

**Judgment.**—If defendant is sued by a fictitious name, and judgment is rendered against him without inserting his real name in complaint, it is ground for reversal, but the judgment is not void, p. 588.

Cited in Farris v. Merritt, 63 Cal. 119, as authority that it is necessary to amend the complaint by inserting the defendant's real name when ascertained, otherwise no judgment could be taken and enforced against him. See Campbell v. Adams, 50 Cal. 203, ante.

**50 Cal. 589-591. GEORGE v. NORTH PACIFIC TRANSPORTATION COMPANY.**

**Nuisance.**—Until a street is made capable of public use, owner of lot fronting thereon cannot sue to abate an obstruction in the street, p. 591.

Cited to same effect in Payne v. McKinley, 54 Cal. 533, and holding that the complaint in an action to enjoin a public nuisance, must show special damage to the plaintiff. Distinguished in Schulte v. Transportation Co., 50 Cal. 594, in which case the street was capable of being used for travel with vehicles or otherwise.

**50 Cal. 592-595. SCHULTE v. NORTH PACIFIC TRANSPORTATION COMPANY.**

**Nuisance.**—Owner of lot fronting on a street in a condition to be used as such, who sustains a special damage by reason of an obstruction therein, may sustain an action therefor, p. 595.

Cited to same effect in Shirley v. Bishop, 67 Cal. 545, obstruction in navigable waters in front of plaintiff's land, cutting off access thereto; so in San Jose Ranch Co. v. Brook, 74 Cal. 466, obstruction of highway preventing plaintiff's ingress or egress to and from his land; Hargo v. Hodgdon, 89 Cal. 629, to same effect; Branahan v. Hotel Co., 39 Ohio

Notes Cal. Rep.—161.

St. 336, 48 Am. Rep. 459, case of a hackney coach stand on a public street, interfering with access to the premises of an adjoining proprietor; Ross v. Thompson, 78 Ind. 94, obstruction in street; Chicago v. Union Buil. Assn., 102 Ill. 394, 40 Am. Rep. 600, denying right of lot-owner to restrain the closing of a street, as it did not appear that he would suffer special and peculiar injury; City of Roseburg v. Abraham, 8 Oreg. 512, as to the necessity of alleging facts showing that complainant has suffered some special or extraordinary damage; notes to 1 Am. Dec. 58; 28 Am. Dec. 306, to ruling stated.

Same.—It is not material in such case by whom the street was improved, whether by the public or by private persons, p. 594.

Cited in Barton v. McDonald, 81 Cal. 267, holding a street contractor liable for leaving an unguarded hole in the street, whether he was authorized to make the street repairs by competent authority or not.

General Citation.—Phelps v. Detroit, 120 Mich. 455.

#### 50 Cal. 595-603. CLARKE v. RANSOM.

Testamentary Intent is necessary to constitute will, p. 600.

Cited in Estate of Scott, 128 Cal. 71, holding document not to be a will.

Will.—Parol testimony is admissible to show whether an instrument propounded as a will is such, p. 600.

Cited to same effect in Mitchell v. Donahue, 100 Cal. 208, 38 Am. St. Rep. 282, and holding that obviously omitted words will be supplied wherever the word omitted is apparent and no other word will supply the defect; so in Smith v. Holden, 58 Kan. 540; Barnely v. Hayes, 11 Mont. 576, 28 Am. St. Rep. 498, as to sufficient indication of testamentary intent.

Second will, altering former one, need not state in terms that it is intended thereby to alter such former will, p. 602.

Cited in extended notes to 45 Am. Rep. 332; and 28 Am. St. Rep. 352, treating of "revocation of wills."

#### 50 Cal. 603-606. SAN FRANCISCO v. SULLIVAN.

Ejectment may be maintained by a municipal corporation to recover possession of streets which it owns, p. 605.

Cited to same effect in 65 Cal. 436, 52 Am. Rep. 304, and holding that a private citizen cannot acquire title by adverse possession to land which has been dedicated to public use as a street; so in Territory v. Deegan, 3 Mont. 87. Ruling approved in Weeping Water v. Weed, 21 Neb. 270, ejectment to recover possession of a public square. Cited in 14 Am. St. Rep. 278, extended note, treating of extinguishment of easements through nonuse.

**50 Cal. 606-610. MERCIER v. HEMME.**

**Constructive Trust.**—Under some circumstances, the law will raise a trust by construction, and fasten it upon the conscience of a party who, by circumvention, has obtained for himself advantages of which he ought not, according to equity and good conscience, to have deprived another, p. 609.

Cited and applied in Coggswell v. Griffith, 23 Neb. 344; and cited in Jasper v. Hagan, 1 N. Dak. 82, as favoring the rule that no action can be maintained at law by the cestui que trust against the trustee while the trust remains open, unless the amount due the former has been liquidated; Smith v. Bank, 107 Iowa, 631, holding bank not liable to beneficiary for application of deposit by trustee to his account, where no notice of trust was shown.

**50 Cal. 610-611. LARNEY v. MOONEY.**

**Pleading.**—Denial in answer in precise language of complaint is not good, p. 611.

Cited, in approval of ruling, in Smith v. Smith, 19 Neb. 714; Curtiss v. Livingston, 36 Minn. 313, as to effect of specific denial; Thomas v. State, 51 Ark. 139; Same v. Same, 54 Ark. 587, applying the principle of the decision to pleadings in criminal proceedings; Rock Springs etc. Co. v. Salt Lake etc. Assn., 7 Utah, 162, noted under Blankman v. Vallejo, 15 Cal. 639; Peterson v. Bean, 22 Utah, 50, noted under Levinson v. Schwartz, 22 Cal. 230.

**General Citation.**—Board of Education v. Prior, 11 S. D. 294.

**50 Cal. 613-614. WUNDERLIN v. CADOGAN.**

**Deed not containing name of grantee is void as a conveyance**, p. 614.

Cited to same effect in Lockwood v. Bassett, 49 Mich. 549, but holding that if the name is inserted before delivery, and the deed is delivered by the grantor himself or by his direction, it is sufficient.

**50 Cal. 615-616. MILLER v. BRIGHAM.**

**Pleading.**—An affirmative allegation may be traversed by an affirmative averment inconsistent with it, p. 615.

Cited in County v. Gage, 139 Cal. 401, holding answer sufficient to raise issue; Souter v. Maguire, 78 Cal. 544, action to quiet title, holding that an allegation that the plaintiff is "the owner" of the land is of an ultimate fact, and a sufficient statement of the plaintiff's right; Perkins v. Brock, 80 Cal. 322; and Churchill v. Baumann, 95 Cal. 545, in affirmance of the ruling stated.

**Partnership.**—If one of two partners sells his interest to a third person, it dissolves the partnership, and the purchaser cannot maintain an

action to recover his interest in the property, but must sue for an accounting, p. 616.

Cited in Churchill v. Proctor, 31 Minn. 135; and Blaker v. Sands, 29 Kan. 558, as to right of partner to an accounting; Vincent v. Vierths, 60 Mo. App. 14, to same effect, holding also that the sale by a partner of his interest is not within the statute of frauds; Marx v. Goodnough, 23 Oreg. 547, in approval; Crossen v. Murphy, 31 Oreg. 124, right to retain assets for purpose of winding up affairs of copartnership; Driscoll v. Driscoll, 143 Cal. 534, on point that transfer of interest in partnership property by written instrument is good as between the parties without delivery of the property; notes to 69 Am. St. Rep. 17, 77 Am. St. Rep. 317, and 40 Am. St. Rep. 571.

**50 Cal. 616-618. VON SCHMIDT v. BOURN.**

Trover.—Action of, lies for wrongful sale of stock pledged, p. 618.

Cited in Payne v. Elliott, 54 Cal. 341, 35 Am. Rep. 82, as authority that trover lies for certificates of shares of stock, and holding further that an action lies for the conversion of the shares of stock which the certificate represents, as well as for that of the certificate.

**50 Cal. 621-624. BRODER v. NATOMA WATER AND MINING COMPANY.**

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Cited in Farley v. Irrigating Co., 58 Cal. 144, as to effect of said act, construed in connection with the amendatory act of July 9, 1870.

**50 Cal. 628-631. LEONARD v. KINGSLEY.**

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Appeal.—When appellant has shown error in admission of evidence, it will be presumed to have been injurious to the adverse party, unless the contrary clearly appears, p. 630.

Cited in People v. Furtado, 57 Cal. 347; Blakely v. Blakely, 89 Cal. 326, in approval of the ruling.

**50 Cal. 631-633. MERK v. GELZHAEUSER.**

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Cited in *People v. Sing Yon*, 145 Cal. 6, applying principle in prosecution for murder; *Shafer v. Willis*, 124 Cal. 41, on point that discretion of trial court in so denying motion will not be interfered with; *Railway Co. v. Forsyth*, 49 Tex. 179, holding that the motion may be met by affidavits impeaching the credibility of the witness relied on to testify to the alleged newly-discovered facts.

**Slander.**—In action for slanderous words imputing crime, plea of justification must be proved beyond a reasonable doubt, p. 633.

Cited in *Chaplin v. Lee*, 18 Neb. 442, in approval of the rule. Doctrine disapproved in *Hearne v. De Young*, 119 Cal. 682.

#### 50 Cal. 633-638. COOK v. NORMAN.

**Husband and Wife.**—Under the law prior to 1861, the surviving husband could sell or mortgage the common property so far as necessary to pay community debts, p. 638.

Cited in *Plass v. Plass*, 121 Cal. 134, noted under *Broad v. Broad*, 40 Cal. 493; *Johnston v. S. F. Sav. Union*, 63 Cal. 559, 563, holding, also, that in an action to foreclose a mortgage so executed by the surviving husband the children of the deceased mother were necessary parties. Explained and harmonized in *Same v. Same*, 75 Cal. 142, 144, 7 Am. St. Rep. 134, 135, holding that under act of 1850, the surviving husband had authority to keep alive a debt and mortgage made before the wife's death, but no authority to make an entirely new mortgage to raise money for the prosecution of new enterprises.

**Purchase in Good Faith of Community Property** from surviving husband to support title as against child need not show that sale was necessary to pay community debts, p. 638.

Approved in *Von Rosenberg v. Perrault*, 5 Idaho, 726, following rule.

**General Citation.**—In *Greiner v. Greiner*, 58 Cal. 120, holding that a wife cannot maintain an action while the marriage bond exists, to set aside a transfer of the common property, made by the husband for the purpose of defrauding her; *Crary v. Field*, 9 N. M. 234.

#### 50 Cal. 641-644. NAGLEE v. PALMER.

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Cited in *Palmer v. Galvin*, 72 Cal. 186, in approval. So, to same effect in *Galvin v. Palmer*, 113 Cal. 53; and *Murray v. Hobson*, 10 Colo. 69.

#### 50 Cal. 644-646. TRIPLETT v. MUNTER.

**Fees.**—Illegal fees must be knowingly, wilfully, or corruptly taken, to warrant removal from office, p. 646.

Cited in *Smith v. Ling*, 68 Cal. 325, as to necessity of alleging that defendant acted knowingly, willfully, or corruptly; *Hedges v. Dam*, 72 Cal. 522, as to necessity of alleging nature of claims unlawfully allowed by board of supervisors; *People v. Ward*, 85 Cal. 592, proceeding to remove judicial officer for misconduct in office; and so in *Woods v. Varnum*, 85 Cal. 643; *Rankin v. Jauman*, 4 Idaho, 62, upholding Revised Statutes, section 7459, relating to removal of officers for collecting illegal fees. Referred to in treating of crime of extortion, 96 Am. Dec. 195, extended note.

**General Citation.**—*McDowell v. Limbocker*, 61 Kan. 267, 275.

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**50 Cal. 650-651. HIMMELMANN v. FITZPATRICK.**

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Cited in approval in *Tompkins v. Batie*, 11 Neb. 151; 38 Am. Rep. 363 (case of chattel mortgage). Disapproved in *Olmstead v. Tarsney*, 69 Mo. 399; *McClung v. Trust Co.*, 137 Mo. 118; *Hyams v. Bamberger*, 10 Utah, 14, holding that the doctrine does not apply to a pledge; and so in *Mitchell v. Roberts*, 5 McCrary, 430, 17 Fed. Rep. 779; *McClung v. Missouri Trust Co.*, 137 Mo. 118; 76 Am. Dec. 449, note, to ruling stated.

**50 Cal. 652-655. DYER v. BARSTOW.**

**Joinder of Actions.**—Two causes of action for enforcing liens for two street assessments, made on the same lot at different times and on different contracts, cannot be joined in the same suit, p. 654.

Distinguished in *People v. Hagar*, 52 Cal. 182; and *District No. 110 v. Feck*, 60 Cal. 405, holding that two assessments for reclamation purposes in a swamp land district made on the same land at different times may be recovered in the same action. Referred to in *Reynolds v. Lincoln*, 71 Cal. 190, in which case it is held that error in overruling a demurrer to complaint, on ground of misjoinder of causes of action, will not warrant a reversal, when the substantial rights of the parties

are not affected thereby; State v. Mining Co., 14 Nev. 240, in approval of the ruling.

**Street Contract.**—Owner of property adjacent to street is not a party to a contract for the improvement of the street, made between a third party and superintendent of streets, p. 654.

Approved in Gillis v. Cleveland, 87 Cal. 217; so in Heft v. Payne, 97 Cal. 110, but holding that such owner can question the regularity of the proceeding resulting in the assessment in the same manner and upon the same principles as the validity of a tax may be questioned.

**50 Cal. 655-659. BARRETT v. BIRGE.**

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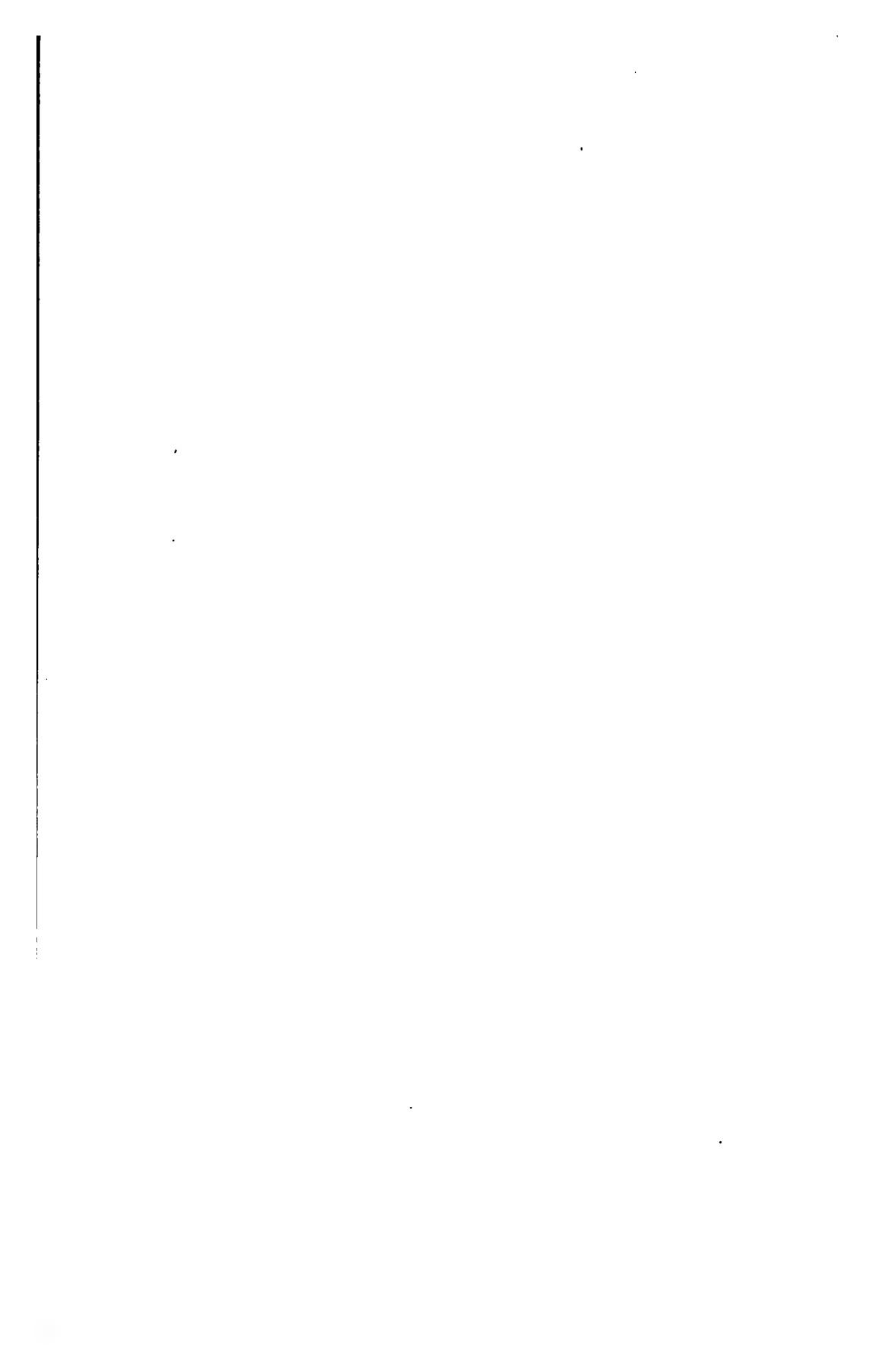
Cited in Emeric v. Alvarado, 90 Cal. 459, holding that covenant of warranty attaches merely to the interest which the deed purports to convey; notes, 48 Am. Dec. 775; and 58 Am. Dec. 587, to ruling stated.

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Cited as authority in 85 Am. Dec. 210, extended note, treating of conclusiveness of judgment in ejectment.

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# VOLUME LI.

By ALBERT RAYMOND.

Revised to include citations to Volume 147, by CHARLES L. THOMPSON.

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**51 Cal. 47-51 HILL v. GWIN.**

Mortgagor Can Recover Damages from persons removing fixtures from mortgaged property before foreclosure even if by consent of mortgagee, p. 50.

Cited in Lavenson v. Standard etc. Co., 80 Cal. 246, 13 Am. St. Rep. 148, as holding mortgagor liable for such removal, also discussing section 2929 of the Civil Code; Connecticut etc. Co. v. Mayer, 8 Mo. App. 23, on point that mortgagor's liability on mortgage is not relieved by removal of fixtures therefrom by his grantee although with mortgagee's consent; Dewey v. Walton, 31 Neb. 823, discussing conflicting claims to lien on improvements on mortgaged property.

Mortgage Lien is Terminated as to fixtures when severed from land before foreclosure, p. 50.

Cited to same effect in Moisant v. McPhee, 92 Cal. 79, as to removal of bark from trees on land mortgaged, although mortgage was deed absolute in form. Cited, also, in note on general subject to Partridge v. Hemenway, 28 Am. St. Rep. 325, where rule criticised.

Deed on Foreclosure does not relate back to date of mortgage so as to deprive mortgagor of right of action for fixtures removed by third persons with mortgagee's consent, p. 50.

Cited in note on relation in foreclosure sales, Jackson v. Ramsay, 15 Am. Dec. 253.

**51 Cal. 52-55. HOWARD v. SAN FRANCISCO.**

Municipal Corporation is Not Liable for damages sustained through negligence of fire department, p. 55.

Cited to same effect in Wilcox v. Chicago, 107 Ill. 339, 47 Am. Rep. 436,

as to collision caused by driver of ladder wagon; and, on same point in *Gillespie v. Lincoln*, 35 Neb. 45; *Henkel v. Detroit*, 49 Mich. 261, 43 Am. Rep. 473, as to obstruction of property by collecting of wagons at public market established by city; *Grube v. St. Paul*, 34 Minn. 403, and *McKenna v. St. Louis*, 6 Mo. App. 322, as to negligent management of hose carriage; *Edgerly v. Concord*, 59 N. H. 79, as to frightening of horse by testing of hydrant by fire department; *Condick v. Jersey City*, 46 N. J. L. 159, as to injuries caused by driver of public dumping cart; *Welsh v. Rutland*, 46 Vt. 237, 48 Am. Rep. 768, as to injury from ice formed in street in thawing out hydrant by department; *Mendel v. Wheeling*, 28 W. Va. 246, 247, 57 Am. Rep. 671, 673, as to loss by fire caused by negligence in care of its water works; *Mayor v. Workman*, 67 Fed. Rep. 350, as to collision with fireboat when used in extinguishing fire; and see *Boyd v. Insurance Patrol*, 113 Pa. St. 278, discussing but not deciding liability of patrol for injuries done by its employees. Denied in dissenting opinion in *Chope v. Eureka*, 78 Cal. 591, main opinion, holding city not liable for damages from falling into sewer excavation; *Welsh v. Rutland*, 56 Vt. 237, 48 Am. Rep. 768, as to injury from ice formed in street in thawing out hydrant by department; *Peterson v. Wilmington*, 130 N. C. 78; *Workman v. Mayor etc. New York*; *Haider v. St. Paul etc. Ins. Co.*, 67 Minn. 518; note to 100 Am. Dec. 359.

51 Cal. 55-64. **MORRIS v. DE CELIS.**

**Adverse Possession Creates Title** when properly continued, p. 60.

Cited to same effect in *Pacific etc. Co. v. Stroup*, 63 Cal. 153, holding adverse possession shown by facts; and *National etc. Co. v. Powers*, 3 Mont. 349, holding similarly on facts.

**Specification of Particulars** of insufficiency of evidence held sufficient, p. 60.

Cited in *Wise v. Burton*, 73 Cal. 167, on point that specification is sufficient that follows finding when general in form.

**Statute of Limitations as to Mexican Grant** does not begin to run until final approval of survey by district court, p. 60.

Cited to same effect in *Emeric v. Alvarado*, 64 Cal. 608, further citing cases on point that statute begins from issuance of patent.

51 Cal. 64-73. **NATIONAL GOLD BANK v. McDONALD.** 21 Am. Rep. 697.

**Deposit in Bank of Check drawn by another of its depositors** is not of itself equivalent to cash deposit, p. 70.

Cited to same effect in *Steinhart v. National Bank*, 94 Cal. 366, 28 Am. St. Rep. 136, on point that receipt of check for antecedent debt is not equivalent to payment; *Commonwealth v. Reading etc. Bank*, 133

Mass. 21. 43 Am. Rep. 499, on point that entry of credit on pass-book may be canceled when given for check afterwards found bad; Free-holders v. State Bank, 32 N. J. Eq. 468, holding bank of deposit of draft to be mere agent for collection under facts. Distinguished in City etc. Bank v. Burns, 68 Ala. 276, 44 Am. Rep. 142, holding bank bound under facts held to show intention of so receiving deposit. Cited, also, in note on general subject to 34 Am. Dec. 308; 14 Am. St. Rep. 387; 16 Am. St. Rep. 347; 32 Am. St. Rep. 175; 47 Am. St. Rep. 389; 77 Am. St. Rep. 628.

**Custom of Banks.**—Questions as to admissibility of evidence thereof not decided, p. 71.

Cited in note on general subject to Governor v. Withers, 50 Am. Dec. 99.

**51 Cal. 73-75. MILLER v. ELLIS.**

**Delivery of Patent** is unnecessary to make it effective, p. 74.

Cited to same effect in Cruz v. Martinez, 53 Cal. 243, where properly recorded in general land office; Eltzroth v. Ryan, 89 Cal. 139, holding further as to introduction of copy as evidence.

**51 Cal. 75-86. CHAMBERLIN v. VANCE.**

**Slander—Innuendo.**—Words with covert meaning may be alleged and proved to have been intended to defame and understood in particular way, p. 83.

Cited to same effect in Nidever v. Hall, 67 Cal. 83, holding proof necessary of their being understood as alleged; Clugston v. Garretson, 103 Cal. 445, on question of sufficiency of complaint and holding words charging arson actionable, per se. Cited, also, in note on general subject to Wimer v. Allbaugh, 16 Am. St. Rep. 425.

**Slander.**—Evidence of speaking of similar words is admissible to show malice, although spoken after action commenced, but damages are not allowable therefor, p. 84.

Cited to same effect in Harris v. Zanone, 93 Cal. 69, admitting such evidence as showing express malice; Westerfield v. Scripps, 119 Cal. 611, as to repetition of charge by newspaper; and on same point in Hearne v. De Young, 119 Cal. 677, holding further as to sufficiency of justification; Post etc. Co. v. Hallam, 59 Fed. Rep. 534, as to prior publication, although independent suit already begun thereon. Distinguished in Stern v. Lowenthal, 77 Cal. 343, where words were not of similar import.

**Offer of Proof** must be complete in itself and contain all facts showing relevancy to issue, p. 84.

Cited to same effect in Smith v. East Branch etc. Co., 54 Cal. 165, and Palmer v. McMaster, 10 Mont. 396, holding offer properly rejected.

as too vague; *Shumway v. Leakey*, 67 Cal. 459, holding offer of assessment roll insufficient to prove title.

**Failure to Instruct Jury** as to particular point is not error when instruction not requested by counsel, p. 84.

Cited to same effect in *People v. McLean*, 84 Cal. 483, as to cautioning jury to disregard evidence stricken out.

**Slander—Mitigation.**—Evidence of rumors of plaintiff's guilt of charge made is inadmissible, p. 85.

Cited in note on general subject to *Anthony v. Stephens*, 13 Am. Dec. 500.

**Verdict "in Gold Coin."**—Surplusage may be disregarded and judgment may be rendered thereon for amount found, generally, p. 85.

Cited to same effect in *Belford v. Woodward*, 158 Ill. 133, on point that default judgment payable in coin, where same not demanded, is valid only as payable in legal tender; *Hancock v. Buckley*, 18 M. A. 465, holding as surplusage a provision in verdict that costs be divided.

#### 51 Cal. 86-90. **REIS v. GRAFF.**

**Act Validating Assessment** gives it validity only from time of passage, p. 90.

Cited to same effect in *People v. O'Neil*, 51 Cal. 92, holding pending suits not affected by passage of such act after their commencement; and *People v. Kinsman*, 51 Cal. 93, and *People v. McCain*, 51 Cal. 361, on same point; *Gibson v. Zimmerman*, 27 Mo. App. 100, holding, however, authority of contractor derived from anterior ordinance. Cited also in note to *People v. Seymour*, 76 Am. Dec. 531, on validating acts.

**Street Assessment.**—Publication of notice of award must be ordered by supervisors, p. 90.

Cited to same effect in *City of Napa v. Easterby*, 61 Cal. 517, holding further as to admissibility of parol evidence of such order; *California Imp. Co. v. Moran*, 128 Cal. 378, noted under *Donnelly v. Tillman*, 47 Cal. 40; *Gas Co. v. Parkersburg*, 30 W. Va. 439, on point that municipal corporations have only powers expressed in or necessarily implied from their charters.

#### 51 Cal. 91-92. **PEOPLE v. O'NEIL.**

**Street Assessment.**—Appeal to supervisors cannot be dismissed without hearing, when taken regularly and in proper time, p. 92.

Cited to same effect in *Mahoney v. Braverman*, 54 Cal. 569, sustaining, however, power to dismiss at hearing on question of law without taking of testimony.

**Act Validating Assessment** does not affect suits instituted on such assessment before its passage, p. 92.

Cited in note on general subject to *People v. Seymour*, 76 Am. Dec. 531.

**Appeal to Supervisors suspends force of assessment and suit cannot be maintained thereon until appeal determined, p. 92.**

Cited to same effect in *Williams v. Bergin*, 108 Cal. 173, holding action premature if brought before confirmation of assessment by board or making of new one under its direction; *Buckman v. Landers*, 111 Cal. 350, on point that assessment may be corrected by such appeal when not including property properly taxable; *Girvin v. Simon*, 127 Cal. 495, holding no affirmative action by owner necessary, when no notice of hearing was given by board.

#### 51 Cal. 92-93. PEOPLE v. KINSMAN.

**Act Validating Assessment does not affect suits instituted on such assessment before its passage, p. 93.**

Cited in note on general subject to *People v. Seymour*, 76 Am. Dec. 531.

#### 51 Cal. 101-108. BREUNER v. LIVERPOOL AND LONDON AND GLOBE INSURANCE CO. 21 Am. Rep. 703.

**Finding of Fact, if ultimate, will be regarded a finding although placed among conclusions of law, p. 107.**

Cited to same effect in *Bath v. Valdez*, 70 Cal. 355, as to finding of adverse possession. Distinguished in *Savings etc. Society v. Burnett*, 106 Cal. 538, as to question of ownership, where conclusion of law held not to be such misplaced finding.

**Insurance.—“Fallen Building” does not include one of which more than three-fourths was left standing, p. 107.**

Cited to same effect in *Harder v. St. Paul etc. Co.*, 67 Minn. 518, on point that no breach of condition in policy occurs until it is totally broken. Distinguished in *Huck v. Globe etc. Co.*, 127 Mass. 311, 34 Am. Rep. 375, holding building to have fallen, under facts. Cited, also, in note to *Renshaw v. Missouri etc. Co.*, 23 Am. St. Rep. 916, on loss by fire; *Gilson v. Delaware etc. Co.*, 36 Am. St. Rep. 859, and *Nicols v. Sun etc. Co.*, 42 Am. St. Rep. 465, on general subject.

**Insurance.—“Change in Building” does not refer to change occasioned by accident, p. 107.**

Cited in notes to 2 Am. St. Rep. 583, and 66 Am. St. Rep. 692, 695.

#### 51 Cal. 108-110. MITCHELL v. HAGGENMEYER.

**Claims Against Estate—Evidence.—Deposition of plaintiff is inadmissible under present statute, even though admissible when taken, p. 109.**  
Distinguished in *Neis v. Farquharson*, 9 Wash. 515, holding such

deposition admissible when action originally brought against decedent in lifetime and deposition then taken.

**51 Cal. 110-111. THOMPSON v. HANCOCK.**

**Bill of Exceptions is Unnecessary for review of sufficiency of findings to support judgment, p. 111.**

Cited in *Knight v. Roche*, 56 Cal. 17, on point that new trial cannot be granted for such error where findings cover all issues (but see *Simmons v. Hamilton*, 56 Cal., where main case cited in dissenting opinion, page 498); *Wilson v. Wilson*, 64 Cal. 93, holding, however, errors not appearing on judgment-roll not reviewable without such bill.

**51 Cal. 112-116. HAGGIN v. CLARK. S. C. 71 Cal. 449.**

**Damages in Action for Trespass for mesne profits include rental value of land with costs of ejectment suit, p. 115.**

Cited to same effect in *Furlong v. Cooney*, 72 Cal. 330, confining such damages, however, in ejectment, to land actually sued for.

**51 Cal. 116-118. COLLIER v. STEINHART.**

**Master is Not Liable to Servant for injuries caused by engineer employed by superintendent, p. 117.**

Cited to same effect in *McLean v. Blue Point etc. Co.*, 51 Cal. 258, where fellow-servants were mine laborer and foreman respectively; *McDonald v. Hazletine*, 53 Cal. 36, as to longshoreman and foreman engaged in loading ship; dissenting opinion in *Brown v. C. P. etc. Co.*, 68 Cal. 176, as to railway engineer and switchman, main opinion holding complaint sufficient as against demurrer; *Congrave v. S. P. etc. Co.*, 88 Cal. 365, 368, 370, as to brakeman and conductor; *Trewartha v. Buchanan etc. Co.*, 96 Cal. 499, as to mine laborer and engineer; *Daves v. S. P. Co.*, 98 Cal. 21, 22, 35 Am. St. Rep. 135, 136, as to section hand and section foreman; *Stevens v. Railroad Co.*, 100 Cal. 567, as to fireman and engineer of ferryboat; *Buckley v. Gould etc. Co.*, 8 Saw. 399, 14 Fed. Rep. 837, as to mine laborer and workman in charge of hoisting engine. Cited, also, in note on general subject to *Murray v. Railroad Co.*, 36 Am. Dec. 287; *King v. Railway Co.*, 11 Biss. 369.

**51 Cal. 120-125. PEARSON v. PEARSON.**

**Pretermitted Child.—Ejectment by maintained against devisees under will, p. 120.**

Distinguished in *Newman v. Waterman*, 63 Wis. 624, denying right of action where such child (an adult) had appeared in proceedings wherein will was probated.

**Conflict of Laws.—Marriage valid where made is valid here, p. 125.**

**Notes Cal. Rep.—162.**

Cited in *Estate of Wood*, 137 Cal. 136, 137, as to marriage by divorced person in Nevada contrary to laws of California.

**51 Cal. 125-128. OFARREL v. HARNEY.**

**Deed—Description.**—Survey will prevail over map in case of conflict, p. 127.

Cited to same effect in *Cleveland v. Choate*, 77 Cal. 78, holding reference to map surplusage in case of such conflict, and further as to admissibility of parol evidence to show its error; *Whiting v. Gardner*, 80 Cal. 80, where deed referred both to map and to survey; *Holst v. Streitz*, 16 Neb. 253, on point that lines actually run will control in case of conflict between plat and survey; *Wilson v. Chicago Lumber etc. Co.*, 129 Fed. 639, construing deed made pursuant to decree of probate court which deed referred to map; *McKinney v. Doane*, 155 Mo. 298; *McMaster v. Morse*, 18 Utah 27.

**51 Cal. 128-133. CUNNINGHAM v. CROWLEY.** See *Manley v. Cunningham*, 72 Cal. 239.

**Application for Location of Lands** under act of 1863, page 593, is insufficient if affidavits thereon do not conform to statutory requirements, p. 131.

Cited to same effect in *Johnson v. Squires*, 55 Cal. 104, holding further as to effect of curative act (Stats. 1871-72, p. 622); *Churchill v. Anderson*, 58 Cal. 60, holding, however, such insufficiency not to destroy effect of patent as against trespasser.

**Land Contest.**—Order of reference may be made by register, whether as such or as surveyor general, p. 132.

Cited to same effect in *Espinosa v. Phelan*, 77 Cal. 101, where signed by deputy for both officers.

**Land Contest.**—Purpose of action is to determine which applicant has better right to purchase, p. 133.

Cited to same effect in *Pollard v. Putnam*, 54 Cal. 633, holding, however, that validity of defendant's application is not affected by such action, and construing section 3498 of the Political Code; *Perri v. Beaumont*, 91 Cal. 33, sustaining settler's right to contest application, and further construing sections 3414 and 3415 of the Political Code. Cited, also, in *Gilson v. Robinson*, 68 Cal. 542, and *Jacobs v. Walker*, 76 Cal. 177, on point that contest may be made after issuance of certificate of purchase.

**Land Contest—Parties.**—State is not necessary party to proceedings, p. 133.

Cited to same effect in *McFaul v. Pfankuch*, 98 Cal. 402, also construing Political Code, sections 3415, 3416, 3514.

**51 Cal. 140-142. GANEA v. SOUTHERN PACIFIC RAILROAD COMPANY.**

**Malicious Prosecution.**—Probable cause is shown *prima facie*, by holding to answer, p. 141.

Cited to same effect in *Diemer v. Huber*, 75 Cal. 290, holding, however, this circumstance not conclusive; and on same point in *Darnell v. Sallee*, 7 Ind. App. 584, and *Louisville etc. Co. v. Hendricks*, 13 Ind. App. 12, further holding complaints sufficient; *Holliday v. Holliday*, 123 Cal. 32, and *Harper v. Harper*, 49 W. Va. 665, but stating fact of holding not to be conclusive evidence; *Eastman v. Monastes*, 32 Or. 297, 67 Am. St. Rep. 534, on point that acquittal is not *prima facie* evidence of want of probable cause; *Stamper v. Raymond*, 38 Or. 35, discharge of accused on preliminary examination by committing magistrate is *prima facie* evidence of want of probable cause for causing arrest; *Ross v. Hixon*, 46 Kan. 553, 26 Am. St. Rep. 125 (and note 155, 158), holding further as to effect of conviction as proof of probable cause; *Brady v. Stiltner*, 40 W. Va. 294, discussing respective presumptions from discharge by examining magistrate and refusal of grand jury to indict; *Miller v. Chicago etc. Co.*, 41 Fed. Rep. 904, discussing elements of proof and holding probable cause shown by facts.

**51 Cal. 142-145. MEYER v. METZLER.**

“Nuisance” includes obstruction to free use of another’s property interfering with its comfortable enjoyment, p. 144.

Cited to same effect in *Grandona v. Lovdal*, 78 Cal. 617, 12 Am. St. Rep. 124, holding, however, projecting tiles not a nuisance under facts. Cited, also, in note to *Godley v. Huntley*, 59 Am. Dec. 736, on liability for nuisances to passersby.

**51 Cal. 146-151. McCREA v. HARASZTHY.**

**Probate of Wills.**—Statutory provisions examined and discussed, p. 148.

Cited in note on general subject to *Schultz v. Schultz*, 60 Am. Dec. 358.

**Executor is Not Discharged until entry of decree of discharge in terms**, p. 151.

Cited to same effect in *Dohs v. Dohs*, 60 Cal. 360, construing section 1589 of the Code of Civil Procedure; *Dean v. Superior Court*, 63 Cal. 475, holding, however, discharge contained in decree of distribution not void as premature where no estate remained in executor’s hands; *In re Rose*, 80 Cal. 170, on point that decree settling accounts does not discharge administrator and is not a final judgment; *In re Clary*, 112 Cal. 294, holding, further, that court can compel administrator after decree of distribution to dispose of estate in accordance therewith, no dia-

charge having been granted; Hubbard v. Urton, 67 Fed. Rep. 421, holding further under local statute, that beneficiaries may sue after discharge, for property unadministered upon and of which decedent was defrauded.

#### 51 Cal. 151-153. MONDRAN v. GOUX.

**Pleading—Complaint.**—Plaintiff must recover upon cause of action therein alleged and not some other developed by proofs, p. 153.

Cited to same effect in Sigourney v. Zellerbach, 55 Cal. 440, as to action to foreclose mortgage; Burke v. Levy, 68 Cal. 33, on point that plaintiff (appellant) cannot on appeal treat as void a judgment whose invalidity he did not allege; Heinlen v. Heilbron, 71 Cal. 563, as to recovery of damages to lands not included in complaint; Reed v. Norton, 99 Cal. 619, where complaint in mechanic's lien foreclosure was upon theory that no valid contract existed and decree on theory of existence of such contract; Owen v. Meade, 104 Cal. 183, as to variance between pleading and evidence; and Shenandoah etc. Co. v. Morgan, 106 Cal. 417, on same point; Elmore v. Elmore, 114 Cal. 519, as to money judgment in action to enforce trust as to land, and holding further as to practice in urging variance, and on last point in Miller v. Hallock, 9 Colo. 553, granting nonsuit for variance; Rogers v. Kimball, 121 Cal. 253, denying right of recovery based on estoppel not pleaded originally or by amendment; Davis v. Pacific etc. Co., 127 Cal. 321, ruling similarly as to recovery for false imprisonment on complaint for malicious prosecution; Nichols v. Randall, 136 Cal. 431, noted under Stout v. Coffin, 28 Cal. 65; Greer v. Heiser, 16 Colo. 313, when decree followed neither complaint nor proof; Harkins v. Cooley, 5 S. Dak. 230, on point that judgment will be reversed when findings are outside of issues.

#### 51 Cal. 153-155. DUBBERS v. GOUX.

**Substitution of Plaintiff** cannot be made on plaintiff's motion, on ground that one substituted is real party in interest, p. 154.

Cited to same effect in Skewes v. Dunn, 3 Utah, 191, 192, where motive of substitution was to allow testimony of wife, otherwise incompetent; Railway Co. v. State, 56 Ark. 169, denying right of amendment to substitute only party entitled to sue for plaintiff not so entitled; Flanders v. Lyon, 51 Neb. 104, denying right to substitute stranger as plaintiff in replevin suit, over defendant's objection; Hallett v. Larcom, 5 Idaho, 495, new plaintiff cannot be substituted in place of plaintiff who brings the action where party sought to be substituted was real party in interest at commencement of action.

#### 51 Cal. 158-164. HOLLINSHEAD v. SIMMS.

**Patentee of Public Land** may be decreed to hold it in trust for another when patent obtained by fraud and perjury, and the other has acted with diligence, p. 164.

Discussed and doubted in Chapman v. Quinn, 56 Cal. 295, discussing necessity that latter should have made proof of his right before land officers, and see on same point Burling v. Thompkins, 77 Cal. 200, 261, and Dreyfus v. Badger, 108 Cal. 63. Cited, also, in Orth v. Orth, 145 Ind. 201, 57 Am. St. Rep. 197, as to rule of constructive trust, holding none warranted by facts; South End etc. Co. v. Tinney, 22 Nev. 27, on point that facts constituting such trust may be set up as equitable defense to ejectment based on patent title; Adams v. Lambard, 80 Cal. 439, on point that trustee selling lands in violation of trust is not entitled to interest on his account; dissenting opinion in Thum v. Wolstenholme, 21 Utah, 488, applying rule to proceeds of life insurance policy.

**51 Cal. 165. DE MIRANDA v. TOOKEY.**

**Mexican Grant.**—Statute of Limitations does not begin to run till patent issued, p. 165.

Cited to same effect in Hill v. Den, 54 Cal. 23; Emeric v. Alvarado, 64 Cal. 609, where suit brought before patent issued and within proper period after final approval of survey; note to 76 Am. St. Rep. 483.

**51 Cal. 166-169. GOODWIN v. NICKERSON.**

**Note.**—Contemporaneous agreement in writing must be read and considered with note when suit brought thereon, p. 169.

Cited to same effect in Jacoway v. Insurance Company, 49 Ark. 324, on point that agreement made by agent in connection with note cannot be repudiated and note sued on; Brooke v. Struthers, 110 Mich. 570, on point that terms of note may be modified by those of accompanying mortgage.

**51 Cal. 169-171. KNIGHT v. HAIGHT. S. C. KNIGHT v. ROCHE,**  
56 Cal. 25.

**51 Cal. 172. EHRLICH v. EWALD.** S. C. 66 Cal. 98, when former decision held not law of case.

**51 Cal. 172-175. GATELEY v. IRVINE.**

**Street Assessment.**—Parol evidence is admissible to show that record of street superintendent was not made on day of its date, p. 175.

Cited in Merrill v. Sypert, 65 Ark. 53, applying rule to correction of certificate of acknowledgment. Overruled in Brady v. Bartlett, 56 Cal. 362 (and see 353, 361), construing Stats. 1871-72, p. 822, as to such record.

**51 Cal. 175-178. HILL v. HASKIN.**

Defect in complaint is cured by judgment unless specially demurred to, p. 177.

Cited in Cushing v. Pires, 124 Cal. 665, noted under Dikeman v. Norrie, 36 Cal. 94; Whitehurst v. Stuart, 129 Cal. 196, as to objection of uncertainty in complaint; and Estate of Behrens, 130 Cal. 418, as to like objection to opposition to probate; Hershfield v. Aiken, 3 Mont. 452, as to allegation of conclusion of law.

#### 51 Cal. 180-181. BONNER v. QUACKENBUSH.

**Bill of Exceptions.**—Insufficiency of Evidence cannot be examined in absence of specification of particulars, p. 180.

Cited to same effect in San Francisco v. Pacific Bank, 89 Cal. 24, holding general exception to decision insufficient.

#### 51 Cal. 181-184. KING v. CONNOLLY.

**Unlawful Detainer against Tenant at Will** for holding over cannot be maintained unless both thirty and three days' notice are given, p. 182.

Cited to same effect in Martin v. Splivalo, 56 Cal. 129, holding action not maintainable under facts. Cited, also, in Stedman v. McIntosh, 42 Am. Dec. 129, on tenancies at will.

#### 51 Cal. 184-186. CURRY v. ROUND TREE.

**Action against Partnership.**—Several judgment cannot be entered against partner on his default, when action brought against firm, p. 186.

Cited to same effect in Wienreich v. Johnston, 78 Cal. 256, on point that when firm sues on note to it one partner cannot recover personal judgment on ground that note made to him individually.

#### 51 Cal. 191-193. TYLER v. HEALEY.

**Recalling of Witness** is within discretion of court even if adverse party objects, p. 192.

Cited to same effect in Schaetzl v. Huron, 6 S. Dak. 140, as to withdrawal of complaint of intervention, on motion of intervention, and holding refusal thereof reversible error.

#### 51 Cal. 193-194. CARPENTER v. GANN.

**Tax Deed is Invalid** where not reciting compliance with statutory requirements, p. 194.

Cited to same effect in McGrath v. Wallace, 116 Cal. 553, under same act, holding sale void for like insufficiency of sheriff's return; Eastman v. Gurrey, 15 Utah, 417, where defective in many particulars; Mora v. Nunez, 7 Saw. 460, 10 Fed. Rep. 637, where sale void because made to highest bidder instead of least quantity, et cetera, under Stats. 1861, p. 471.

**51 Cal. 194-197. SEVERY v. CENTRAL PACIFIC RAILROAD COMPANY.**

**Nuisance—Obstruction of Street.**—Person who does not own to center of street cannot complain of its obstruction by railroad unless sustaining special damage therefrom, p. 197.

Cited to same effect in Crowley v. Davis, 63 Cal. 461, denying injunction against such obstruction where damages no different and no greater; Hogan v. Central Pac. R. R. Co., 71 Cal. 86, holding no special injury shown by facts; McCloskey v. Kreling, 76 Cal. 513, as to erection of adjacent wooden building in violation of fire ordinances, and ruling similarly as to special injury; Cabbell v. Williams, 127 Ala. 326, but holding special damage shown in action to enjoin obstructions of public road, under facts stated.

**Lots Bounded by Street** do not extend to its center where contrary intent appears from deeds, p. 197.

Cited to same effect in Macadamizing Co. v. Williams, 70 Cal. 540, holding such intent shown under facts.

**51 Cal. 198-202. SPECT v. GREGG.**

**Acknowledgment.**—Power of attorney from four grantors need be acknowledged by one only, p. 200.

Cited to same effect in Fresno etc. Co. v. Rowell, 80 Cal. 117, 13 Am. St. Rep. 115, as to contract acknowledged by one of the parties thereto.

**Ejectment.**—Source of title of grantor need not be proved by plaintiff where both parties claim under him as a common source, p. 200.

Cited to same effect in Frink v. Roe, 70 Cal. 306; Bowen v. Swander, 121 Ind. 168. Note citation: Rice v. Railway Co., 47 Am. St. Rep. 76, on general subject.

**Ejectment.**—Ouster of cotenant is proved by denial of plaintiff's title and right of entry, in answer, p. 201.

Cited to same effect in Green v. Tripp, 56 Cal. 212, as to plea of adverse possession and denial of plaintiff's title; Phelan v. Smith, 100 Cal. 167, holding ouster shown also by facts stated; Fenton v. Miller, 94 Mich. 211, as to plea of adverse possession by guardian of infant cotenants; Grant v. Paddock, 30 Oreg. 316, as to plea of adverse possession.

**51 Cal. 205-210. REYNOLDS v. HOSMER.**

**Water Right Connected with Ditch** passes to owner of upper half of ditch, p. 200.

Cited to same effect in Dixon v. Shermeier, 110 Cal. 586, discussing effect of decree of foreclosure of mining claims and water rights; Geddis v. Parrish, 1 Wash. 591, discussing conflicting claims to water right.

**51 Cal. 210-212. McDONALD v. MISSION VIEW HOMESTEAD ASSOCIATION.**

**Statute of Frauds.**—Complaint need not allege that contract within statute was in writing, p. 212.

Cited to same effect in Broder v. Conklin, 77 Cal. 336, as to instrument creating trust; Nunez v. Morgan, 77 Cal. 432, 433, as to contract to convey land alleged in cross-complaint, and holding further objection waived where evidence of parol contract not objected to; Yoakam v. Kingery, 126 Cal. 33, applying rule to contract as to community realty. Note citation: 86 Am. Dec. 685, on pleading of statute.

**Findings Contradicting Admissions** in pleadings are erroneous, p. 211.

Cited to same effect in Ortega v. Cordero, 88 Cal. 226, as to date and consideration of agreement alleged in complaint and not denied in answer.

**51 Cal. 212-215. WILKINS v. WILLSON.**

**Redemption.**—Judgment Debtor held to have waived right to, p. 215.

Cited in note to Flanders v. Aumack, 67 Am. St. Rep. 516, on general subject.

**51 Cal. 215-217. ESTATE OF GALVIN.**

**Statute of Limitations.**—Revival of debt barred by can be made only by debtor's written promise, p. 217.

Cited to same effect in Dorland v. Dorland, 66 Cal. 190, as to money loaned, and denying power of administrator to allow claim so barred.

**Statute of Limitations** begins to run from time of loan repayable on demand, p. 217.

Cited in Newhall v. Sherman, 124 Cal. 511, noted under Holmes v. West, 17 Cal. 623.

**51 Cal. 222. BREWSTER v. JOHNSON.**

**Appeal.**—Judgment will be **Affirmed** where no briefs filed nor oral argument made, p. 222.

Cited to same effect in Faris v. Lampson, 73 Cal. 191; Peek v. Peek, 75 Cal. 299, allowing, however, brief filed after proper time to be considered, but on merits only; Drexler v. Seal Rock etc. Co., 78 Cal. 625; Tucker v. Constable, 16 Oreg. 239; Killbonic v. Nuus, 24 Mont. 293, noted under Edmondson v. Alameda Co., 24 Cal. 350.

**51 Cal. 222, 223. PONCE v. McELVY.**

**Amendment.**—Complaint is not admissible in evidence against plaintiff when superseded by amended complaint, p. 223.

Cited to same effect in *Johnson v. Powers*, 65 Cal. 180, admitting, however, averments of original complaint when inconsistent with plaintiff's testimony; *Osment v. McElrath*, 68 Cal. 470, as to answer, but holding error not prejudicial under circumstances; *Pfister v. Wade*, 69 Cal. 138, holding original pleading admissible in support of independent fact connected with case; *Wheeler v. West*, 71 Cal. 128; *Duff v. Duff*, 71 Cal. 527, as to statements of property in successive petitions for letters of administration; *Stern v. Loewenthal*, 77 Cal. 344, and *Ralphs v. Hensler*, 114 Cal. 199, as to answer; *Corbett v. Clough*, 7 S. Dak. 179, admitting such original averments, however, when inserted under parties' personal direction or afterward approved; dissenting opinion in *Barrett v. Featherstone*, 89 Tex. 580, main opinion ruling contra.

**Appeal.—Injury is Presumed** from error unless contrary is shown, p. 223.

Cited to same effect in *Duff v. Duff*, 71 Cal. 527, and *Storch v. McCain*, 85 Cal. 308, as to admission of evidence; and on same point in *People v. Ah Own*, 85 Cal. 584.

**51 Cal. 223-227. WHEELOCK v. PACIFIC PNEUMATIC GAS COMPANY.**

**Counterclaim.—Breach of covenant held pleadable** as, p. 226.

Note citation: *Woodruff v. Garner*, 89 Am. Dec. 483, 485, on general subject.

**51 Cal. 227-229. SWALL v. CLARKE.**

**Note.—Bona Fide Purchaser of for value is unaffected by any payments of which he had no notice**, p. 229.

Note citations: *Sims v. Lyles*, 26 Am. Dec. 157, and *Bailey v. Smith*, 89 Am. Dec. 402, on general subject.

**51 Cal. 239-241. CURTIS v. SPRAGUE.**

**Note.—Demand and Notice are waived by guarantor by promise to pay after full knowledge of laches**, p. 240.

Cited to same effect in *Stanley v. McElrath*, 86 Cal. 457, as to waiver by indorser of notice of protest; *Greeley v. Whitehead*, 25 Fla. 531, 48 Am. St. Rep. 261, as to waiver by payment of interest after maturity of objection that note was not properly presented.

**Parties.—Indorsee for Collection can sue in own name without joining beneficial owner**, p. 241.

Cited to same effect in *Flanagan v. Brown*, 70 Cal. 259, holding, however, release by owner to payee a defense to action against latter by such indorsee.

**Note Indorsed in Blank is payable to bearer on delivery**, p. 241.

Cited to same effect in *Storch v. McCain*, 85 Cal. 306, holding mortgage secured by such note to pass with such indorsement and delivery; *Eames v. Crosier*, 101 Cal. 262, holding allegation of such indorsement sufficient to show indorsee's right to sue; and on same point in *Bank v. Sherer*, 108 Cal. 516, when note payable to maker's order and so indorsed and delivered to plaintiff after several transfers.

51 Cal. 242-243. **MASCAREL v. RAFFOUR.**

**Counsel Fees in Foreclosure cannot exceed amount stipulated in mortgage**, p. 242.

Cited to same effect in *Monroe v. Fohl*, 72 Cal. 570, on point that no counsel fee can be allowed unless provided for in mortgage or statute—and holding no greater sum allowable than that so stipulated; *Granger's etc. Assn. v. Clark*, 84 Cal. 207, holding fee reducible by appellate court when unreasonable.

**Foreclosure of Mortgage on one of two parcels included waives lien as to other**, p. 242.

Cited to same effect in *Bull v. Coe*, 77 Cal. 60, 11 Am. St. Rep. 239, holding, further, personal judgment for deficiency also waived; *Hall v. Arnott*, 80 Cal. 354, holding foreclosure of one mortgage a waiver of another mortgage on same property, although complaint included both, but did not show their connection; *Commercial Bank v. Kershner*, 120 Cal. 500, holding lien waived by proceedings in attachment suit against same property. Distinguished in *Barbieri v. Ramelli*, 84 Cal. 157, in denying right to action for debt, although mortgage valueless; *Campan v. Molle*, 124 Cal. 417, holding right to foreclose equitable mortgage waived by omission in action to foreclose another mortgage, and to same effect cf. *Stockton etc. Co. v. Harrold*, 127 Cal. 616 (but see *Gerig v. Loveland*, 130 Cal. 514, when relief ultimately allowed under two mortgages when such omission was caused by mistake); *Bank v. Reed*, 131 Cal. 603, on point that property is released from mortgage and sale thereunder, when not included in judgment foreclosure; *Newhall v. Bank*, 136 Cal. 536, as to mortgages of undivided interests; *Murphy v. Superior Court*, 138 Cal. 72, discussing venue in action for partition of land situate in several counties; *De Weese v. Smith*, 97 Fed. 314, applying principle to splitting of causes of action on contract; *Doly v. Eastman*, 28 Wash. 577, where holder of mortgage on two tracts foreclosed as against one only, it was waiver of right to enforce mortgage lien against other tract, though omission was unintentional.

**Mortgage.—Personal Judgment cannot be had against mortgagor until mortgage security exhausted**, p. 242.

Cited to same effect in *Lavenson v. Standard Soap Co.*, 80 Cal. 248, 13 Am. St. Rep. 149, discussing remedies of mortgagee for impairment of his security.

**51 Cal. 243-254. PEOPLE v. HIBERNIA SAVINGS AND LOAN SOCIETY.** 21 Am. Rep. 704.

**Taxation.—Solvent Debts or Credits** are not taxable, although secured by mortgage, p. 249.

Cited to same effect in *Bank v. Chalfant*, 51 Cal. 370 (rereported, p. 472) holding further as to right to recover back taxes paid thereon; *Germany etc. Co. v. San Francisco*, 128 Cal. 593, holding railroad bonds not assessable to owners when secured by mortgage of local realty; *Arapahoe Co. v. Printing Co.*, 15 Colo. App. 196, membership in or contract with *Associated Press* by publisher of newspaper is not property subject to taxation. Distinguished in *San Francisco v. Flood*, 64 Cal. 507, sustaining tax on mining stock, as "property"; *Mackay v. San Francisco*, 113 Cal. 399, as to railroad bonds owned by resident although secured by property outside of state. Denied in *Lamar v. Palmer*, 18 Fla. 149, 150, 153, taxing debts secured by mortgage, and holding main case opposed to earlier California cases; *State v. Rand*, 39 Minn. 508, ruling similarly as to debt due on land contract and holding case to be a "notable and much criticised exception" to rule of assessable credits; *New Orleans v. Mechanics etc. Co.*, 30 La. Ann. 877, 31 Am. Rep. 233, as to solvent credits, and see *State v. Bank*, 17 Nev. 154, 163, following last case. Note citations: *People v. Worthington*, 74 Am. Dec. 94, and *Vaughan v. Murfreesboro*, 60 Am. Rep. 416, on general subject.

**51 Cal. 255-258. McLEAN v. BLUE POINT GOLD MINING COMPANY.**

**Negligence of Fellow-servant** with person injured exonerates master where ordinary care used in his selection, p. 257.

Cited to same effect in *McDonald v. Hazeltine*, 53 Cal. 36; *Brown v. Central Pac. etc. Co.*, 68 Cal. 176; *Congrave v. Southern Pac. etc. Co.*, 88 Cal. 365, 368, 370; *Trewartha v. Buchanan etc. Co.*, 96 Cal. 499; *Daves v. Southern Pac. Co.*, 98 Cal. 21, 22; 35 Am. St. Rep. 135, 136; *Stevens v. Railroad Co.*, 100 Cal. 566; *Buckley v. Gould etc. Co.*, 8 Saw. 399; 14 Fed. Rep. 837; and in note to *Murray v. Railroad Co.*, 36 Am. Dec. 287—all cited with facts, under *Collier v. Steinhart*, 51 Cal. 116; Cited in *Donovan v. Ferris*, 128 Cal. 54, 79 Am. St. Rep. 29, applying rule to foreman of quarry and those working under him; *Stephens v. Doe*, 73 Cal. 28, as to miner and mine foreman (but see *Brown v. Sennett*, 68 Cal. 228, holding stevedore's foreman not a fellow servant under facts); *Fagundes v. Central Pac. etc. Co.*, 79 Cal. 99, as to laborer clearing snow from track and track walker and conductor; *Livingston v. Kodiak etc. Co.*, 103 Cal. 264, as to steward's assistant and mate of vessel. Note citations: *King v. Railway Co.*, 11 Biss. 369, on general subject.

**51 Cal. 258-260. MELTON v. LAMBARD.**

**Statute of Frauds.**—Sale of mining claim is invalid unless in writing, p. 260.

Cited to same effect in Garthe v. Hart, 73 Cal. 544, discussing oral agreement as to adjustment of boundaries of mining claims. Note citation: McClintock v. Bryden, 63 Am. Dec. 107, on general subject.

Mining Claim is real estate under statute of frauds, p. 260.

Cited to same effect in Moore v. Hamerstag, 109 Cal. 123, as to agreement to hold claim in trust for another; Williams v. Gibson, 84 Ala. 231, 5 Am. St. Rep. 371, on point that minerals "in place" are part of freehold and holding further as to grant thereof; Hirbourn v. Reeding, 3 Mont. 19, sustaining, however, verbal agreement of partnership in mining properties.

**51 Cal. 260-262. GIACCOMINI v. BULKELEY.**

**Tort.**—Damages cannot be considered that are remote and purely speculative, p. 262.

Cited to same effect in Wallace v. Ah Sam, 71 Cal. 200, 60 Am. Rep. 536, as to loss of prospective profits, on action for breach of contract; Crow v. San Joaquin etc. Co., 130 Cal. 314, noted under Muldrow v. Norris, 2 Cal. 74.

**51 Cal. 262-264. DOWD v. CLARKE.**

**Findings are Necessary unless waived, p. 263.**

Cited to same effect in Mulcahy v. Glazier, 51 Cal. 628, holding waiver presumed from absence, unless objection made based on failure to find; Savings etc. Society v. Thorne, 67 Cal. 54, holding waiver not shown by moving for new trial, and statutory methods of waiver exclusive; Garr v. Spaulding, 2 N. Dak. 417, holding waiver presumed when nonwaiver not affirmatively shown by record; Drainage District v. Crow, 20 Oreg. 538, reversing judgment for want of findings on material issues.

**51 Cal. 264-265. BASS v. BERRY.**

**Statute of Limitations.**—Absence of defendant from state must be alleged in complaint otherwise showing claim barred, p. 265.

Cited to same effect in Pleasant v. Samuels, 114 Cal. 39, discussing respective use of demurrer and answer to raise plea of statute; Knox v. Gerhauser, 3 Mont. 271, sustaining refusal to strike out such allegations; Lake v. Steinbach, 5 Wash. 665, on point that defendant's nonresidence when urged as bar must be expressly pleaded by him.

**51 Cal. 266-269. SANBORN v. BELDEN.**

**Eminent Domain—Compensation.**—Giving a bond by railroad company on preliminary order, is insufficient, p. 269.

Cited to same effect in Vilhac v. Stockton etc. Co., 53 Cal. 212, holding such bond invalid as statutory undertaking and section 1254 of the Code of Civil Procedure unconstitutional; and on same point in Coburn v. Townsend, 103 Cal. 238, holding further sureties on such bonds not liable when principal has paid all damages covered thereby.

**Eminent Domain.—Preliminary Order is void delivering possession to petitioner before proper provision for compensation made,** p. 269.

Cited to same effect in Coburn v. Goodall, 72 Cal. 505; 1 Am. St. Rep. 79; Callahan v. Dunn, 78 Cal. 370, on point that title does not pass on preliminary order unless followed by payment and final decree; Martin v. Tyler, 4 N. Dak. 294, where property taken by county for right of way, under drainage statute. Note citation; Bloodgood v. Railroad Co., 31 Am. Dec. 375, on general subject.

**Eminent Domain.—Plaintiff cannot be let into possession until compensation is paid or secured,** p. 269.

Cited in Steinhart v. Superior Court, 137 Cal. 578, noted under Davis v. Railroad Co., 47 Cal. 517.

**51 Cal. 269-273. CONSOLIDATED CHANNEL COMPANY v. CENTRAL PACIFIC RAILROAD COMPANY.**

**Eminent Domain.—Taking is Unlawful when for purely private use,** p. 271.

Cited to same effect in Dower v. Richards, 73 Cal. 480, as to constructing tunnel for mining purposes, and Amador etc. Co. v. Dewitt, 73 Cal. 485, as to right of way through tunnel for same purposes; but see Overman etc. Co. v. Corcoran, 15 Nev. 152, sustaining similar taking under local act; Smeaton v. Martin, 57 Wis. 369, sustaining, however, ditch to drain public highway. Note citation: Varick v. Smith, 28 Am. Dec. 423, on general subject, and Beekman v. Railroad Co., as cited under next syllabus.

**Eminent Domain—“Public Use.”—Legislative declaration that use is public is ineffective when contrary clearly appears from facts,** p. 272.

Cited to same effect in Lux v. Haggin, 69 Cal. 304, sustaining, however, supply of water to farming neighborhoods for irrigation; In re Madera etc. District, 92 Cal. 309, 27 Am. St. Rep. 113, holding, however, legislative will to prevail over doubts of court in determining whether purpose of act is public or private; Santa Ana v. Harlin, 99 Cal. 542, ruling similarly as to opening of street by city under act March 6, 1889; County v. Coburn, 130 Cal. 634, noted under Stock-

ton etc. Co., 41 Cal. 175; McQuillen v. Hatton, 42 Ohio St. 204, holding question one for judicial determination, and construction of ditch not authorized under local statutes; and on same point in Vamer v. Martin, 21 W. Va. 551, discussing right to establish public and private roads. Note citation: Beekman v. Railroad Co., 22 Am. Dec. 691, on general subject, and 705, on condemnation for mining purposes.

51 Cal. 273-275. **WYMAN v. LEMON.**

**Ballot Will not be Rejected as having distinguishing mark, where undesignedly discolored from use of ink,** p. 275.

Cited to same effect in Rutledge v. Crawford, 91 Cal. 530, 25 Am. St. Rep. 214, holding rejection improper where accidental ink blur appeared on back of ballot; State v. Saxon, 30 Fla. 676, 32 Am. St. Rep. 550, holding party designations not to be distinguishing "designations" sufficient to reject vote.

51 Cal. 275-277. **McKEE v. MONTEREY COUNTY.**

**Estoppel.—Public Officer receiving money as belonging to county cannot afterward question its right thereto,** p. 277.

Cited to same effect in People v. Bunker, 70 Cal. 215, on point that officer collecting fees under statute cannot retain them on ground that statute is unconstitutional; County v. Fay, 131 Cal. 551, denying right of officer to assert that fees held by him were illegally collected; State v. Scanlan, 2 Ind. App. 326, as to unauthorized receipt by sheriff of money on deposit in lieu of bail. Distinguished in San Bernardino v. Davidson, 112 Cal. 505, where moneys were not received as official agent of county.

51 Cal. 277-278. **LADD v. TULLY.**

**Finding is Insufficient "that all material facts set forth in complaint are true,"** p. 278.

Cited to same effect in Hardenberg v. Hardenberg, 54 Cal. 592, Cassidy v. Cassidy, 63 Cal. 352, Warren v. Robinson, 71 Cal. 381, and Abrahamson v. Lamberson, 68 Minn. 456, as to similar finding; Harlan v. Ely, 55 Cal. 344, as to findings that all allegations of answer "are untrue, except only in so far as the same accord with the foregoing facts"; Krug v. Lux etc. Co., 129 Cal. 323, 324, as to finding that allegations of answer are untrue so far as inconsistent with allegations of complaint; Musselman v. Musselman, 140 Cal. 107, as to recital that all the material allegations are sustained. Distinguished in McCormack v. Phillips, 4 Dak. 534, holding that special issues need not be submitted to jury where general verdict rendered covers all issues.

**51 Cal. 278-279. PEOPLE v. KINSEY.**

**Former Acquittal.**—Verdict must be rendered on before verdict on plea of not guilty, p. 279.

Cited to same effect in People v. Helbing, 59 Cal. 567, as to similar plea; People v. Fuqua, 61 Cal. 377, holding, further, such plea not presumed withdrawn or waived by absence of verdict thereon; and, on same point, in People v. Tucker, 115 Cal. 338; State v. O'Brien, 19 Mont. 8, on point that such pleas must be passed on by jury; Territory v. Barrett, 8 N. Mex. 73, applying rule to pleas in abatement based on disqualifications of grand jurors; State v. Childers, 32 Or. 128, but holding objection unavailable when first urged on appeal from order denying new trial; and cf. People v. Kerm, 8 Utah, 271, holding plea not available where jury was discharged, after void or defective verdict, with defendant's consent.

**51 Cal. 280-281. EX PARTE AH PEEN.**

Trial by Jury cannot be demanded in proceedings to commit minor to industrial school for information, p. 280.

Cited to same effect in Crocker v. State, 60 Wis. 556, as to inquisition of insanity. Note citation: Flint River etc. Co. v. Roberts, 48 Am. Dec. 191, 193, on general subject.

**51 Cal. 285-288. EX PARTE ROSENBLAT.**

State Extradition Laws are based solely on principle of comity, p. 287.

Cited to same effect in Kurtz v. State, 22 Fla. 42, 1 Am. St. Rep. 176, holding local act constitutional and construing its provisions. Note citations: Work v. Corrington, 32 Am. Rep. 358, and Simmons v. Vandyke, 46 Am. St. Rep. 417, on general subject.

Extradition cannot be defeated by attempted arrest on civil process pending extradition proceedings, p. 287.

Cited to same effect in Harriett, Petitioner, 18 R. I. 13, 15, surrendering prisoner under executive warrant on similar facts. Note citations: 57 Am. Dec. 399, and 68 Am. St. Rep. 131.

**51 Cal. 295-298. GONZALES v. WASSON.**

**Statutory Construction.**—Code selections, when conflicting, should be so construed that both may have effect, p. 297.

Cited to same effect in Camp v. Grider, 62 Cal. 26, as to sections of same code.

**Lawful Fences.**—Statutes included under section 19 of the Political Code are not subject to provisions of section 841 of the Civil Code, p. 297.

Cited to same effect in *Meade v. Watson*, 67 Cal. 593, citing case, also at page 594 as to effect of agreement between adjoining owners to inclose all lands within one fence.

**Partition Fences—Cost.**—Liability for under statutes stated, p. 298. Note citation: *Myers v. Dodd*, 68 Am. Dec. 633, 634.

51 Cal. 298-301. **COOPER v. SHEPARDSON.**

**Miscellaneous.**—Dissenting opinion in *State v. Thum*, 6 Idaho, 338, on point that court on appeal may remand for new trial without rendering final judgment.

51 Cal. 301-303. **GOLDSTEIN v. KELLY.**

**Execution Sale.**—Injunction of as casting cloud on title is discretionary, p. 363.

Cited to same effect in *Crawford v. Lamar*, 9 Colo. App. 86, holding injunction properly denied under facts, where plaintiff's title doubtful; *Washington etc. Co. v. Railway etc. Co.*, 2 Idaho, 407, on point that preliminary injunction to prevent construction of railroad is discretionary, and refusal thereof justified under facts.

51 Cal. 303-307. **BARNES v. JONES.**

**Statutory Construction.**—Headnotes of code chapters may be referred to in interpreting sections where language doubtful, p. 306.

Cited to same effect in *Ex parte Koser*, 60 Cal. 192, construing Sunday laws, holding, however, headings not conclusive as to legislative power to enact the sections (but see dissenting opinion, p. 205); *Sharon v. Sharon*, 75 Cal. 16, holding such headnotes to control title to entire act, and construing Civil Code sections as to marriage; *Keyes v. Cyrus*, 100 Cal. 325, 38 Am. St. Rep. 299, construing homestead sections of Code of Civil Procedure; *Mackey v. Miller*, 126 Fed. 162, using deadly weapon in resisting Indian agent who was making search for spirituous liquors did not fall within Revised Statutes, section 5447, relating to assaults on customs officers making searches.

**Statutory Construction.**—Title of act may be referred to in interpreting it where language doubtful, p. 306.

Cited to same effect in *Ex parte Kohler*, 74 Cal. 45, discussing Pure Wine Act (Stats. 1887, p. 46).

**Tree Cutting.**—Treble damages cannot be allowed under section 251 of the Practice Act, when done by mistake as to boundaries of land, p. 306.

Cited to same effect in *Stewart v. Sefton*, 108 Cal. 206, as to similar facts, under section 733 of the Code of Civil Procedure, and holding further as to award of nominal damages therein; *Isom v. Rex*, etc.

Co., 140 Cal. 680, applying rule to action under section 732, Code of Civil Procedure, when act not wilfully done; *Gardner v. Lovegren*, 27 Wash. 363, upholding instruction as to recovery of treble damages for wilful and unlawful cutting of plaintiff's timber, under Ballinger's Code, section 5856. Distinguished in *Lane v. Buhl*, 103 Mich. 40, awarding treble damages under local forcible entry act, irrespective of defendant's good faith in retaining possession. Note citations: 34 Am. Dec. 176, and 1 Am. St. Rep. 496.

**51 Cal. 307-309. FERRAN v. BOARD OF SUPERVISORS.**

**Swamp Land District.**—Petition should contain specific description of property to be included, p. 309.

Cited in *People v. Reclamation Dist.*, 130 Cal. 611, holding description insufficient.

**51 Cal. 309-312. ROGERS v. GILMORE.**

**Attachment of Personality.**—Manual custody need not be taken of threshing outfit, p. 312.

Cited in *People v. Sylva*, 143 Cal. 63, noted under *Dutertre v. Driard*, 7 Cal. 549. Note citation: 21 Am. Dec. 679, 680.

**51 Cal. 313-315. FAY v. COBB.**

**Sham Answer.**—General denial cannot be stricken out as sham in advance of trial on plaintiff's motion and affidavit, p. 315.

Cited to same effect in *Greenbaum v. Turrill*, 57 Cal. 287, as to answer denying allegations specifically; *Cupples etc. Co. v. Jensen*, 4 Dak. Ter. 151, as to verified general denial of material allegations; *In re Bartholomew*, 41 Kan. 276, further denying right to compel defendant to give affidavit or deposition to be used on such motion; *King v. Waite*, 10 S. Dak. 5, although such answer was contradicted by subsequent affidavit filed by defendant; *Green v. Hughitt etc. Township*, 5 S. Dak. 456, where answer contained general denial and inconsistent special defenses; *Loranger v. Mining Company*, 6 S. Dak. 841, as to general denial, where motion based on unsupported affidavit of plaintiff that answer was false. Note citation: 72 Am. Dec. 523.

**51 Cal. 319-322. PEOPLE v. FISHER.**

**Arson**, at common law, regarded the security of the habitation rather than property destroyed, p. 320.

Cited to same effect in *People v. De Winton*, 113 Cal. 405, 408, 54 Am. St. Rep. 358, 361, holding statute not to include burning of one's own house even with intent to destroy those of others. Note citations: 81 Am. Dec. 65, and 71 Am. St. Rep. 267.

Notes Cal. Rep.—163.

**Arson—Ownership.**—Building may be described in indictment as property of owner, even if occupied by tenant, p. 320.

Cited to same effect in *Avant v. State*, 71 Miss. 81, holding, further, as to variance in this particular. Note citation: *Mary v. State*, 81 Am. Dec. 72.

**Criminal Law.**—Venue of crime must be proved as alleged, p. 320.

Cited to same effect in *People v. Tarpey*, 59 Cal. 371, robbery, where no proof made.

**Motion for New Trial** in criminal case, for insufficiency of evidence can be made and heard without statement, p. 321.

Cited to same effect in *People v. Hewill*, 56 Cal. 118, holding settlement proper after decision of motion, and, further, as to contents of such statement; concurring opinion in *Sansome v. Meyers*, 80 Cal. 488, discussing issuance of mandamus to compel settlement of bill.

**Criminal Bill of Exceptions.**—Contents of stated, p. 321.

Cited in *Walker v. Superior Court*, 135 Cal. 375, on point that bill need not embody entire evidence; *People v. Moran*, 144 Cal. 61, but holding bill of exceptions sufficient; *People v. Dye*, 62 Cal. 524, holding objection of insufficiency of evidence not maintainable under bill as settled; concurring opinion in *People v. Johnson*, 91 Cal. 270, on point that specification of particulars of insufficiency of evidence need not be inserted; *People v. Buckley*, 116 Cal. 148, on point that absence of testimony from bill on any point will raise presumption that none was given, and affirming case on this point; *Territory v. Stone*, 2 Dak. Ter. 175, holding substance of evidence sufficient. Distinguished in *People v. Coulter*, 145 Cal. 71, but approved in dissenting opinion, pp. 75, 77, 78, 79, holding on appeal from conviction for burglary in second degree where only question is as to sufficiency of evidence, and bill of exceptions and judgment roll show affirmatively that bill does not contain all evidence where bill purports to give only evidence relating to time of offense, other questions not reviewable.

**51 Cal. 328-341. STOCKTON AND VISALIA RAILROAD COMPANY v. STOCKTON.**

**Railway Aid Bonds—Conditions.**—Subsidy in consideration of construction of certain miles of road is not forfeited because of its purchase of already constructed road of another company on same route, p. 334.

Cited in *Los Angeles etc. Co. v. Wilshire*, 135 Cal. 659, discussing contract to construct street railway; *Talcott v. Pine Grove*, 1 Flipp. 136, Fed. Cas. No. 13,735, discussing validity of such bonds, noted under *Pattison v. Board*, 13 Cal. 175; *Indianapolis etc. Co. v. Holmes*, 101 Ind. 352, holding, however, condition of subsidy not fulfilled by facts stated; *Chicago etc. Co., v. Makepeace*, 44 Kan. 679, where road used track of another for last one hundred feet of its route; and, on same point, Wil-

liams v. Railway Co., 82 Tex. 561, on like facts, where railway bonus notes given and Missouri etc. Co. v. Tygard, 84 Mo. 288, 54 Am. Rep. 100, as to use of one mile of another road for short period; Lewis v. Land Company, 124 Mo. 686, holding maker of note in aid of location of works not entitled rescission thereof for noncompliance in minor details; State v. Hannibal etc. Co., 37 Mo. App. 506, on point that toll-road corporation is not amenable to quo warranto by reason of purchase of another toll-road already constructed. Distinguished in Lamb v. Anderson, 54 Iowa, 194, under local statutes holding conditions not complied with. Note citations: De Voss v. Richmond, 98 Am. Dec. 675, on general subject.

**Mandamus Will Lie to compel performance of official duty when refusal is arbitrary or capricious, and facts justify performance, p. 339.**

Cited in San Luis Obispo County v. Gage, 139 Cal. 402, on point that writ will issue only in case of plain abuse of discretion; dissenting opinion in Board of Commissioners v. Mayhew, 5 Idaho, 583, majority holding mandamus does not lie to reverse order of inferior tribunal continuing hearing of proceeding before it when tribunal is exercising judicial discretion vested in it by law; dissenting opinion in Pyke v. Steunenberg, 5 Idaho, 626, majority holding mandamus does not lie to direct state board of examiners to audit and allow certain claims presented to board; awarding writ, in Wood v. Strother, 76 Cal. 549, 550, 9 Am. St. Rep. 253, 254 (cited in State v. Rickards, 16 Mont. 158, 50 Am. St. Rep. 485), as to countersigning street assessment warrant, and holding generally as to control of acts involving discretion; Hunt v. Broderick, 104 Cal. 315, as to auditing valid claim properly allowed by supervisors; State v. Barnes, 25 Fla. 304, 23 Am. St. Rep. 521, denying writ, however, where reason for refusal within discretion of officer, e. g., determination that bond was invalid; Shotwell v. Covington, 69 Miss. 737, holding, however, approval of bonds judicial and not controllable by mandamus, even though refusal arbitrary. Note citation: Wedden v. Town Council, 98 Am. Dec. 377, on general subject.

**General Citation.—St. Louis v. Coffee, 76 Mo. App. 328.**

**51 Cal. 345-351. NEWHALL v. CENTRAL PACIFIC RAILROAD COMPANY. S. C. 21 Am. Rep. 713.**

**Bill of Lading** transfers title to goods to assignee in good faith even if assignment made after notice to carrier of stoppage in transitu, p. 350.

Cited to same effect in Dodge v. Meyer, 61 Cal. 420, discussing, further, rights of indorsee who has purchased draft drawn on shipment; Bank v. Railway Co., 69 Mo. App. 254, holding right of stoppage of transitu lost under facts. Note citations: Chandler v. Sprague, 38 Am. Dec. 422, on general subject.

**Vendor's Lien.—Stoppage in transitu can only be asserted while goods**

are in transit and where vendee becomes insolvent during that period, p. 350.

Cited to same effect in Conrad v. Fisher, 37 Mo. App. 362, 384, discussing, generally, nature of such lien of right of stoppage and holding lien not waived by facts: and see Bank v. Railway Co., 69 Mo. App. 254, cited supra.

#### 51 Cal. 352-360. BRENTHAM v. DAVIDSON.

**Guardian.**—Legislature may authorize by special act to sell ward's estate and reinvest its proceeds, p. 357.

Distinguished in Lincoln v. Alexander, 52 Cal. 485, 28 Am. Rep. 640, holding void an act empowering sale by mother of ward then under another's guardianship; dissenting opinion in Rider v. Regan, 114 Cal. 679, main opinion sustaining general act allowing sale of homestead by other spouse on insanity of the other; Davidson v. Koehler, 76 Ind. 412, sustaining and construing such special act. Note citations: Bank v. Cooper, 24 Am. Dec. 542, and Davison v. Johonnot, 41 Am. Dec. 455, on special statutes.

#### 51 Cal. 360-362. PEOPLE v. McCAIN.

**Street Assessments.**—Sunday is not included, if last of five days for publishing resolution of intention, p. 361.

Cited to same effect in Alameda etc. Co. v. Huff, 57 Cal. 332, holding award on following Monday premature.

#### 51 Cal. 362-364. ALLEN v. REED.

**Division Fence.**—Adverse possession by building such fence on line not true boundary held not shown by facts, p. 363.

Cited in McDonald v. Drew, 97 Cal. 269, ruling similarly, on point that taxes not paid on portion wrongfully inclosed by fence; Brummell v. Harris, 162 Mo. 405, discussing phases of estoppel by acquiescence in boundary line, although untrue according to survey.

#### 51 Cal. 365-367. FOULKE v. SAN DIEGO AND GILA SOUTHERN PACIFIC RAILROAD COMPANY.

**Contracts.**—Railroad corporations are liable upon implied contract, although not in writing as required by act of 1861, when not executory, p. 367.

Cited to same effect in Main v. Casserly, 67 Cal. 129, holding company liable on note whose consideration was retained, although executed pursuant to contract ultra vires; Gribble v. Columbus etc. Co., 100 Cal. 72, ruling similarly and holding corporation estopped in pais from denying president's power to mortgage in form adopted; Storz v. Finkelstein, 46 Neb. 584, denying right of action, however, on sale pro-

hibited by law; Manchester etc. R. R. v. Concord R. R., 68 N. H. 132, 49 Am. St. Rep. 390, as to executed ultra vires contract of consolidation made to prevent competition but not prohibited by law; Texas etc Co. v. Gentry, 69 Tex. 632, as to executed ultra vires railroad contract where within general scope of corporate authority, but method of execution defective. Note citations: Pixley v. Railroad Co., 91 Am. Dec. 637, on general subject.

51 Cal. 369-370. **BANK OF MENDOCINO v. CHALFANT.** Rereported, 51 Cal. 470-472.

**Taxation.**—Solvent credits are not taxable, p. 370.

Cited in Germania etc. Co. v. San Francisco, 128 Cal. 593, noted under People v. Bank, 51 Cal. 243. Note citation: 74 Am. Dec. 94.

**Tax Collector** should receive legal portion of tax, where separable, if tendered, p. 370.

Cited to same effect in Mackay v. San Francisco, 113 Cal. 402, discussing right to recover back penalty where illegality consisted of illegal raise of property by state board.

51 Cal. 371-372. **PEOPLE v. ARDAGA.**

**Rape.**—Conviction will be set aside when had on woman's uncorroborated and improbable testimony, p. 372.

Cited to same effect in People v. Castro, 60 Cal. 118, and Gazley v. State, 17 Tex. App. 277, holding evidence insufficient; Lind v. Closs, 88 Cal. 13, applying rule to civil action by husband; dissenting opinion in State v. Depoister, 21 Nev. 119, main opinion holding evidence sufficient. Note citation: 80 Am. Dec. 369, on general subject.

51 Cal. 372-374. **PEOPLE v. AH SING.**

**Reasonable Doubt.**—Instruction held erroneous, p. 373.

Cited in People v. Bemmerly, 87 Cal. 121, ruling similarly as to like instruction; People v. Paulsell, 115 Cal. 12, as to instruction that such doubt must be based on common sense; Lovett v. State, 30 Fla. 157, holding similar instruction erroneous as holding mere preponderance sufficient; and see ruling similarly in Jenkins v. State, 35 Fla. 831; 48 Am. St. Rep. 293; Patzwald v. United States, 7 Okla. 235.

51 Cal. 375-376. **EX PARTE GRANICE.**

**Habeas Corpus** cannot be used to review correctness or regularity of order of commitment, p. 376.

Cited to same effect in Ex parte Prince, 27 Fla. 202, 26 Am. St. Rep. 71, as to sufficiency of indictment; In re Thompson, 9 Mont. 339, as to sufficiency of evidence to support verdict; Ex parte Tice, 32 Or. 184,

noted under *Ex parte Gibson*, 31 Cal. 619; *In re Mahany*, 29 Colo. 446, where defendant tried for murder was convicted of manslaughter and over defendant's objection court set verdict aside and ordered new trial, and defendant moved for discharge for jeopardy, habeas corpus does not lie; *Parker v. State*, 5 Tex. App. 582, as to sufficiency of indictment or constitutionality of law on which indictment based. Note citations: *Commonwealth v. Lecky*, 26 Am. Dec. 49, on general subject.

**51 Cal. 376-379. PEOPLE v. MURPHY.**

**Embezzlement—Venue.**—Prosecution under section 507 of the Penal Code should be had in county of conversion unless property received with intent to convert, p. 378.

Cited in *People v. Gordon*, 133 Cal. 331, 85 Am. St. Rep. 177, sustaining venue of county of conversion, and in which intent to embezzle was conceived; dissenting opinion in *People v. Mitchell*, 168 N. Y. 608, discussing venue as to bailee who appropriates property in county to which he has removed it; denied in *State v. Hengen*, 106 Iowa, 715, holding venue to be in county wherein property was originally. Distinguished in *State v. Hoshor*, 26 Wash. 653, where defendant was given check in one county which he deposited in such county and then went into another county, and drew check on bank in first county which was cashed in latter county, venue of embezzlement is in former county. Distinguished in *People v. Scott*, 74 Cal. 96, holding evidence inadmissible of burglary in San Diego under indictment in San Bernardino charging its commission in latter county, although proceeds of crime brought there. Note citations: *Calkins v. State*, 98 Am. Dec. 161, on general subject; page 151, on essentials of proof.

**51 Cal. 379-381. KINSEY v. GREEN.**

**Additional Findings.**—Cause was remanded on reversal with directions to find on omitted issue, p. 381.

Cited in *San Diego etc. Co. v. Neale*, 78 Cal. 65, on point that party may move for new trial, as to part of issues; *Duff v. Duff*, 101 Cal. 4, on point that court may grant new trial as to part of issues, although asked for generally.

**51 Cal. 381-387. WATERLOO TURNPIKE ROAD COMPANY v. COLE.**

**Corporations.**—Special acts cannot authorize supervisors to grant particular corporation franchises not common to all similar corporations under general law, p. 384.

Cited to same effect in concurring opinion in *Omnibus etc. Co. v. Baldwin*, 57 Cal. 170, as to act authorizing corporation to lay car tracks in streets of city in opposition to general law; *People v. Central Pacific R. R. Co.*, 83 Cal. 413, as to act prescribing special method of taxation

of property of railroad corporations; concurring opinion in *Home v. Reis*, 95 Cal. 150, as to act that part of fines collected in city police courts be paid to designated private home for inebriates; *Los Angeles etc. Co. v. Los Angeles*, 88 Fed. 742, noted under *San Francisco v. S. V. W. W.*, 48 Cal. 493; *Los Angeles v. Los Angeles City Water Co.*, 177 U. S. 574.

**Corporation.**—Validity of franchise is attackable collaterally where want of jurisdiction therefor apparent on face of proceedings, p. 386.

Cited to same effect in *Deer Lodge v. At.*, 3 Mont. 172, as to attack by sureties on bail bond ordered without jurisdiction.

#### 51 Cal. 387-388. **BANK v. NORTHAM.**

Interest is not allowable on items of running account where no settlement had, p. 388.

Cited to same effect in *Cox v. McLaughlin*, 76 Cal. 70, 9 Am. St. Rep. 171, as to services when reasonable value sued for; *Heald v. Hendey*, 89 Cal. 635, as to materials furnished, et cetera, modifying judgment accordingly on appeal.

#### 51 Cal. 388-404. **RUTLEDGE v. MURPHY.**

Decision of Land Department construing act of July 22, 1866, held to be correct, pp. 391, 396.

Cited in *Hosmer v. Wallace*, 51 Cal. 368, sustaining same decision; concurring opinion in *Lynch v. Brigham*, 51 Cal. 494, from dissenting opinion in main case, p. 398, discussing conclusiveness of such decision; and on same point (from p. 391, where question not decided), dissenting opinion in *Chapman v. Quinn*, 56 Cal. 287, discussing conflict of authorities thereon; and *Hays v. Steiger*, 76 Cal. 560, as holding such decisions conclusive on courts as to questions of fact involved except when fraud practiced, and on last point in *Buckley v. Howe*, 86 Cal. 600, and *Wormouth v. Gardner*, 112 Cal. 510, discussing right to impose trust on patentee in such case, in favor of one rightfully entitled thereto. Note citations: 20 Am. Dec. 273, and 75 Am. St. Rep. 882.

#### 51 Cal. 404-406. **BARBER v. BURROWS.** Rercported 51 Cal. 473.

**Contract.**—Execution is not had until signed by all parties by whom it was intended it should be signed, p. 406.

Cited to same effect in *Jackson v. Torrence*, 83 Cal. 538, denying conveyance of undivided interest of one who with another had agreed to convey whole property, latter not having signed. Distinguished in *Gregory v. Railroad Co.*, 10 Neb. 255, holding signature of passenger to railroad ticket not prerequisite to its validity, where signature not requested.

Sureties are not released by unexecuted agreement of extension of time of performance, p. 406.

Cited in *Sawyers v. Campbell*, 107 Iowa, holding surety not released by alteration not affecting his liability.

51 Cal. 406-412. **DEAN v. DAVIS.**

**Corporations.—Reclamation District is a public corporation**, p. 409.

Cited to same effect in *People v. Reclamation District*, 53 Cal. 348, holding, further, as to proof of its existence and ground for forfeiture; *People v. Williams*, 58 Cal. 647, sustaining existence of such district under facts; *Estate of Bulmer*, 59 Cal. 131, holding school district a corporation and entitled to bequest under will; *People v. La Rue*, 67 Cal. 528, holding, further, as to validity of consolidation of two districts, although merely de facto; *Irrigation District v. Williams*, 76 Cal. 368, as to irrigation districts under Stats. 1887, p. 29; and on same point *Irrigation District v. De Lappe*, 79 Cal. 353, holding, further, such district properly organized; *People v. Reclamation District*, 117 Cal. 119, holding, however, districts incorporated under act of 1861 merely quasi corporations; *Stelmer v. La Plata Co.*, 5 Colo. App. 387, holding county a quasi, not municipal, corporation; *Board v. Collins*, 46 Neb. 423, as to irrigation districts, and holding their officers to be public officers; *Blair v. West Point Precinct*, 2 McCrary, 462, 5 Fed. Rep. 267, holding, however, county precinct not a corporation, within federal jurisdiction; *Vincent v. County*, 30 Fed. Rep. 750, discussing but not deciding whether county in Nevada is a corporation. Note citations: *Todd v. Birdsall*, 13 Am. Dec. 524, on quasi corporations; *Mayor v. State*, 74 Am. Dec. 594, on delegation of power to tax.

**Reclamation Districts.—Legislature has power to form**, p. 410.

Cited to same effect in *Lamb v. District*, 73 Cal. 133, 2 Am. St. Rep. 782, further holding district not liable for indirect or consequential damages caused by building of levee; *People v. Reclamation Dist.*, 130 Cal. 613, but holding de facto existence of former reclamation district attackable, when it has had no de jure existence; and on same point *Sels v. Greene*, 81 Fed. Rep. 555; *In re Madera etc. District*, 92 Cal. 311, 323, 27 Am. St. Rep. 115, 125, as to irrigation districts; *Wilson v. Board*, 133 Ill. 467, as to sanitary districts; *Reclamation District v. Hagar*, 6 Saw. 572, 4 Fed. Rep. 371, further holding lands derived from Mexican grant includable therein.

**Reclamation District.—Validity of existence cannot be collaterally attacked for fraud where petition regular on face**, p. 411.

Cited to same effect in *Hoke v. Perdue*, 62 Cal. 546, as to objection that petition not sufficiently signed, and holding, further, such district a public corporation; *Quint v. Hoffman*, 103 Cal. 507 (cited in *Miller v. Perris etc. District*, 85 Fed. Rep. 699, and see 698), as to objection that proceedings as to irrigation district were beyond jurisdiction of super-

visors; but see *In re Madera etc. District*, 92 Cal. 334, 27 Am. St. Rep. 133, allowing similar inquiry in case of direct attack, and *Brandenstein v. Hoke*, 101 Cal. 134, allowing constitutionality of act to be collateral-ly reviewed; *Hamilton v. San Diego*, 108 Cal. 284, as to formation of school district, holding, further, as to respective rights of claimants to taxes collected by it; *Morrison v. Morey*, 146 Mo. 561; applying rule to levee districts under local statutes; and cf. *Board v. Crittenden*, 94 Fed. 616, as to similar districts under Arkansas statutes. Note citations: *Jones v. Camden*, 51 Am. St. Rep. 842, on municipal bonds.

**Injunction will not Lie to restrain collection of invalid reclamation district assessment**, p. 412.

Cited to same effect in concurring opinion in *Lent v. Tillson*, 72 Cal. 434, as to street widening assessment where sale could not create cloud; *Byrne v. Drain*, 127 Cal. 668, noted under *Savings etc. Soc. v. Austin*, 46 Cal. 415.

#### 51 Cal. 412-414. CONLAN v. QUINBY.

**Ejectment.—Receiver's Receipt is sufficient for prima facie case**, p. 414.

Cited to same effect in *Witcher v. Conklin*, 84 Cal. 502, holding such receipt to be "certificate of purchase" under section 1925 of the Code of Civil Procedure, and further that absence of record of payment in land office is immaterial; *Conkling v. Pacific etc. Co.*, 87 Cal. 299, holding such receipt sufficient as basis for action to restrain diversion of water.

#### 51 Cal. 415. SPEEGLE v. LEESE.

**Judgment is unsupported when finding omitted on material issues**, p. 415.

Cited to same effect in *Kusel v. Kusel*, 147 Cal. 57, applying rule in action for divorce; *Golson v. Dunlap*, 73 Cal. 161, holding insufficient as finding a statement that there was no evidence sufficient as basis for finding; and *Leviston v. Ryan*, 75 Cal. 294; *Connally v. Hingley*, 82 Cal. 643, and *Monterey v. Cushing*, 83 Cal. 510, on same point, and as holding that in such case finding should be against party on whom was burden of proof; *Gull etc. Co. v. School District*, 1 N. Dak. 509, reversing judgment for want of findings. Distinguished in *Lount v. Lount*, 1 Ariz. Ter. 425, under local theory of implied findings, holding findings presumed in order to support judgment.

#### 51 Cal. 416. SAN BENITO COUNTY v. WHITESIDES.

**County Cannot Bring Suit to Abate Obstruction of Highway in its own name**, p. 416.

Cited in *Sierra County v. Butler*, 136 Cal. 549, but sustaining action by county to enjoin flooding of highway by water and debris from mine; *Bailey v. Dale*, 71 Cal. 37, sustaining action by road overseer, further con-

struing section 2743 Political Code; Hall v. Kauffman, 106 Cal. 453, sustaining action by road commissioner, and holding notice sufficient.

**51 Cal. 417. HOLCOMB v. SAWYER.**

Appeal is Nugatory where undertaking not filed within proper time, p. 417.

Cited to same effect in Perkins v. Cooper, 87 Cal. 243, holding filing not waived under facts by stipulation in transcript.

Undertaking on Appeal must be filed within year limited for notice, p. 417.

Overruled in Lowell v. Lowell, 55 Cal. 319, in which main case is said to have been reported here by mistake, a rehearing being granted.

**51 Cal. 418-420. McCULLOUGH v. BOARD OF EDUCATION.**

Municipal Property cannot be used for purpose not authorized by law, p. 419.

Cited in Davenport v. Buffington, 97 Fed. 239, denying right of city to sell property already dedicated as public park; McIntyre v. El Paso Co., 15 Colo. App. 84, where land in city is dedicated solely for park, city officials cannot convey it or permit it to be used for erection thereon of county courthouse; City of Llano v. County of Llano, 5 Tex. Civ. App. 139, on point that dedication for one use cannot be diverted to another.

**51 Cal. 423-424. WELLS v. CAHN.**

Materialman's Lien cannot extend beyond amount due contractor by owner, p. 424.

Cited to same effect in Dingley v. Greene, 54 Cal. 336, where contractor fully paid at time of abandonment, and holding payments made in good faith when made upon architect's certificates as provided in original contract; Rosenkranz v. Wagner, 62 Cal. 154, holding subcontractor's complaint insufficient, and finding as to payment outside of issues; Whittier v. Hollister, 64 Cal. 284, holding insufficient complaint of subcontractor's materialman. Distinguished under local statute in Hunter v. Truckee Lodge, 14 Nev. 32, holding liens to exist irrespective of payments made before recording of notice.

**51 Cal. 425. WEBBER v. CALIFORNIA AND OREGON RAILROAD COMPANY.**

Land Bounded by Street extends to its center, p. 425.

Cited to same effect in Weyl v. Sonoma etc. Co., 69 Cal. 206, holding no contrary intention shown by deed, and further as to right of owner as against street railroad.

**51 Cal. 425-429. DREW v. CENTRAL PACIFIC RAILROAD COMPANY.**

Railroads.—“Stopover” privileges can be asserted only when allowed by contract of carriage, p. 428.

Cited to same effect in Gulf etc. Co. v. Henry, 84 Tex. 684, discussing rights of limited ticket holder who had taken wrong train by mistake; Roberts v. Koehler, 12 Saw. 255, 30 Fed. Rep. 96, sustaining carrier's lien under facts for additional transportation of baggage in case of stopover. Note citations: Commonwealth v. Power, 41 Am. Dec. 480, and Cheney v. Railroad Co., 45 Am. Dec. 193, on general subject.

**51 Cal. 429-430. MAHONEY v. AURRECOCHEA.**

Judicial Notice extends to harvest time in county where court held, p. 430.

Cited to same effect in Haines v. Snedigar, 110 Cal. 23, where involved in question of fitness of harvester. Note citations: Lanfear v. Mestier, 89 Am. Dec. 690, on general subject.

**51 Cal. 431-434. HAVERSTICK v. TRUDEL.**

Jurisdiction of Probate Court does not include enforcement of trust against administrator in favor of heirs, as to realty held by him in trust, p. 433.

Cited in Estate of Davis, 136 Cal. 598, but holding proceeding one to revoke probate and not to enforce trust; Estate of Vance, 141 Cal. 627, applying rule to attempt on settlement of account to impose trust on estate property; Auguisola v. Arnaz, 51 Cal. 438, sustaining, however, exclusive jurisdiction of such court to compel executor to account for personality in his hands as such. Dissenting opinion in Rosenberg v. Frank, 58 Cal. 419, main opinion sustaining jurisdiction of court of equity to construe will admitted to probate; Hubbard v. Urton, 67 Fed. Rep. 423, sustaining equity jurisdiction of suit by heirs against administrator after discharge, for accounting of personality converted by him. Note citations: Deck v. Gerke, 73 Am. Dec. 560, on general subject.

Misjoinder of Actions cannot be considered on appeal when not raised by demurrer, p. 434.

Cited to same effect in Light v. Pressey, 18 Mont. 278, where demurrer general, holding further objection waived by answering after demurrer overruled.

**51 Cal. 435-439. AUGUISOLA v. ARNAZ.**

Probate Court.—Jurisdiction is exclusive to compel executor to account for personal property received as such, and as final distribution of estate.

Cited to same effect in Rosenberg v. Frank, 58 Cal. 419, sustaining, however, power of court of equity to construe will admitted to probate;

Crew v. Pratt, 119 Cal. 149, as to decree of distribution and holding such decree conclusive against collateral attack as to validity of trust determined therein; Hubbard v. Urton, 67 Fed. Rep. 421, as cited under Haverstick v. Trudel, 51 Cal. 431. Note citations: Deck v. Gerke, 73 Am. Dec. 560, and Gurner v. Maloney, 99 Am. Dec. 354, on general subject.

**51 Cal. 442-446. WILLIAMS v. DWINELLE.**

Contempt cannot be predicated of refusal of trustee to pay over, on court's order, money which he has not received, p. 446.

Cited to same effect in Brown v. Moore, 61 Cal. 435, as to refusal of garnishees to sell property of debtor and pay proceeds into court. Dissenting opinion in State v. Hero, 36 La. Ann. 358, main opinion ordering release on habeas corpus from imprisonment under similar facts.

Prohibition was granted to prevent judge from finding petitioner guilty of contempt, p. 446.

Cited in People v. Carrington, 5 Utah, 532, approving practice; State v. Circuit Court, 97 Wis. 15, 65 Am. St. Rep. 98, noted under People v. County Judge, 27 Cal. 151.

General Citation.—State v. Judge of First Judicial Dist. 50 La. Ann. 556.

**51 Cal. 447-465. BRALY v. REESE.**

Failure to Make Objection is waiver of point that best evidence was not offered, p. 462.

Cited to same effect in Yik Hon v. S. V. W. W. 65 Cal. 620, as to variance; where no objection taken nor motion to strike out made; Banister v. Campbell, 138 Cal. 460, ruling similarly where objection was that evidence was "irrelevant, incompetent and immaterial"; Eversdon v. Mayhew, 85 Cal. 10, as to admission of copy without accounting for original and holding general objection insufficient; Caledonia etc. Co. v. Noonan, 3 Dak. Ter. 199 (cited in Pitts etc. Works v. Young, 6 S. Dak. 565), as to general objection to secondary evidence.

Roman Law of Nature as to guardians discussed, p. 464.

Cited in Lux v. Haggin, 69 Cal. 384, on point that such law was not adopted by act of April 13, 1850, adopting the "common law."

**51 Cal. 465-468. HARTLEY v. BROWN.**

Mexican Grant.—Patent to Heirs after death of applicant vests legal title in them, p. 467.

Cited to same effect in McDonald v. Burton, 68 Cal. 453, holding, however, action maintainable by administrator, against grantees of heirs, to recover property for benefit of estate.

**Ejectment will Lie in favor of patentees, heirs of applicant, as against purchaser from his administrator, where no equitable defense interposed, p. 467.**

Cited to same effect in Dorn v. Baker, 96 Cal. 209, as to action by patentee as against holder of equitable title when latter not set up; Bouldin v. Phelps, 12 Saw. 315, 30 Fed. Rep. 562, holding action not maintainable, however, by holder of equitable title as against patentee although patent improperly obtained.

**51 Cal. 468-470. PEOPLE v. SHAINWALD.**

**Arson.**—Store held to be subject of, p. 468.

Cited in note to Carter v. State, 71 Am. St. Rep. 268, defining arson.

**Order of Evidence** is within discretion of court, p. 469.

Cited to same effect in Bates v. Tower, 103 Cal. 406, holding no abuse shown; Swenson v. Bender, 114 Fed. 4, holding error waived by subsequent admission of necessary preliminary matter.

**Arson.**—Evidence of Prior Attempt is admissible to show intent in crime as charged, p. 469.

Cited to same effect in People v. Lattimore, 86 Cal. 404, as to prior arson, and admitting also statements of defendant made in connection therewith. Note citations: Mary v. State, 81 Am. Dec. 68, on general subject.

**Arson.**—Identity of Property held to be sufficiently established, p. 470.

Cited in People v. Greening, 102 Cal. 386, ruling similarly as to partnership property. Note citations: Mary v. State, 81 Am. Dec. 72, 73, on general subject.

**51 Cal. 473-474. BARBER v. BURROWS.** Rereported, 51 Cal. 404.

Contract is not Executed until signed by all parties by whom it was intended it should be signed, p. 474.

Cited to same effect in Crittenden v. Armour, 80 Iowa, 223, holding contract invalid when signed by person substituted for one whose signature originally to be obtained.

**51 Cal. 474-478. HAGAR v. BOARD OF SUPERVISORS.**

**Reclamation Districts.**—Act of 1868 was first amended by Political Code, p. 476.

Overruled in Swampland District v. Haggin, 64 Cal. 210, holding act amended by Stats. 1871-72, p. 668.

**Reclamation District.**—Assessment may be made under amendment of 1874 for work to be done, p. 477.

Cited to same effect in *Swampland District v. Silver*, 98 Cal. 53, holding specification of work unnecessary as to work to be done.

**51 Cal. 478-485. MAJORS v. COWELL.**

**Lis Pendens.**—Doctrine does not apply to proceedings in federal courts, p. 482.

Cited to same effect in *Stewart v. Wheeling etc. Co.*, 53 Ohio St. 167, holding further as to effect, as constructive notice, of action in federal court to foreclose mortgage. Note citations: *Stout v. Philippi etc. Co.*, 56 Am. St. Rep. 855, 861, 862, on general subject.

**Lis Pendens.**—Filing of complaint alone, is not, p. 484.

Note citations: *Newman v. Chapman*, 14 Am. Dec. 776, and *Stout v. Philippi etc. Co.*, 56 Am. St. Rep. 860.

**Judgment does not Bind one not a party to it, even if he afterward joins in appeal and participates in cost thereof**, p. 484.

Cited to same effect in *Central Baptist Church v. Manchester*, 17 R. I. 494, 33 Am. St. Rep. 896, where attorney for stranger to record participated in suit; *Lane v. Welds*, 99 Fed. 289, quoting *Andrews v. National Pipe Works*, 76 Fed. Rep. 173, as to participation by stockholders in suit against corporation.

**51 Cal. 489-491. BROWN v. RICE.**

**Misjoinder of Actions—Demurrer.**—Improper overruling of, even where answer filed thereafter, made ground of reversal, p. 491.

Cited in *Reynolds v. Lincoln*, 71 Cal. 190, ruling similarly, and holding error in so overruling not waived by subsequent answer.

**Misjoinder of Actions** includes suits for separate penalties incurred by tollgatherer, p. 491.

Cited to same effect in *State v. Yellow Jacket etc. Co.*, 14 Nev. 240, as to joinder of claims for taxes for distinct periods.

**51 Cal. 495-499. PEOPLE v. ATHERTON.**

**Jury.—Allowance of Challenge for Bias** is not subject of exception, p. 496.

Cited to same effect in *People v. Cochran*, 61 Cal. 549, where facts made ground for challenge were not denied, and ruling not excepted to; *State v. Pritchard*, 15 Nev. 79, further holding challenge properly allowed; *State v. Hing*, 16 Nev. 309, further holding as to form of such challenge; *United States v. Jones*, 69 Fed. Rep. 976, applying rule to excusing of grand jurors on court's own motion. Note citations: *Helms v. State*, 53 Am. Dec. 101, on general subject.

**51 Cal. 499-501. CITY OF SANTA BARBARA v. STEARNS.**

**Tax—Jurisdiction.**—When legality of tax is disputed in proceeding in police court, it must be transferred to district court, p. 501.

Cited to same effect in Santa Barbara v. Eldred, 95 Cal. 380, 381, 382, sustaining judgment of superior court, however, where action to collect taxes brought from police court by appeal and retrial had on merits.

“Tax” includes license fee, p. 501.

Distinguished in State v. French, 17 Mont. 57, 59, holding such fee not a tax within statutory provisions as to uniformity.

**51 Cal. 501-503. HARTMAN v. OLVERA.**

Garnishee cannot on examination be ordered to pay to sheriff, without action, moneys in his hands where he denies indebtedness to judgment debtor, p. 503.

Cited to same effect in Hibernia etc. Society v. Superior Court, 56 Cal. 266, annulling judgment by default against garnishee on failure to appear for examination; Ex parte Hollis, 59 Cal. 414, ruling similarly as to contempt order for failing to deliver to assignee in insolvency, on order of insolvent court, property held adversely to insolvent; Brown v. Moore, 61 Cal. 435, as to contempt order for constable's refusing to sell under garnishment proceedings property taken by them from debtor on execution; McDowell v. Bell, 86 Cal. 616, as to order in supplementary proceedings appointing receiver to take possession of property transferred by judgment debtor; and on same point in Wallace v. McLaughlin, 12 Utah, 435; and Everton v. Parker, 3 Wash. 336; Deering v. Richardson etc. Co., 109 Cal. 83, as to order in like proceedings that garnishee pay moneys to one judgment creditor notwithstanding conflicting claims thereto. Note citations: Morley v. Green, 42 Am. Dec. 114, on jurisdiction over strangers to action.

**51 Cal. 504. CITY OF SACRAMENTO v. NATIONAL GOLD BANK.**

**License Tax.**—Complaint in action for is insufficient where not alleging ordinance requiring defendant to take out license, p. 504.

Cited to same effect in Town of Hayward v. Pimental, 107 Cal. 389, holding, however, judgment on such complaint not attackable collaterally on motion to quash execution thereon.

**51 Cal. 505-507. BOSQUETT v. CRANE.**

**Conclusion of Law** is erroneous when based upon allegations of answer which should have been disregarded, p. 507.

Cited to same effect in Simmons v. Hamilton, 56 Cal. 495, and cited

there also as holding that error in conclusions is decision against law for which new trial lies, but see as to last point dissenting opinion, p. 497.

**Findings of Fact Must Support** judgment and respond to all material issues, p. 507.

Approved in *Wilson v. Wilson*, 6 Idaho, 604, applying rule in foreclosure of mortgage.

Absence of Findings on material issue may be cured by amendment if evidence already sufficient or further testimony may be taken thereon, p. 507.

Cited to same effect in *Hayes v. Wetherbee*, 60 Cal. 399, sustaining filing of additional findings before entry of judgment, where inadvertently omitted; *North v. Peters*, 138 U. S. 283 (cited in *Thompson v. Connecticut etc. Co.*, 139 Ind. 353), construing Dakota statute and sustaining filing of additional findings.

#### 51 Cal. 508-511. **PEOPLE v. NATIONAL GOLD BANK.**

**Taxation.—Capital Stock** is not assessable against corporation issuing it, p. 510.

Cited to same effect in *San Francisco v. S. V. W. W.*, 63 Cal. 526, 527, 528, as to "capital" and "capital stock" where all of latter issued to stockholders; but see concurring opinion, pp. 531, 533. Note citations: *Commonwealth v. Bank*, 96 Am. Dec. 291, on general subject.

#### 51 Cal. 511-514. **TENANT v. PFISTER.**

Question of Misjoinder of Parties cannot be raised by general demurrer, p. 513.

Approved in *Ross v. Page*, 11 N. Dak. 460, following rule.

**Joinder of Plaintiffs.**—Plaintiffs cannot sue in joint action for use and occupation of property wherein they have no joint interest, p. 514.

Cited to same effect in *Foreman v. Boyle*, 88 Cal. 293, as to action by owners of separate tracts for damages for diversion of water, but holding joint action maintainable to enjoin such diversion or abate obstruction of water; *Senior v. Anderson*, 138 Cal. 723, applying rule in action for unlawful diversion of water.

#### 51 Cal. 514-516. **MISCH v. MAYHEW.**

**Computation of Time—Notice.**—Three days' notice in election proceedings under section 1116 of the Code of Civil Procedure, is sufficient if given on 7th of hearing to be had on 10th, p. 516.

Cited in *Dingley v. McDonald*, 124 Cal. 95, holding suit not barred if brought on anniversary of day of accrual of right of action; *Bellmer v. Blessington*, 136 Cal. 4, applying rule to notice of execution sale;

**Hannah v. Green**, 143 Cal. 21, applying rule to notice under section 1118 of the Code of Civil Procedure; **Hagenmeyer v. Mendocino County**, 82 Cal. 217, as to seven days' notice given on 11th of hearing on 18th; **Landregan v. Peppin**, 86 Cal. 127, holding insufficient a thirty days' notice under section 3785 of the Political Code, given on July 25th of proceedings on August 23d; **Derby v. Modesto**, 104 Cal. 522, as to two weeks' publication under the Statutes of 1891, page 94, when given for fourteen consecutive days prior to date of passage of ordinance; **Bates v. Howard**, 105 Cal. 182, as to ten days' notice under section 1373 of the Code of Civil Procedure, given on the 12th of hearing on 22d; **Stinson v. Sweeney**, 17 Nev. 322, as to notice in election contest, including first day and excluding last.

#### 51 Cal. 523-524. GUTTENBERGER v. WOODS.

**Equity Maxima**.—He who seeks equity must do equity, p. 524.

Cited to same effect in **Benson v. Shotwell**, 87 Cal. 60, applying rule as condition of relief to plaintiff in action to quiet title.

#### 51 Cal. 524-526. HORN v. COVARUBIAS.

**Attachment**.—Sheriff's Justification for seizure of property in debtor's possession may consist of writ alone but must prove in addition, proceedings on which writ based, when property seized in possession of another, p. 526.

Cited to same effect in **Stephens v. Hallstead**, 58 Cal. 197, as to seizure from debtor, and holding, further, as to pleading and findings of fraudulent transfer; **Brichman v. Ross**, 67 Cal. 604, holding writ admissible as *prima facie* justification where seizure from debtor; **Jones v. McQueen**, 13 Utah, 187, as to seizure from stranger to writ and holding showing insufficient.

#### 51 Cal. 526-528. AMADOR COUNTY v. BUTTERFIELD.

**Inconsistent Defenses**.—Judgment on pleadings is improper because of, when answer contains denial of material allegations, p. 527.

Cited to same effect in **Botto v. Vandament**, 67 Cal. 333, as to action for diversion of water; **Cushing v. Keslar**, 68 Cal. 477, as holding such judgment proper where material facts not denied, but holding such rule inapplicable to land contests. Denied in **Seattle etc. Bank v. Carter**, 13 Wash. 295, holding proof unnecessary if fact admitted is one of such defenses; **State v. Comrs. Sheridan Co.**, 7 Wyo. 165.

#### 51 Cal. 528-529. HARRIS v. BURNS.

**Wrongful Attachment**.—Findings must cover issues of fraud raised by answer, p. 529.

Cited to same effect in dissenting opinion in **Synnott v. Shaughnessy**, Notes Cal. Rep.—164.

2 Idaho, 129, main opinion holding findings sufficient as to issue of fraud. Distinguished in *Fabian v. Collins*, 3 Mont. 229, under local theory of implied findings, as to absence of finding on estoppel.

**51 Cal. 529-530. FELTON v. JUSTICE.**

**Injunction against Threatened Trespasses** will not lie where defendant in actual adverse possession, p. 530.

Cited in *Taylor v. Clark*, 89 Fed. 8, further denying jurisdiction of federal court to entertain action to quiet title when plaintiff is out of possession, irrespective of state statute; *Snyder v. Hopkins*, 31 Kan. 560, sustaining writ as to waste, but not as to customary use of land by occupant, plaintiff's title being in dispute. Distinguished in *Fabian v. Collins*, 3 Mont. 222, 223, enjoining, under facts, threatened diversion of water. Note citations: *Jerome v. Ross*, 11 Am. Dec. 506, on general subject.

**51 Cal. 530-532. CURRY v. WHITE.**

**Partnership.—Dissolution** terminates power of partner to bind co-partner by note thereafter for firm demand, p. 532.

Cited to same effect in *Bank v. Page*, 98 Ill. 120, discussing powers after dissolution as to new and old contracts, and acceptance by liquidating partner. Note citations: *Chardon v. Oliphant*, 6 Am. Dec. 574, and *Gilmore v. Ham*, 40 Am. St. Rep. 567, on general subject.

**51 Cal. 534-537. CHRISTMAN v. BRAINARD.**

**Land Contest—Pleading.**—Each party must state facts respectively entitling him to purchase, p. 536.

Cited to same effect in *Wright v. Laugenour*, 55 Cal. 282, holding complaint insufficient in proceedings under the Statutes of 1863, page 591; *Lane v. Pferdner*, 56 Cal. 124, applying rule to burden of proof of respective claims; *Gilson v. Robinson*, 68 Cal. 543 (cited in *Prentice v. Miller*, 82 Cal. 573), as to defendant's answer and proof in proceeding under the Statutes of 1867-68, page 507, as amended; citing main case also at page 542, as holding that contest may be made after issuance of certificate of purchase, and, on last point, *Turner v. McDonald*, 76 Cal. 177; *Peabody v. Prince*, 78 Cal. 516, as to cross-complaint in action to impose trust on patent under section 3495 of the Political Code; *Anthony v. Jillson*, 83 Cal. 300, as to answer, in contest for mining claim under section 2326 of the Revised Statutes.

**51 Cal. 539-541. YOAKUM v. BOWER.**

**Execution Sale.—Redemption** may be made by judgment debtor although he has conveyed to another, p. 540.

Cited to same effect in Southern etc. Co. v. McDowell, 105 Cal. 101, 21 Am. St. Rep. 244, as to right to redeem whole property when part sold to another.

**51 Cal. 541-543. LEROUX v. MURDOCK.**

**Forcible Entry—Occupant.**—Plaintiff need not show personal presence on property at time of entry, p. 543.

Cited to same effect in Giddings v. Land etc. Co., 83 Cal. 99, holding occupancy sufficient although plaintiff not personally present for five days preceding entry and property not inclosed.

**Forcible Entry.—Answer** is insufficient if containing negative pregnant, p. 543.

Cited in State v. Board, 53 Neb. 771, ruling similarly as to such denial of corporate character of party.

**51 Cal. 543-545. DEVOE v. DEVOE.**

**Findings of Fact** must be within issues, p. 545.

Cited to same effect in Green v. Chandler, 54 Cal. 628, as to finding in mechanic's lien suit that certain land was necessary for use and occupation of mill, et cetera, and reversing judgment therefor; Rudel v. Los Angeles, 118 Cal. 286, disregarding such findings and holding party not estopped from raising objection; Nichols v. Randall, 136 Cal. 431, noted under Stout v. Coffin, 28 Cal. 65; Harris v. Lloyd, 11 Mont. 405, 28 Am. St. Rep. 487, and Harkins v. Cooley, 5 S. Dak. 231, reversing judgment for such findings.

**51 Cal. 545-549. PACKARD v. JOHNSON.**

**Ejectment.**—Ouster of cotenant is proved by defendant's assertion of title in answer, p. 548.

Cited to same effect in Phelan v. Smith, 100 Cal. 167, holding ouster also shown by evidence.

**Recording Acta.—Deed** by judgment debtor, if first recorded, takes precedence over deed on sale under judgment, although first deed executed after judgment docketed, p. 548.

Cited to same effect in Vaughn v. Schmalsle, 10 Mont. 197, as to conflict between mortgage recorded after attaching of lien of judgment and deed on execution sale under latter.

**51 Cal. 549-550. MELONE v. STATE.**

**Officers.**—Additional Salary may be granted secretary of state for performance of imposed duties outside those of office, p. 550.

Cited to same effect in Green v. State, 51 Cal. 577, as to controller.

**51 Cal. 552-554. BROWNE v. FERREA.**

Execution.—Sale en Masse may be set aside on defendant's motion, when advertised as separate tracts, p. 553.

Cited to same effect in Marston v. White, 91 Cal. 40, holding sale valid, however, when no bid obtained for lots when first offered separately. Note citations: Patterson v. Carneal, 13 Am. Dec. 213, on general subject.

**51 Cal. 554-556. WILLISTON v. PERKINS.**

Contract.—Performance must be made within reasonable time when contract silent, p. 565.

Cited to same effect in Hannah v. McNickle, 82 Cal. 125, holding three years excessive for payment of nine hundred dollars purchase price of land; Harkinson v. Dry Placer etc. Co., 6 Colo. 272, as to wages dependent on testing of machine, and holding reasonableness a question of law; Hood v. Hampton etc. Co., 106 Fed. 412, as to contract to pay wages when work resumed or property sold; Whiting v. Gray, 27 Fla. 491, as to contract for delivery of cargo of lumber; Noland v. Bull, 24 Oreg. 485, as to payment of present debt on sale of certain property; Randall v. Johnson, 59 Miss. 318, 42 Am. Rep. 366 (and note 367), on point that payment to be made at certain time after vessel's return, must, in case of her loss, be made within that period after usual time for trip.

**51 Cal. 559-561. PORTER v. GARRISSINO.**

Ejectment.—Intervention cannot be made by one alleging title paramount to both original litigants, p. 561.

Cited in McNamara v. Crystal etc. Co., 23 Wash. 32, denying right to intervene when property thereby affected is different from that in original action. Distinguished in Reay v. Butler, 69 Cal. 579, allowing intervention by landlord in suit brought against his tenants, and criticising main case as to distinction between statutory intervention and right of landlord to defend in tenant's name. Note citations: Brown v. Saul, 16 Am. Dec. 183, on general subject.

**51 Cal. 562. JUDSON v. PORTER.**

Injunction will not lie in one court to restrain prosecution of action in co-ordinate court, p. 562.

Cited to same effect in Waymire v. San Francisco etc. Co., 112 Cal. 650, as to injunction by stockholders against foreclosure of trust deed securing corporate bonds, for fraud, et cetera; Wolfe v. Titus, 124 Cal. 289, quoting Waymire v. S. F. Ry. Co., 112 Cal. 646.

**51 Cal. 563-566. ESTATE OF SMITH.**

Probate—Petition for Sale.—Requirements stated, p. 566.

Cited in *Estate of Cook*, 137 Cal. 188, holding petition insufficient as to allegations of value; *Estate of Levy*, 141 Cal. 644, but holding petition sufficient in absence of special objection; *Estate of Boland*, 55 Cal. 315, holding petition insufficient as not being in substantial compliance with statute; *Kertchem v. George*, 78 Cal. 600, ruling similarly and holding purchaser not liable for purchase money thereon; *Estate of Devincenzi*, 119 Cal. 501, holding, further, order not attackable collaterally by purchaser in opposing order confirming sale unless petition did not confer jurisdiction. Distinguished in *Sprigg v. Stomp*, 7 Saw. 293, 8 Fed. Rep. 218, sustaining petition on collateral attack.

**Probate Homestead—Sale.**—Right to homestead is not lost by reason of mere making of order of sale, p. 568.

Cited to same effect in *In re Still*, 117 Cal. 514, where no sale made under such order.

#### 51 Cal. 568-570. ESTATE OF PRITCHETT.

**Probate Decree of Distribution** will not be delayed because time for contest of will has not expired, p. 569.

Cited to same effect in *Estate of Ricaud*, 57 Cal. 423, sustaining power to delay, however, where assets are not ascertained or are involved in litigation.

#### 51 Cal. 571-573. FARMERS' AND MECHANICS' BANK OF SAVINGS v. CHRISTENSEN.

**Judgment on pleadings** is improper when issue presented necessary to be proved, p. 573.

Cited to same effect in *Botto v. Vandament*, 67 Cal. 334, where general and inconsistent special denial.

**Note.**—**Nonpayment** must be proved by plaintiff when issue raised by answer, p. 573.

Cited in *Brennan v. Brennan*, 122 Cal. 441, production of note in evidence for plaintiff without any indorsement of payment thereon, is sufficient *prima facie* proof of payment, under denial of allegation of nonpayment; *Griffith v. Lewin*, 125 Cal. 620, discussing sufficiency of proof of nonpayment. Overruled in *Melone v. Ruffino*, 129 Cal. 520, 79 Am. St. Rep. 132, in so far as it holds that plaintiff must prove nonpayment, although alleging it; *Turner v. Turner*, 79 Cal. 569, holding, further, as to presumption from possession by parties respectively; *Bank v. Boyd*, 99 Cal. 606, holding improper the striking out of general denial to unverified complaint in foreclosure.

#### 61 Cal. 573-575. JEFFERSON v. WENDT.

**Sheriff's Deed.**—Statute of Limitations does not run against purchaser till delivery of deed to him, p. 575.

Cited to same effect in *Barroilhet v. Anspacher*, 68 Cal. 120, but not deciding whether statute runs from actual delivery or from time that purchaser became entitled to deed, and on same point in *Leonard v. Flynn*, 89 Cal. 542, 23 Am. St. Rep. 504, following main case, however, on stare decisis; *Robinson v. Thornton*, 102 Cal. 685 (and see dissenting opinion, 687), holding rule inapplicable, however, to stranger to judgment or title not received from defendant. Note citations: *Keaton v. Thomasson's Lessee*, 58 Am. Dec. 58, on relation of sheriff's deed.

**51 Cal. 575-576. LASSING v. PAIGE.** S. C. 56 Cal. 139, 142, criticising main case, however.

**Contract—Modification.**—Evidence held insufficient to show, p. 576.

Cited in *Norddeutschen v. Bertheau*, 79 Cal. 499, as holding that where evidence is clear and undisputed court may determine as matter of law whether contract shown.

**51 Cal. 582-583. MEYER v. ROTH.**

**Evidence.**—Reporter's Notes are inadmissible to show evidence at former trial where witness resident of state, p. 583.

Cited to same effect in *Reid v. Reid*, 73 Cal. 206, as to certified transcript of evidence given by defendant in another action; *Reynolds v. Fitzpatrick*, 28 Mont. 174, refusing testimony of witness at former trial on showing that sheriff returned he could not find witness, and that daughter had written the party seeking to introduce testimony that she had not heard from him in two years, and that another party had said he was in Klondike. See note 65 Am. Dec. 677.

**51 Cal. 583-586. MARKET STREET RAILWAY COMPANY v. CENTRAL RAILWAY COMPANY.**

**Street Railroad.**—Maintenance of does not exclude public from use of street, p. 586.

Cited to same effect in *Pacific etc. Co. v. Wade*, 91 Cal. 453, 25 Am. St. Rep. 205, discussing nature of interest of company in street and joint use of tracks, section 499, Civil Code; *Chicago etc. Co. v. Steel*, 47 Neb. 746, holding railroad not entitled to compensation from subsequent road for crossing its tracks under proper ordinance; *G. C. etc. Co. v. G. C. S. etc. Co.*, 63 Tex. 553, as to right of city to grant use of street to company when abandoned by first, without judicial determination of forfeiture; and see same case on another appeal, 65 Tex. 505; *Texas etc. Co. v. Rosedale etc. Co.*, 64 Tex. 83, 53 Am. Rep. 741, on point that street railroad may run its line through yard of another company in the street over which the first was authorized to run. Note citations: *Attorney General v. Metropolitan etc. Co.*, 28 Am. Rep. 268, on general subject; *Vanderlip v. Grand Rapids*, 16 Am. St. Rep. 613, and

Western etc. Co. v. Railroad Co., 25 Am. St. Rep. 478, on taking for public use.

**Right of Street Railroad to use street cannot be attacked at suit of another, p. 586.**

Cited to same effect in dissenting opinion in *Omnibus etc. Co. v. Baldwin*, 57 Cal. 179, discussing forfeiture of charter; *Atchison etc. Co. v. Genl. Elec. Ry. Co.*, 112 Fed. 693, denying right of railroad which has been given power to cross a street to attack franchise to another for right of way along the street.

**51 Cal. 586-588. LOUPE v. WOOD.**

**Landlord is not Liable to Tenant in tort for damages suffered by reason of defective construction of leased property, p. 588.**

Cited to same effect in *Sieber v. Blanc*, 76 Cal. 173, holding landlord not liable for injuries to tenant suffered through defects; and on same point in *Rogan v. Dockery*, 23 Mo. App. 315, distinguishing liability to strangers. Cited, also, in *Goodwin v. Horne*, 60 N. H. 486, as holding that misrepresentation is actionable only when of past or existing facts; *Purcell v. English*, 86 Ind. 40, 44 Am. Rep. 260, as to injury to one tenant in use of common stair, where no covenant to keep in repair; *Cole v. McKey*, 66 Wis. 509, 57 Am. Rep. 296, as to injuries to subtenant where subletting done in violation of lease. Note citations; *Lowell v. Spalding*, 50 Am. Dec. 777, on general subject; *Polack v. Pioche*, 95 Am. Dec. 118, on covenant to repair.

**51 Cal. 588-590. PEOPLE v. WALDEN.**

**Instructions on Facts include charge that facts proven raise reasonable presumption of other facts, p. 590.**

Cited to same effect, holding instructions erroneous, in *Stone v. Geyser etc. Co.*, 52 Cal. 318, as to presumption of abandonment of claim; *People v. Carrillo*, 54 Cal. 64, as to presumption of felonious appropriation; *People v. Wong Ah Ngow*, 54 Cal. 153, 35 Am. Rep. 71, as to presumption of guilt from flight; *Helbing v. Svea etc. Co.*, 54 Cal. 158, 35 Am. Rep. 73, as to presumption of fraud in application for insurance policy; *People v. Mitchell*, 55 Cal. 237, as to presumption of guilt from possession of stolen property; *People v. Messersmith*, 61 Cal. 249, as to instruction that suicidal tendency does not prove insanity; *People v. Williams*, 73 Cal. 534, as to instruction that certain facts showed murder in first degree; *Scott v. Wood*, 83 Cal. 405, as to presumption of continued existence of act shown to exist; *Kauffman v. Maier*, 94 Cal. 270, as to caution to jury on credibility of witnesses; dissenting opinion in *Liverpool etc. Co. v. S. P. Co.*, 125 Cal. 443, main opinion sustaining instruction as assumption of undisputed facts; *Stoaksbury v. Swan*, 85 Tex. 572, as to presumption that notary had performed

official duty properly. Distinguished in *United States v. Snow*, 4 Utah, 306, holding instruction as to presumption of cohabitation, not one concerning facts.

**51 Cal. 592-594. RALSTON v. BOARD OF SUPERVISORS.**

**Swamp Land Districts.**—Petition must specifically describe lands to be included, p. 594.

Cited in *People v. Reclamation Dist.*, 130 Cal. 611, noted under *Farran v. Board*, 51 Cal. 307.

**51 Cal. 594-597. McKIERNAN v. HESSE.**

**Fixtures.**—Engine and boilers on mining land, erected by prior occupant, held to be, and to pass by patent, p. 596.

Cited to same effect in *Roseville etc. Co. v. Iowa etc. Co.*, 15 Colo. 31, 22 Am. St. Rep. 374, holding such fixtures seizable as personality.

**51 Cal. 597-603. PEOPLE v. CHIN MOOK SOW.**

**Conviction of Felony** of defendant may be proved by his cross-examination when testifying in his own behalf, p. 600.

Cited to same effect in *People v. Rolfe*, 61 Cal. 544, holding error, if any, cured by other evidence of conviction; dissenting opinion in *People v. O'Brien*, 66 Cal. 605, discussing limits of such cross-examination, main opinion holding improper questions asked; *People v. Arlington*, 123 Cal. 358, but holding similar evidence inadmissible when offered in chief; *People v. Meyer*, 75 Cal. 386 (but see dissenting opinion, page 388), as to prior conviction; and on same point in *People v. Arnold*, 116 Cal. 687, and in *People v. Sears*, 119 Cal. 271, distinguishing rule before codes; and see on last point *State v. Bacon*, 13 Oreg. 145. Note citations: *Allen v. State*, 73 Am. Dec. 776, on general subject.

**51 Cal. 603-605. McNEIL v. BARNEY.**

**Instructions as to Facts** or weight of evidence are erroneous. p. 605.

Cited to same effect in *Quint v. Dimond*, 147 Cal. 714, holding erroneous argumentative instructions in action for damages to wheat crop by fire caused by sparks from traction engine; *Scott v. Wood*, 81 Cal. 405, as to instructions on inferences of fact to be drawn by jury from those proved; *Kauffman v. Maier*, 94 Cal. 283, as to instruction that certain evidence should be received with caution.

**51 Cal. 605-607. HAHN v. SOUTHERN PACIFIC RAILROAD COMPANY.**

**Negligence.**—Railroad is not liable for damages occasioned by escaping steam unless done unnecessarily or willfully, p. 607.

Cited to same effect in Railway Co. v. Lewis, 60 Ark. 416, affirming verdict on conflict of evidence; Leavitt v. Railway Co., 5 Ind. App. 518, further holding demurrer to evidence improperly sustained under facts; Omaha etc. Co. v. Clark, 35 Neb. 872, holding complaint sufficient; Bittle v. Camden etc. Co., 55 N. J. L. 623, as to liability for negligent or wanton action; Kalbus v. Abbott, 77 Wis. 620, holding negligence shown by facts; Weil v. St. Louis etc. Ry. Co., 64 Ark. 538. Note citation: Baltimore etc. Co. v. Breinig, 90 Am. Dec. 58, on general subject.

**51 Cal. 608-609. DOMINGOS v. SUPERVISORS.**

Supervisor cannot Contract with county for additional services rendered, p. 609.

Cited to same effect in Irwin v. Yuba Co., 119 Cal. 689, denying claim for services and expenses in attending anti-debris convention as representative of board.

**51 Cal. 609-612. VEACH v. ADAMS.**

Execution against Cotenant may be levied by seizure of whole of property, p. 611.

Cited in Sims v. Jones, 54 Neb. 771, 69 Am. St. Rep. 751, noted under Bernal v. Hovious, 17 Cal. 541, 542; Sharp v. Johnson, 38 Or. 249, officer levying on undivided interest in chattels may take entire chattel into his possession. See note 79 Am. Dec. 151.

**51 Cal. 612-614. MASON v. JOHNSON.**

Protest against Payment of illegal tax need not state facts whereof tax collector has notice, p. 614.

Cited to same effect in Smith v. Farrelly, 52 Cal. 81, and Rumford etc. Works v. Ray, 19 R. I. 460, each holding protest sufficient; Centennial etc. Co. v. Juab Co., 22 Utah, 412, as to specific allegations of illegality of tax, when facts are known to tax collector.

**51 Cal. 618-620. CHASE v. EVOY.**

Claims against Estate—Witnesses.—Section 1880 of the Code of Civil Procedure does not prohibit administratrix from calling codefendant as witness in her behalf, p. 620.

Cited to same effect in Dudley v. Steele, 71 Ala. 427, as to such calling of defendant by administrator plaintiff; Roberts v. Briscoe, 44 Ohio St. 604, as to calling of payee of note by substituted executrix of defendant maker. Distinguished in Moore v. Schofield, 96 Cal. 488, rejecting evidence of plaintiff or co-obligor who has suffered judgment by default as against substituted administrator of codefendant. Note citations: Harris v. Bank, 1 Am. St. Rep. 211, on general subject.

51 Cal. 620-624. **ARFUES v. WASSON.** 21 Am. Rep. 718, and note, 718.

**Mortgage of Future Crops** is valid, before planting, when mortgagor has lease of land, p. 622.

Cited in *Lemon v. Wolff*, 121 Cal. 274, sustaining mortgage of crops to be planted, to secure future advances; *Hall v. Glass*, 123 Cal. 503, 69 Am. St. Rep. 79, 81, sustaining such mortgages as against subsequent insolvency proceedings; *Wilkerson v. Thorp*, 128 Cal. 226, holding rule now "an established rule of property"; *Cottle v. Spitzer*, 65 Cal. 460, 52 Am. Rep. 309, discussing taxation of fruit trees; *Cutting etc. Co. v. Packers' Exch.*, 86 Cal. 577, 21 Am. St. Rep. 65, as to sale of future fruit crop of trees owned by seller; *Mayer v. Taylor*, 69 Ala. 405, 44 Am. Rep. 523, holding such mortgage to create an equitable lien, attaching as mortgage immediately when crop appears; *Grand Forks Bank v. Minneapolis etc. Co.*, 6 Dak. Ter. 364, further holding refiling of mortgage unnecessary when crop appears; *Hughes v. Wheeler*, 66 Iowa, 643, holding mortgage of "all property I may own" during its existence, to include more than borne but bought afterward; *Dickey v. Waldo*, 97 Mich. 264, holding tenancy in common created by agreement of one to plant trees furnished by other and share crop; *Minnesota etc. Co. v. Maginnis*, 32 Minn. 196, as to mortgage of crop to be grown by land owner from seed furnished by mortgagee; *Cumberland Nat. Bank v. Baker*, 57 N. J. Eq. 239. Note citations: *Fonville v. Casey*, 4 Am. Dec. 561; and *Huling v. Cabell*, 27 Am. Rep. 563; on sales of property not in existence; *Moody v. Wright*, 46 Am. Dec. 713, 714; *Greg v. Sanford*, 76 Am. Dec. 726; *McCaffrey v. Woodin*, 22 Am. Rep. 649, 653; *Moore v. Byrum*, 30 Am. Rep. 68; *Long v. Hines*, 10 Am. St. Rep. 195; and *Rochester etc. Co. v. Rasey*, 40 Am. St. Rep. 640, on mortgages of such property.

51 Cal. 624-626. **IN RE BOSTON MINING AND MILLING COMPANY.**

**Statutory Construction.**—Title cannot be resorted to unless body of act ambiguous, p. 625.

Cited to same effect in dissenting opinion in *School Dist. v. School Dist.*, 81 Wis. 440, construing local act.

Provision is directory that statutes contain single subject to be expressed in title, p. 626.

Cited in *Law v. San Francisco*, 144 Cal. 387, applying rule to provision in San Francisco charter as to ordinances. See note 25 Am. Rep. 245.

**General Citation.**—*Choctaw etc. R. Co. v. Alexander*, 7 Okla. 584.

51 Cal. 626-628. **MULCAHY v. GLAZIER.**

**Appeal.**—Error must be affirmatively shown, p. 627.

Cited to same effect in *Patent Brick Co. v. Moore*, 75 Cal. 211, on point that assignment will be presumed to have been written when necessary to support findings and in absence of evidence.

Waiver of Findings will be presumed unless record shows otherwise, pp. 627, 628.

Cited to same effect in *People v. Forbes*, 51 Cal. 629, holding, however, presumption rebutted by record; *Weeks v. Garibaldi*, 73 Cal. 802, applying rule to presumption that trial was had; *Campbell v. Coburn*, 77 Cal. 37, further holding clerk's certificate of nonwaiver to be of no effect; *In re Cook*, 77 Cal. 230, 11 Am. St. Rep. 274, where judgment was by default; *Gordon v. Donahue*, 79 Cal. 502, further holding dating of findings after date of judgment not reversible error; *Goyhinech v. Goyhinech*, 80 Cal. 411; *In re Arguello*, 85 Cal. 553, as to finding on probate order of sale, but not deciding as to necessity therefor; *Tomlinson v. Ayres*, 117 Cal. 570; *Baker v. Baker*, 139 Cal. 627, further holding it insufficient to specify the absence of findings as an error of law; *Bitter v. Mouat etc. Co.*, 10 Colo. App. 317, so holding presumption in absence of bill of exceptions; *Lount v. Lount*, 1 Ariz. Ter. 425, applying will to theory of implied findings in absence of finding on material issues; *Garr v. Spalding*, 2 N. Dak. 419; *Chandler v. Kennedy*, 8 S. Dak. 59, further holding no findings of fact filed; *Haynes v. Roberts*, 4 Utah, 406. Distinguished under local statute in *Bard v. Kleet*, 1 Wash. 374, reversing judgment for want of findings.

#### 51 Cal. 628-629. PEOPLE v. FORBES.

Findings are Necessary upon new matter in answer, p. 629.

Cited to same effect in *Hardenberg v. Hardenberg*, 54 Cal. 592, reversing judgment for failure to find on material issues raised by answer; *Gull River etc. Co. v. School District*, 1 N. Dak. 509, on same point, holding failure not supplied by adoption by court of stipulation containing only evidentiary matters. Distinguished in *Lount v. Lount*, 1 Ariz. Ter. 425, on theory of implied findings, and following earlier California cases.

#### 51 Cal. 629-637. DONNER v. PALMER. S. C. 23 Cal. 40; 31 Cal. 500.

Intervention—Sufficiency of Complaint.—Objection to held waived under facts, p. 634.

Note citations: *Brown v. Saul*, 16 Am. Dec. 181, on general subject.

Law of Case.—Decision on former appeal is conclusive while facts substantially unchanged, p. 636.

Cited to same effect in *Reclamation District v. Goldman*, 65 Cal. 636, as to decision on sufficiency of complaint; *Sharon v. Sharon*, 79 Cal. 653, 687, holding, however, decision on appeal from judgment not bind-

ing on appellate court in considering appeal from order denying new trial; Burns v. Ledbetter, 56 Tex. 283, where former opinion rendered by commissioners; Lowell v. Ball, 58 Tex. 567, affirming decree of trial court rendered on remand conformably with decision. Note citations: Gee's Admr. v. Williamson, 27 Am. Dec. 634, on general subject.

**General Citation.**—Plymouth Co. Bank v. Gilman, 3 S. D. 178.

**51 Cal. 637-639. TREADWELL v. PATTERSON.**

**Tax Sale.**—“*De Minimis*” doctrine does not apply, and sale is void where assessment is beyond amount legally due, p. 638.

Cited to same effect in Harper v. Rowe, 53 Cal. 236, as to excess of seventy cents, and holding further as to owner's and purchaser's remedies in case of such sale; Axtell v. Gerlach, 67 Cal. 483, as to excess of one dollar, and enjoining execution of tax deed; Boston etc. Co. v. McKenzie, 67 Cal. 490, as to excess of ten dollars; Knox v. Higby, 76 Cal. 267, where land was sold for taxes on itself and on improvements on other property though both belonging to same owner; Simmons v. McCarthy, 118 Cal. 625; holding tax deed void for uncertainty as to which of two amounts paid, although difference was three cents; Miller v. Williams, 135 Cal. 184, noted under Bucknall v. Story, 36 Cal. 67; Lufkin v. Galveston, 73 Tex. 343, as to excess of seventy cents; Olsen v. Bagley, 10 Utah, 498, as to excess of over five dollars. Note citations: Glidden v. Chase, 56 Am. Dec. 692, 694, on general subject.

**51 Cal. 639-640. MOYLE v. PORTER.**

**Counterclaim—Action to Quiet Title.**—Answer held insufficient as counterclaim, p. 640.

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By ALBERT RAYMOND.

Revised to include citations to Volume 147, by CHARLES L. THOMPSON.

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23 Nev. 248, as to employment of attorney by county commissioners; and granting writ, Lent v. Tillson, 72 Cal. 434 (concurring opinion), as to departures of commissioners from statute in street widening proceedings, where no jurisdiction acquired of plaintiff's person or property; Gilbert v. Board, 11 Utah, 387, as to action of fire commissioners in removing employee for cause. Cited, also, in note on general subject to Mayor v. Morgan, 18 Am. Dec. 236, 238; Wulzen v. Board, 40 Am. St. Rep. 36, 39.

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#### 52 Cal. 142-154. HOAGLAND v. SACRAMENTO.

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#### 52 Cal. 170-171. BANK OF SANTA ROSA v. CHALFANT.

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#### 52 Cal. 171-189. PEOPLE v. HAGAR.

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**Misjoinder of Causes of Action.**—Action to recover assessment from same owner may include several lots owned by him, p. 181.

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**Striking Out Denials in Answers.**—General denial in verified answer is inadmissible and properly stricken out, p. 182.

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Cited to same effect in *San Mateo v. Maloney*, 71 Cal. 208, on point that official judgment and discretion, when within jurisdiction, cannot be reviewed by courts; *Spaulding v. Homestead etc. Assn.*, 87 Cal. 42, 45, as to judicial action of supervisors upon petition for grading; *Board v. Tregear*, 88 Cal. 354 (cited in *Fallbrook etc. District v. Bradley*, 164 U. S. 173), as to decision upon what lands would be benefited by irrigation; *Reclamation District v. Phillips*, 108 Cal. 310, 311, 313, 321, as to formation of reclamation district, and holding, further, as to collateral attack on validity of assessment; *Jackson v. Dyer*, 104 Ind. 517, as to sufficiency of notice of hearing on drainage proceedings; *Lingo v. Burford*, 112 Mo. 155, as to proceedings in county court in opening road, and finding of fact of notice therein. Cited also, in note on general subject to *Jones v. Camden*, 51 Am. St. Rep. 842.

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**52 Cal. 192-196. SOUTHERN CALIFORNIA COLONY ASSOCIATION  
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**Corporate Officers.**—Authority to execute instrument is shown by affixing of corporate seal thereto, p. 196.

Cited to same effect in Schallard v. Eel River etc. Co., 70 Cal. 146, as to mortgage signed by president and secretary and sealed; Wharf etc. Co. v. Simpson, 77 Cal. 290, as to lease, where seal is shown to have been affixed by proper officer; Vaca etc. Co. v. Mansfield, 84 Cal. 566, holding showing merely *prima facie*, and contradicted by facts proved; Underhill v. Santa Barbara etc. Co., 93 Cal. 314, as to note and mortgage, holding, further, seal properly to be affixed by secretary; Union Pacific etc. Co. v. Chicago etc. Co., 51 Fed. Rep. 327, as to contract of railroad signed by president and secretary allowing another road joint use of bridge for 999 Years; Sioux City etc. Co. v. Trust Co., 82 Fed. Rep. 137, as to mortgage signed by president and secretary although differing in form from resolution authorizing its execution. Cited, also, in notes on general subject to Green Co. v. Blodgett, 50 Am. St. Rep. 156, and to Morrison v. Gas Co., 64 Am. St. Rep. 261.

**Authority of Corporate Officers** must be derived from resolution of board where not otherwise established, p. 196.

Cited to same effect in Alta etc. Co. v. Mining Co., 78 Cal. 633, as to mortgage, where seal not affixed and no resolution passed; Salfield v. Sutter, etc. Co., 94 Cal. 549, as to authorization of agent to execute land contract; Gribble v. Columbus etc. Co., 100 Cal. 74, but holding rule inapplicable where ratification was at issue; Barney v. Pforr, 117 Cal. 58, as to deed without corporate seal and holding neither authority nor ratification shown.

**52 Cal. 196-198. BANK OF SONOMA COUNTY v. FAIRBANKS.**

“Bank” does not include deposit and loan association which does not issue paper to circulate as money, p. 198.

Cited to same effect in Bank v. Hemme etc. Co., 105 Cal. 377, construing sections 34 and 35 of Article IV of the Constitution of 1849; Dearborn v. Bank, 42 Ohio St. 622, 51 Am. Rep. 854, construing “associations with banking powers” under local acts.

**52 Cal. 198-201. SAN FRANCISCO v. FORD.**

**Tax Collector Must Pay** into Treasury all taxes collected, even if illegal and paid under protest, p. 201.

Cited in Craig v. Boone, 146 Cal. 719, action does not lie against tax collector to recover taxes paid to him under protest; People v. Weineke, 122 Cal. 539, on point that statute in action on bond begins to run when moneys are so payable; Phelan v. San Francisco, 120 Cal. 5, holding, further, city not liable to repay such taxes when not paid under duress;

**Ratterman v. State**, 44 Ohio St. 644; dissenting opinion **Hamer v. Weber County**, 11 Utah, 27, discussing power to withhold moneys in payment of his own claims.

**52 Cal. 206-208. PICO v. GALLARDO.**

Possession is Evidence tending to prove notice of occupant's equities, p. 208.

Cited to same effect in **Emeric v. Alvarado**, 90 Cal. 473, holding notice not shown by facts.

**Mortgage in Form of Deed**.—Grantee may recover in ejectment thereon unless defendant alleges fact and offers to redeem, p. 208.

Cited to same effect in **Montgomery v. Speck**, 55 Cal. 358, sustaining decree for conditional foreclosure. Overruled in **Hyde v. Mangan**, 88 Cal. 325, holding facts provable under denial of plaintiff's title; and see dissenting opinion in **Allen v. Allen**, 95 Cal. 203, 204, discussing conflicting decisions and right to redeem from such mortgagee. Cited, also, in **Carpenter v. Lewis**, 119 Cal. 21, on point that vendee from such grantee, without notice, takes title free from all equities. Cited, also, in note to **Hayward v. Worthington**, 35 Am. Dec. 128, on admissibility of parol evidence to show such deed to be a mortgage.

**52 Cal. 208-211. PEOPLE v. AHERN.**

**Swamp Land Assessment** is invalid unless commissioners have followed statute in proceedings, p. 211.

Cited to same effect in **Swamp Land District v. Gwynn**, 70 Cal. 570 (cited in **Reclamation District v. Phillips**, 108 Cal. 322), holding certificate not conclusive as to performance of such acts.

**52 Cal. 211-212. PEOPLE v. ENGLISH.**

**Bill of Exceptions in Criminal Case** will be presumed to contain all material evidence given bearing upon point involved, p. 212.

Cited to same effect in **People v. Buckley**, 116 Cal. 148, holding further as to insertion of original papers, upon question of insufficiency of evidence; but see **People v. Dye**, 62 Cal. 524, distinguishing main case, where bill stated merely that each party introduced evidence to sustain respective contentions; dissenting opinion in **People v. Coulter**, 145 Cal. 77, 78, majority holding where on appeal from conviction for burglary in second degree only question raised as to whether verdict was contrary to evidence, and judgment roll and bill of exceptions showed affirmatively that bill does not contain all evidence and purports only to give evidence directed to time of offense, other questions as to insufficiency of evidence to sustain verdict not reviewable; **United States v. Alexander**, 2 Idaho, 360, as to voir dire examination of juror; dissenting opinion in **Territory v. Neilson**, 2 Idaho, 589, main opinion

sustaining conviction though evidence of prosecution insufficient as shown in record, where defendant's does not appear at all therein.

#### 52 Cal. 212-213. PEOPLE v. ENGLISH.

**Evidence of Confederate.**—Declarations made after consummation of offense are not admissible against each other, p. 213.

Cited to same effect in People v. Aleck, 61 Cal. 139, as to subsequent confession of codefendant jointly indicted; People v. Gonzales, 71 Cal. 575, as to declarations by paramour of defendant, relative to the relations that occasioned the killing; People v. Irwin, 77 Cal. 505, as to declarations before formation of conspiracy and those after consummation of crime; State v. Johnson, 40 Kan. 268, as to declarations after crime; and in absence of the others; State v. Hinkle, 33 Or. 98, noted under People v. Moore, 45 Cal. 19; Sheppard v. Yocom, 10 Oreg. 417, applying rule to civil action for conversion.

#### 52 Cal. 213-216. ROSECRANS v. DOUGLAS.

**Lieu Lands.**—State does not lose title to land for which lieu lands are taken when lieu lands are improperly listed to it, p. 215.

Cited to same effect in Hellman v. Jones, 56 Cal. 463, holding further as to effect of Congressional act of March 1, 1877.

**Listing of Lands to State** conveys no title to state when not authorized, p. 215.

Distinguished in Sullivan v. Shanklin, 63 Cal. 250, denying mandamus under facts, to compel issuance of certificate under section 3571, Political Code.

**State Patent may be Attacked**, though not void upon face, by pre-emptor who has filed application to purchase, where state title void, p. 216.

Distinguished in Churchill v. Anderson, 56 Cal. 58, holding no right to attack patent shown by facts.

#### 52 Cal. 217-219. SMITH v. ACKER.

**Insufficiency of Evidence to Support Findings** cannot be raised on appeal from judgment, p. 219.

Cited to same effect in Frazier v. Crowell, 52 Cal. 403; Culmer v. Caine, 22 Utah, 231, noted under Blethen v. Blake, 44 Cal. 117.

**Finding of Ownership** is one of ultimate fact and will support judgment in ejectment, p. 219.

Cited to same effect in Murphy v. Bennett, 68 Cal. 530 (and see dissenting opinion, page 535), in action for conversion of material of building destroyed; Daly v. Sorocco, 80 Cal. 368, action to quiet title;

**Dam v. Zink**, 112 Cal. 93, as to finding that judgment is not a lien, under facts. Distinguished in **Savings and Loan Society v. Burnett**, 106 Cal. 538, where such finding embraced in conclusions of law and not supported by specific facts found.

Finding of Ultimate Fact will prevail against other findings of probative facts, p. 219.

Cited in **Comm. Bank v. Redfield**, 122 Cal. 408, quoting **Gill v. Driver**, 90 Cal. 74, holding judgment not reversible for errors or defects in findings of such probative facts; **Perry v. Quackenbush**, 105 Cal. 305, holding further, no conflict shown between findings; **Rankin v. Newman**, 107 Cal. 608, holding further finding unnecessary as to matters of evidence pleaded. Distinguished in **Howeth v. Sullenger**, 113 Cal. 551, reversing judgment for contradiction in findings.

#### 52 Cal. 220-225. EX PARTE THISTLETON.

Appellate Courts may establish procedure, when not regulated by statute, within limits of their appellate jurisdiction, p. 223.

Cited to same effect in **People v. Jordan**, 65 Cal. 650, as to practice in criminal appeals from judgment of conviction for misdemeanors. Cited in dissenting opinion in **State v. Thayer**, 158 Mo. 62, construing local statutes; **State v. Reed**, 3 Idaho, 557, 558, writ of error does not lie from order denying change of venue in criminal case; note to **Wheeler v. Winn**, 91 Am. Dec. 196, on writ of error.

Court of Record is one proceeding according to course of common law, p. 225.

Cited to same effect in **United States v. Hall**, 5 N. Mex. 82, holding probate court not to be such under local statute.

General Citation.—**McKercher v. Green**, 13 Colo. App. 276.

#### 52 Cal. 225-227. DRAKE v. FOSTER.

Probate Claim.—Nonpresentation cannot be first raised on appeal, p. 227.

Cited to same effect in **Preston v. Knapp**, 85 Cal. 561, as to sufficiency of complaint in that regard; **Derby v. Jackman**, 89 Cal. 4, holding, however, judgment on pleadings improper, without proof of presentation, although allegation thereof not denied; and see **Falkner v. Hendy**, 107 Cal. 53, explaining distinctions between prior cases, and holding proof necessary when objection properly made in trial court; **Pennie v. Roach**, 94 Cal. 521, where neither alleged nor proved; **Bemmerly v. Woodward**, 124 Cal. 574, noted under **Hentsch v. Porter**, 10 Cal. 555; **Rose v. Pierce Co.**, 25 Wash. 121, noted under **Bank v. Howland**, 42 Cal. 129; **Neis v. Farquharson**, 9 Wash. 517, holding further presentation not necessary under facts of claim.

**52 Cal. 227-231. CENTRAL PACIFIC RAILROAD COMPANY v. HOWLAND.**

Public Lands cannot be taxed until private person has acquired patent or perfect equity to it, p. 230.

Cited to same effect in County v. Hunter, 42 Minn. 313, as to taxation of pre-emption claim from date of final receipt, although entry hereafter suspended. Distinguished in People v. Donnelly, 58 Cal. 146, sustaining taxation of possessory right of purchaser of state land, prior to patent or payment of purchase money. Cited, also, in note on general subject to Board v. Ottawa, 33 Am. St. Rep. 402.

**52 Cal. 232-235. MARSH v. DOOLEY.**

Claim against Estate is barred if not presented by resident legal owner, although equitable owner absent from state and without knowledge of death, p. 234.

Cited to same effect in Diffenderfer v. Scott, 5 Ind. App. 254, on point of bar of cestui where trustee barred, but holding parties not to occupy such relation under facts. Distinguished in Estate of Crosby, 55 Cal. 578, where claim on judgment held properly presented by equitable owner, although never assigned to him.

**52 Cal. 235-237. MARTIN v. MARTIN.**

Husband and Wife—Separate Property.—Land is husband's separate property when paid for by his funds, although bought on credit and wife joined in mortgage therefor, p. 237.

Cited to same effect in Flournoy v. Flournoy, 86 Cal. 293, 21 Am. St. Rep. 42, holding property to be wife's under similar facts.

**52 Cal. 238-244. MERRITT v. WILCOX.**

Stipulation of Attorney will not bind client unless in writing or entered on minutes, p. 240.

Cited in Kent v. San Francisco Sav. Union, 130 Cal. 406, holding stipulation binding when so entered; Haley v. Bank, 20 Nev. 422, as to oral agreement not to take default. Cited, also, in note on general subject to Clark v. Randall, 76 Am. Dec. 256.

**52 Cal. 244-245. FIGG v. HANDLEY.**

Certificate of Purchase is *prima facie* evidence of right to possession as against mere trespasser, p. 245.

Cited to same effect in Conkling v. Pacific etc. Co., 87 Cal. 299, as to receiver's receipt to pre-emptor, in action to enjoin diversion of water.

**52 Cal. 246-247. EMERSON v. SKAGGS.**

Malicious Prosecution.—Want of probable cause must be shown affirmatively by plaintiff, p. 247.

Cited to same effect in *Lacey v. Porter*, 103 Cal. 605, holding probable cause shown by facts and sustaining directing of verdict for defendant.

#### 52 Cal. 248-249. NEILSON v. CRAWFORD.

**Stockholder's Liability—Evidence.**—Corporate books are not admissible in action to enforce, p. 249.

Distinguished in *San Pedro etc. Co. v. Reynolds*, 121 Cal. 83, 85, admitting books kept by manager to show his frauds and defalcations; *McGowan v. McDonald*, 111 Cal. 69, 70, 52 Am. St. Rep. 157, admitting depositors' pass-books from banking corporation in their action against stockholders for pro rata of deposits shown thereby; *Borland v. Haven*, 13 Saw. 574, 37 Fed. Rep. 407, admitting stock transfer books and minute books of directors' meetings.

**Stockholder's Liability for share of corporate debts is primary**, p. 249.

Cited to same effect in *Hyman v. Coleman*, 82 Cal. 653, 16 Am. St. Rep. 180, holding liability barred in three years from date of original indebtedness, notwithstanding its intermediate renewal by corporation.

#### 52 Cal. 250-251. UHL v. UHL.

Action by wife to annul bigamous marriage cannot be joined with one to quiet title to separate property as against husband, p. 250.

Cited to same effect in *Peck v. Peck*, 66 Mich. 591, as to action for divorce and to secure accounting of wife's separate property and on same point in *Letts v. Letts*, 73 Mich. 145; *Wetmore v. Wetmore*, 40 Or. 333, title to realty cannot be determined in divorce suit.

#### 52 Cal. 251-252. PEOPLE v. LEITH.

**Aider and Abettor.**—Defendant held not liable as, under facts, p. 251.

Cited to same effect in *Tanner v. State*, 92 Ala. 7, discussing and sustaining instructions as to liability as conspirators.

#### 52 Cal. 252-254. LE CLERT v. OULLAHAN.

**Recording Act.**—Unrecorded deed will, in absence of fraud, prevail against attachment levied after its delivery, p. 253.

Cited to same effect in *Ward v. Waterman*, 85 Cal. 507, discussing right of attaching creditor to object to reformation of prior trust deed.

**Additional Findings** may be ordered on remand when material issues not found, p. 254.

Cited in *San Diego etc. Co. v. Neale*, 78 Cal. 65, on point that party may move lower court for new trial on part of issues; *Lake v. Bender*, 18 Nev. 373, as to property issues in divorce suit; *Synnott v. Shaughnessy*, 2 Idaho, 120, holding findings insufficient as to issues specified.

52 Cal. 257-262. **McCREERY v. SAWYER.** S. C. see **McCreery v. Duane**, 52 Cal. 263, 293.

**Van Ness Ordinance—Deed.**—Question of issuance to proper beneficiary cannot be raised by stranger to title of property conveyed, p. 261.

Cited in **San Francisco etc. Co. v. Hartung**, 138 Cal. 228, noted under **Le Roy v. Cunningham**, 44 Cal. 599; **Rousset v. Reay**, 60 Cal. 340, sustaining validity of deed to Outside Lands; **Palmer v. Galvin**, 72 Cal. 187, as to deed to part of Point San Jose military reservation; and see **Galvin v. Palmer**, 113 Cal. 53. Cited, also, in **Baker v. Brickell**, 87 Cal. 334, discussing title of city to lands of former pueblo; **Murray v. Hobson**, 10 Colo. 69, holding defendant not entitled to impeach townsite conveyance, under facts stated. Cited, also, in note to **Gale v. Mensing**, 64 Am. Dec. 200, on effect of trustees' conveyance.

52 Cal. 262-263. **McCREERY v. DUANE.**

**General Denial** will not permit evidence of adverse possession, p. 263.

Cited to same effect in **Nordholt v. Nordholt**, 87 Cal. 556, 22 Am. St. Rep. 271, as to necessity of specially pleading duress in execution of deed; **Michalitschke v. Wells etc. Co.**, 118 Cal. 690, as to pleading of special contract limiting carrier's liability, in action against it for failure to deliver.

52 Cal. 263-269. **MORENHAUT v. WILSON.**

**Abandonment of Mining Claim** is question of intent, p. 257.

Cited to same effect in **Myers v. Spooner**, 55 Cal. 261, refusing to disturb verdict where evidence conflicting. Cited, also in note to **Wyman v. Hurlburt**, 40 Am. Dec. 465, 466, on general subject.

**Forfeiture of Mining Claim** must be specially pleaded in ejectment for its possession, p. 258.

Cited to same effect in **Du Prat v. James**, 61 Cal. 362, holding forfeiture properly pleaded, but no finding on issue; **Johnson v. McLaughlin**, 1 Ariz. 502, holding, further, forfeiture not effected by failure to follow local regulations unless specified as penalty therefor; **Power v. Sla**, 24 Mont. 251, discussing nature of plea of forfeiture; **Wulf v. Manuel**, 9 Mont. 287, where claimed as result of conveyance to alien; **Steel v. Gold, Lead etc. Co.**, 18 Nev. 86, holding rule inapplicable, however, where forfeiture claimed under section 2326 of the Revised Statutes; **Bishop v. Baisley**, 28 Oreg. 127, where claimed for failure to perform requisite work, and holding, further, burden of proof on person claiming forfeiture.

**Forfeiture of Mining Claim** for noncompliance with regulations inures in favor of one subsequently entering on claim who complies therewith, p. 268.

Cited to same effect in Horswell v. Ruiz, 67 Cal. 112, holding however, instructions conflicting.

**Nonjoinder of Plaintiffs.**—Tenants in common of mine need not all join in ejectment for its possession, where no objection taken by answer, p. 289.

Cited to same effect in Moulton v. McDermott, 80 Cal. 630, sustaining ejectment by one cotenant for whole tract as against intruder, although nonjoinder pleaded in answer; Mather v. Dunn, 11 S. Dak. 200, 74 Am. St. Rep. 789, noted under Collier v. Corbett, 15 Cal. 183.

**52 Cal. 270-277. OAKLAND PAVING COMPANY v. RIER.**

**Street Improvements in Oakland.**—Act relating to construed, p. 274.

Cited in Reid v. Clay, 134 Cal. 213, discussing question of ratification of street improvement contract made with city by secretary of corporation; Frantz v. Jacob, 88 Ky. 533, construing local act as not intended to amend special city charter as to street improvements.

**52 Cal. 277-279. EFFORD v. SOUTH PACIFIC COAST RAILROAD COMPANY.**

**Preliminary Injunction.**—Order dissolving on coming in of answer is within discretion of court, p. 279.

Cited to same effect in White v. Nunan, 60 Cal. 407, as to order continuing such injunction.

**52 Cal. 280-292. BANK OF CALIFORNIA v. WESTERN UNION TELEGRAPH COMPANY.**

**Principal is Liable for torts of agent committed in course of agency,** p. 288.

Cited to same effect in Overacre v. Blake, 82 Cal. 81, as to deceit of agent in course of agency; Bank v. Pacific etc. Co., 103 Fed. 843, 844 (affirmed at 109 Fed. 372, 374, 377), applying rule to fraud of telegraph operator in transmitting false money order message; McArthur v. Home etc. Assn., 73 Iowa, 339, 5 Am. St. Rep. 687, as to fraud of agent of life insurance company in filling up application; McCord v. Telegraph Co., 39 Minn. 185, 12 Am. St. Rep. 640, as to transmission of forged dispatch by agent of telegraph company. Cited, also, in note on liability of telegraph company for forged dispatches, to Birney v. Telegraph Co., 81 Am. Dec. 616, 617; Telegraph Co. v. Blanchard, 45 Am. Rep. 493.

**52 Cal. 293-294. McCREERY v. DUANE.**

**Van Ness Ordinance—Deed.**—Question of issuance to proper beneficiary cannot be questioned by stranger to title of property conveyed, p. 294.

Cited in note to Gale v. Mensing, 64 Am. Dec. 200, on effect of trustee's conveyance.

**52 Cal. 294-299. ESTATE OF HEADEN.**

**Homestead on Separate Property** descends to surviving spouse as surviving joint tenant and not by descent, p. 297.

Cited to same effect in Gagliero v. Dumont, 54 Cal. 501, holding surviving husband entitled to sue for recovery of such property wrongfully conveyed before wife's death, as being his; Herrold v. Reen, 58 Cal. 448, and Levins v. Rovegno, 71 Cal. 283, 284, discussing acts of 1860 and 1862, and holding former to be statute of descent; Tyrrell v. Baldwin, 78 Cal. 475 (cited in Dickey v. Gibson, 113 Cal. 33, 54 Am. St. Rep. 325), as to community property, holding, further, that property is not subject to execution sale for survivor's subsequent debts; and on same point Sanders v. Russell, 86 Cal. 120, 21 Am. St. Rep. 27, holding, however, homestead liable for debts of survivor to extent of excess in value; in re Ackerman, 80 Cal. 210, 13 Am. St. Rep. 117, as to homestead on community property, and holding, further, as to right to probate homestead after sale of first; Collins v. Scott, 100 Cal. 451, as to like homestead, holding heirs of law of deceased husband not entitled as against surviving wife.

**52 Cal. 299-301. FIGG v. HENSLEY.**

**Ejectment may be Maintained** on receiver's duplicate receipt while entry not suspended, p. 301.

Cited to same effect in Witcher v. Conklin, 84 Cal. 503, construing section 1925 of the Code of Civil Procedure, and holding, further, force of receipt not impaired by absence of record in land office showing payment.

**Pre-emption Entry may be canceled** by commissioner of general land office, p. 301.

Cited to same effect in Jones v. Meyers, 2 Idaho, 797, 35 Am. St. Rep. 262, where final receipt obtained on false evidence, and holding further, purchaser from claimant bound by rules of caveat emptor; Parsons v. Venzke, 4 N. Dak. 457, 470, on both points, holding, further, as to power of court of equity to regulate cancellation made by inadvertence or mistake; Orchard v. Alexander, 157 U. S. 382, holding action of register and receiver not conclusive, and construing section 2263 of the Revised Statutes.

**52 Cal. 302-306. KRAEMER v. KRAEMER.**

**Husband and Wife—Property.**—Character of is determined by law of state of residence at time of acquisition, p. 305.

Cited in Estate of Burrows, 136 Cal. 115, as to property purchased here from proceeds of property acquired in Kansas; Shumway v. Leakey, 67 Cal. 460, holding, further, law of such state presumed *prima facie* to be like that of California.

**Separate Property** of either spouse remains such although converted into other property, p. 305.

Cited in *Jackson v. Torrence*, 83 Cal. 529, on point that property bought by husband with common funds and conveyed as gift to wife becomes her separate property.

**52 Cal. 306-309. MORRISON v. GOLD MOUNTAIN GOLD MINING COMPANY.**

**Corporate Stock**.—Conversion will not lie against company for refusal to issue, when plaintiff has no legal title thereto, p. 309.

Cited to same effect in *Hawkins v. Mansfield etc. Co.*, 52 Cal. 515, holding action not maintainable under facts.

**Corporate Contracts** do not include agreement of incorporators prior to incorporation, p. 309.

Cited to same effect in *Hardware Co. v. Hardware Co.*, 87 Ala. 210, 211, 13 Am. St. Rep. 26 (and see note p. 39), holding, however, corporation bound by agreement of promoters with third persons, of which it has accepted the benefits; and on same point in *Weatherford etc. Co. v. Granger*, 86 Tex. 356, 40 Am. St. Rep. 843, holding, however, company not liable for services of attorney for promoter, under facts.

**52 Cal. 310-312. PEOPLE v. BAILHACHE.**

**County Officers**.—Consolidation is invalid under Political Code, section 4106, unless ordinance published by order of board, p. 311.

Cited to same effect in *People v. Williams*, 64 Cal. 92, holding no consolidation had.

**52 Cal. 315-319. STONE v. GEYSER QUICKSILVER MINING COMPANY.**

**Abandonment of Mining Claim** cannot be had when party was never in possession, p. 318.

Cited to same effect in *Boulder etc. Co. v. Ditch Co.*, 22 Colo. 120, as to water right, and discussing effect of holding by acquiescence. Note citation: *Wyman v. Hurlburt*, 40 Am. Dec. 465, on general subject.

**Instructions on Facts**.—Charge is error that a presumption of fact was created by proof of other facts, p. 318.

Cited to same effect in *People v. Carrillo*, 54 Cal. 64, as to presumption of felonious appropriation; *Helbing v. Svea etc. Co.*, 54 Cal. 158, 35 Am. Rep. 73, as to presumption of fraud in application for insurance; *Scott v. Wood*, 81 Cal. 405, as to presumption of continuance of fact; *Stooksbury v. Swan*, 85 Tex. 572, as to presumption of regularity of official acts. Distinguished in *United States v. Snow*, 4 Utah, 306, sustaining instruction as not subject to such objection. Cited, also, in note to *State v. White*, 72 Am. Dec. 545, on general subject.

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**52 Cal. 319-322. TUOHY v. WINGFIELD.**

Attachment is Improper of property in which debtor has merely contingent expectation, p. 321.

Cited to same effect in Howell v. Foster, 65 Cal. 173, holding crop raised by tenant not attachable in suit against him where title was to remain in landlord until payment of advances.

**52 Cal. 322-325. WEST v. SMITH.**

Injunction Will Lie to prevent removal of plaintiff's crop by insolvent defendant, p. 325.

Cited to same effect in Rohrer v. Babcock, 114 Cal. 126, as to removal and consumption of hay stack; Taylor v. Clark, 89 Fed. 7, noted under Felton v. Justice, 51 Cal. 529.

**52 Cal. 325-326. REED v. KIMBALL.**

**Appeal.**—Motion to dismiss will be denied where appeal not properly taken, p. 326.

Cited to same effect in Biagi v. Howes, 63 Cal. 385, where undertaking insufficient, and discussing practice on such motion; Bellegarde v. San Francisco Bridge Co., 80 Cal. 62, where undertaking filed too late. Cited, also, in Voorhees v. Manti, 13 Utah, 438, as holding that appeal will be dismissed where not properly perfected.

**Undertaking on Appeal** must be properly filed or appeal is ineffectual for any purpose, p. 326.

Cited in Cook v. Oregon etc. Co., 7 Utah, 420, denying right to file new undertaking thereafter.

**52 Cal. 326-331. KENNEDY v. NUNAN.**

**Execution will Reach** interest left in grantor under trust deed, p. 331.

Cited to same effect in LeRoy v. Dunkerly, 54 Cal. 460, as to interest of San Francisco in beach and water lots (Stat. 1851, page 307); Jones v. Throckmorton, 57 Cal. 384, as to interest of beneficiary under trust deed; Fish v. Fowlie, 58 Cal. 375, as to interest of vendee under contract of sale; King v. Gotz, 70 Cal. 241, as to interest of husband in community property after trust deed thereon to secure debt; Judson v. Lyford, 84 Cal. 506-7, holding, further, that execution sale of interest of grantor, in deed void as against creditors, conveys his legal title. Cited in note on general subject to McIlvaine v. Smith, 97 Am. Dec. 315; Garland v. Garland, 24 Am. St. Rep. 689, on spendthrift trusts; and on last point in Jourolmon v. Massengill, 86 Tenn. 111, sustaining such a trust.

**Trust Deed held to create interest in grantor**, p. 331.

Cited in note on general subject to Neill v. Keese, 51 Am. Dec. 758.

**52 Cal. 331-333. PEOPLE v. SELFRIDGE.**

Corporation.—Right to be, is a franchise, p. 333.

Cited to same effect in Spring Valley W. W. v. Schottler, 62 Cal. 110, discussing character of corporate franchises.

Certificate of Incorporation is defective when not containing statutory requirements, p. 333.

Cited to same effect in People v. Reclamation Dist., 121 Cal. 529, noted under Harris v. McGregor, 29 Cal. 125; Los Angeles etc. Band v. Spires, 126 Cal. 544, quoting McCallian v. Hibernia etc. Soc., 70 Cal. 167; People v. Golden Gate Lodge, 128 Cal. 263, noted under People v. Stockton etc. Co., 45 Cal. 313; McCallion v. Hibernia etc. Soc., 70 Cal. 168, as to benevolent society; People v. Montecito etc. Co., 97 Cal. 278, 33 Am. St. Rep. 173 (and see note, 179), when articles defectively acknowledged under section 292 of the Civil Code: Bates v. Wilson, 14 Colo. 157, where no directors appointed, but holding objector estopped, by participation in proceedings, from denying de facto existence.

**52 Cal. 334-336. PARRY v. KELLEY.**

Mortgage by Married Woman is as valid as though she were then unmarried, p. 335.

Cited to same effect in Marlow v. Barlew, 53 Cal. 461, as to her separate property, holding, further, that ordinary form of decree could be entered against her on its foreclosure; Brickell v. Batchelder, 62 Cal. 639, discussing statutory changes in married women's power to mortgage.

**52 Cal. 336-337. SEDGWICK v. SEDGWICK.**

Claims Against Estate—Evidence.—Section 1880 of the Code of Civil Procedure does not apply to defendant's testimony in action by executrix against him, p. 337.

Cited to same effect in McPherson v. Weston, 85 Cal. 97, as to evidence of indorser after death of coindorsee who was co-defendant in action by indorsee; but see Moore v. Schofield, 96 Cal. 488, distinguishing main case, and rejecting evidence in favor of plaintiff, of obligor after death of co-obligor and substitution of his administrator. Cited, also, in note on general subject to Harris v. Bank, 1 Am. St. Rep. 211.

**52 Cal. 338-339. CATANICH v. HAYES.**

Judgment-roll does not include notice of overruling of demurrer, p. 339.

Cited to same effect in Jacks v. Baldez, 97 Cal. 92, holding judgment entered after failure to serve such notice, not void upon face of record; Orange etc. Bank v. Duncan, 133 Cal. 255, noted under Dimick v. Campbell, 31 Cal. 240.

**52 Cal. 341-345. SMITH v. GEORGE.**

**Malicious Prosecution for Civil Action.**—Power to bring such action discussed but not decided, p. 344.

Cited in *Easton v. Bank*, 66 Cal. 126, 56 Am. Rep. 78, holding such action maintainable although nothing further done in first action than issuance of summons.

**52 Cal. 345-348. SMITH v. REID.**

**Execution.**—Sale under void execution is void and should be vacated, p. 348.

Cited in *Merguire v. O'Donnell*, 139 Cal. 8, noted under *Cross v. Zane*, 47 Cal. 602.

**52 Cal. 348-350. McFADDEN v. ELLMAKER.**

**Declarations of Grantor**, as to title, while in possession, are admissible against grantee, p. 349.

Cited to same effect in dissenting opinion in *People v. Blake*, 60 Cal. 511, holding, however, grantors not in possession at time thereof, main opinion admitting evidence; *Moore v. Jones*, 63 Cal. 16, as to declarations of husband that property presumptively community was bought with wife's funds; *Frink v. Roe*, 70 Cal. 318, holding, however, admissibility of such declarations subject to other rules of evidence, and excluding same because not competent as varying written instrument; *Sharp v. Blankenship*, 79 Cal. 413, as to declarations regarding location of boundary line. Cited, also, in note to *Horton v. Smith*, 42 Am. Dec. 632, on general subject.

**52 Cal. 350-352. RHODA v. ALAMEDA COUNTY. S. C. 69 Cal. 524.**

**Claim Against County** cannot be sued upon until presented to supervisors and rejected, p. 351.

Cited to same effect in *Bigelow v. Los Angeles*, 141 Cal. 507, noted under *McCann v. Sierra Co.*, 7 Cal. 121; *Powder etc. Co. v. Commissioners*, 9 Mont. 152, as to claim for repayment of taxes. Distinguished in *Vincent v. Lincoln Co.*, 62 Fed. Rep. 707, under local statute, holding rule not applicable to claim on bonds or coupons or judgment thereon. Cited, also, in *Jackson Township v. Farlow*, 75 Ind. 121, on point that claimant against county must show compliance with all statutory prerequisites.

**Pleading.**—"Due" performance can be alleged only in cases authorized by statute, p. 351.

Cited in dissenting opinion in *Church v. Walker*, 10 S. Dak. 98, main opinion sustaining averment of "due" election.

**Judgment by Default** for plaintiff was reversed for insufficiency of complaint, p. 352.

Cited in support of such rule in *Swain v. Burnette*, 76 Cal. 301, reversing judgment for defendant for plaintiff's failure to amend, where complaint was sufficient.

Party claiming benefit of statutory privilege must state facts creating it, p. 352.

Cited in *Miller v. Dailey*, 136 Cal. 217, but sustaining petition in mandamus to compel reinstatement of pupil.

**52 Cal. 355-363. ELLIOTT v. LEOPOLD MINING CO.**

Instance of Proper Joinder of parties, pp. 362, 363.

Approved in *Coombe v. Knox*, 28 Mont. 206, applying rule in action to enforce claim for attorney's fees.

**52 Cal. 363-371. SILVEY v. HODGDON.**

Trust as to Personality may be proved by parol, p. 367.

Cited to same effect in *Roach v. Caraffa*, 85 Cal. 445, as to trust in relation to rents collected.

**52 Cal. 371-372. BRADY v. KELLY.**

Street Assessment.—Judgment in action covering two lots should specify amount due on each and make each liable for its respective debt, p. 372.

Cited to same effect in *Malone v. Big Flat etc. Co.*, 76 Cal. 583, allowing joinder in same action of liens against mining claims worked together as one mine; *Gillis v. Cleveland*, 87 Cal. 218, holding foreclosure of street assessment lien on one lot not a bar to foreclosure of lien on another lot of same owner, and ruling similarly as to allowance of distinct attorney's fees in such actions.

**52 Cal. 373-378. YOAKUM v. BROWER.**

State Lands.—Act of 1872 (stats. 1871-2, p. 587) validates certificate of purchase but title does not pass until payment, p. 376.

Cited to same effect in *Rowell v. Perkins*, 56 Cal. 225, construing act and amendment, Stats. 1877-8, p. 914; *Muller v. Carey*, 58 Cal. 542, also construing said act and Stats. 1869-70, p. 352; *Barker v. Freeman*, 85 Cal. 534, approving main case as to construction of act.

**52 Cal. 378-380. SOMO v. OLIVER.**

Land Contest Before Surveyor General cannot be made where patent has been issued, p. 379.

Cited to same effect in *McFaul v. Pfankuch*, 98 Cal. 402, holding, however, action maintainable on reference by surveyor general after issuance of certificate of purchase and distinguished in *Gilson v. Robinson*, 68 Cal. 542, on same point.

**52 Cal. 380-382. PEOPLE v. BENSON.**

**Cross-Examination.**—Bias or prejudice of witness may be inquired into, p. 381.

Cited to same effect in People v. Wasson, 65 Cal. 540. Cited in Estate of Kasson, 127 Cal. 500, holding cross-examination improperly limited; State v. Ellsworth, 30 Oreg. 153, as to feelings of hostility and prejudice; dissenting opinion in People v. O'Brien, 66 Cal. 604, discussing scope of cross-examination of defendant when testifying in own behalf, main opinion holding improper a cross-examination beyond matters brought out in direct; Anderson v. Black, 70 Cal. 229, holding question proper but rejection not reversible error under circumstances.

**52 Cal. 383-384. EVERETT v. EVERETT.**

**Divorce—Alimony.**—Nature of award discussed, p. 394.

Cited in Smith v. Smith, 142 Cal. 637, sustaining order setting aside allowance under facts stated.

**Permanent Alimony** cannot be granted wife when divorce granted for her offense, p. 394.

Cited to same effect in Ex parte Spencer, 83 Cal. 464, 17 Am. St. Rep. 269, discussing nature of such alimony and construing section 137, 139 Civil Code. Distinguished in Bohnert v. Bohnert, 91 Cal. 431, as to alimony pendente lite for and pending appeal, although divorce granted for wife's adultery; Glynn v. Glynn, 8 N. D. 237; note to 60 Am. Dec. 670.

**52 Cal. 385-399. COBURN v. AMES.** 28 Am. Rep. 534; 57 Cal. 204; Coburn v. Goodall, 72 Cal. 502, 1 Am. St. Rep. 77.

**Eminent Domain.**—Road is not legally established until damages are paid or properly deposited, p. 393.

Cited to same effect in Tehama County v. Bryan, 68 Cal. 61, holding sufficient appropriation shown of damages awarded owner.

**Ejectment** Lies by owner of fee against trespasser, although land subject to public easement, p. 394.

Cited to same effect in Weyl v. Sonoma etc. Co., 69 Cal. 206, as to railway built in street, and holding owner of land bounded thereby presumed to own to its center; People v. Foss, 80 Mich. 564. 20 Am. St. Rep. 535, justifying assault on such trespasser for cutting grass on defendant's land, used as public highway; N. P. Ry. Co. v. Lake, 10 N. Dak. 546, sustaining ejectment by owner of fee in street against one who has erected buildings thereon; Illinois etc. Co. v. Bilot, 109 Wis. 427, 83 Am. St. Rep. 911, discussing rights of parties as against one building on land covered by waters of inland lake.

**Appurtenances.**—Wharf and chute held not to be, under facts, p. 396.

Cited in note on general subject to Strickler v. Todd, 13 Am. Dec. 660.

**Wharf.—Riparian Owner** may construct in front of property when navigation not impeded thereby, p. 397.

Cited to same effect in *Lincoln v. Davis*, 53 Mich. 386, 51 Am. Rep. 122, on point that fishing stakes may be erected in bed of great lakes where not impeding navigation. Cited, also, in note on general subject to *Miller v. Mendenhall*, 19 Am. St. Rep. 232.

**Nuisances.—Ejectment** may be brought by state for wharf constructed in navigable water below low water line, p. 398.

Cited to same effect in *San Francisco Sav. Union v. Petroleum etc. Co.*, 144 Cal. 138, noted under *Blanc v. Klumpke*, 29 Cal. 159; note to *Revell v. People*, 69 Am. St. Rep. 281, on general subject; *Concord Co. v. Robertson*, 66 N. H. 19, discussing rights of littoral owners to cut and remove ice from stream flowing into pond owned by another. Cited, also, in note to *Stetson v. Faxon*, 31 Am. Dec. 132, on private actions for public nuisances.

**Note.—Case** is also cited at 58 Cal. 356, and 58 Cal. 360, but by error for S. C. 57 Cal. 204.

#### 52 Cal. 399-403. **FRAZIER v. CROWELL.**

**Finding in Ejectment** that defendant has good and perfect title is one of fact and will support judgment, p. 401, 402.

Cited to same effect in *Murphy v. Bennett*, 68 Cal. 530, as to finding of ownership of building destroyed; *Daly v. Sorocco*, 80 Cal. 368, as to like finding in action to quiet title, and holding findings as to evidence of ownership unnecessary; *Dam v. Zink*, 112 Cal. 93, as to finding that judgment did not constitute lien.

**Justice's Judgment is no Lien** unless statutory requirements followed, p. 401, 402.

Cited to same effect under local acts in *Hamilton v. Thompson*, 3 Kan. App. 15, holding judgment not properly transferred to district court.

#### 52 Cal. 403-406. **ESTATE OF STOTT.**

**Decree Settling Probate Account** is conclusive of amount with which executor chargeable, where no appeal taken, p. 406.

Cited to same effect in *Estate of Grant*, 131 Cal. 429, denying right of court to set aside order settling former account on hearing of subsequent one; *Reynolds v. Brumagim*, 54 Cal. 258, holding administrator not liable thereafter to successor for failure to recover assets of estate; *Tobelman v. Hildebrandt*, 72 Cal. 315, as to liability to heirs for fraudulent omission of debt from himself to estate, where they had knowledge thereof at time of settlement of account; *In re Couts*, 87 Cal. 483, as to allowance in account of claim as part of expenses of administration, and holding same not attackable on proceedings to sell

property to pay such claim; Estate of Marshall, 118 Cal. 381, as to moneys paid for tomb for decedent, and holding further as to other items of account; Estate of Fernandez, 119 Cal. 582, as to payment of debts before order therefor, and construing section 1646, Code of Civil Procedure.

**Executor is Chargeable with Interest with annual rests on moneys of estate mingled and used with his own business, p. 406.**

Cited to same effect in Gassell v. Gassell, 147 Cal. 513, Guardianship of Dow, 133 Cal. 450, and Estate of Hamilton, 139 Cal. 672, sustaining charging of guardian with compound interest, under facts stated; Scheib v. Thompson, 23 Utah, 567, where guardian, without authority, purchased land with ward's money and value depreciated when ward attained majority, ward entitled to recover from guardian money invested, with commercial rate of interest prevailing during infancy, compounded annually; Estate of Clark, 53 Cal. 359, although no fraud shown and executor always able to return such funds; In re Hilliard, 83 Cal. 428, charging executor with legal interest, where settlement unreasonably delayed, and funds so mingled, although not shown to have derived any profit therefrom; In re Esrich, 85 Cal. 101, charging guardian with compound interest for conversion and use of ward's money for long period; and on same point, Estate of Cousins, 111 Cal. 445, disallowing, however, more than legal rate of interest compounded, where no showing made that more was earned through such use; Miller v. Lux, 100 Cal. 615, as to excess of family allowance paid by executors to widow, their coexecutrix, before order of allowance by court.

#### 52 Cal. 407-411. YOUNG v. WRIGHT.

**Justices' Courts cannot be given jurisdiction by statute of actions in rem against trespassing animals (Stats. 1873-4, p. 50), p. 408.**

Cited to same effect in Sutherland v. Sweem, 53 Cal. 49, holding proceedings thereunder void and inadmissible in replevin for animals so seized. Distinguished in Dangberg v. Ruhensroth, 26 Nev. 460, district court has no jurisdiction over action for trespass by defendant's sheep on plaintiff's land to his damage in sum of one hundred dollars.

**Pleading of Judgment should be that it was duly given and made, not duly "rendered," p. 410.**

Cited to same effect in Judah v. Fredericks, 57 Cal. 391, holding insufficient an allegation that plaintiff is a "duly qualified and acting executrix"; Los Angeles v. Mellus, 59 Cal. 451, ruling similarly as to allegation that order was "made" by mayor, but holding insufficiency cured by amendment. Distinguished in Stockton v. Knock, 73 Cal. 428, where answer did not plead judgment; Harmon v. Comstock etc. Co.,<sup>9</sup> Mont. 248, as to allegation that judgment was "rendered," and ruling similarly as to allegation that attachment was "procured"; Willits v. Walter, 32 Or. 415, construing local statutes and holding allegation

insufficient; distinguished in San Francisco etc. Co. v. Hartung, 138 Cal. 230, and held inapplicable to order appointing executor.

**Pleading.—Statutory Form** must be precisely followed when prescribed, p. 411.

Cited to same effect in Mazkewitz v. Pimentel, 83 Cal. 451, as to grounds of motion for new trial.

52 Cal. 411-412. **WIGGINTON v. MARKLEY.**

**Supervisors' Records.—Mandamus** will not lie to compel correction by clerk, p. 411.

Cited in note on general subject to Sawyer v. Manchester etc. Co., 13 Am. St. Rep. 554, sub nom. Wood v. Orford.

52 Cal. 412-414. **WOOD v. ORFORD.**

**Wife's Antenuptial Note** does not bind husband, p. 414.

Cited in note on general subject to Cole v. Seeley, 60 Am. Dec. 280.

**Married Woman's Note** is binding upon her, p. 414.

Cited to same effect in Brickell v. Batchelder, 62 Cal. 639, discussing statutory changes as to her power to contract.

**Note.—Case** is cited in note 13 Am. St. Rep. 554, by mistake for Sawyer v. Manchester etc. Co., supra.

52 Cal. 414-417. **WILLIAMS v. CONROY.**

**Appeal will not Lie** from interlocutory decree in action to settle trustee's accounts, p. 417.

Cited to same effect in Etchebarne v. Roeding, 89 Cal. 521, as to order setting aside prior order settling referee's account, and holding, further, such order not appealable, as made after final judgment. Distinguished in Arnold v. Sinclair, 11 Mont. 567, 28 Am. St. Rep. 494, holding decree final in action for co-partnership dissolution, although reference ordered. Note citations: Williams v. Field, 60 Am. Dec. 437, on final judgments.

52 Cal. 417-419. **SWIFT v. CANAVAN.**

**Findings must Cover** issues raised by affirmative allegations of answer, p. 419.

Cited in Dieterle v. Bekin, 143 Cal. 688, reversing judgment and remanding cause for findings on issues omitted; Cassidy v. Cassidy, 63 Cal. 353, as to counter charges in answer in divorce.

**Additional Findings** on undetermined issues ordered by appellate court on remand, p. 419.

Cited in San Diego etc. Co. v. Neale, 78 Cal. 65, on point that new trial may be granted in lower court as to part of issues.

**52 Cal. 420-422. GLASCOCK v. ASHMAN.**

Additional Findings on undetermined issues ordered by appellate court on demand, p. 422.

Cited in Duff v. Duff, 101 Cal. 4, on point that trial court may order new trial on single issue; Lake v. Bender, 18 Nev. 373, as to new trial on property issues in divorce suit.

**52 Cal. 424-426. WILKINSON v. MERRILL. S. C. 56 Cal. 560.**

Decision of Land Department under act of 1866 is conclusive as against United States and applicant subsequent to listing to state, p. 426.

Cited to same effect in Mace v. Merrill, 56 Cal. 555, 556, as to validity of location of school warrant; Sullivan v. Shanklin, 63 Cal. 250, holding patentee of state bound thereby and construing section 3572 of the political code; Menotti v. Dillon, 167 U. S. 718, restricting conclusiveness, however, to matters of fact alone, but not of law.

**52 Cal. 427-428. McGUIRE v. QUINTANA.**

General Denial in mechanic's lien suit by subcontractor will not allow introduction of evidence that work not properly done by contractor, p. 428.

Cited to same effect in Michalistschke v. Wells etc. Co., 118 Cal. 690, as to contract limiting carrier's liability in action against it for nondelivery.

**52 Cal. 428-430. LAKE v. LAKE.**

Patent to Husband during coverture is his separate property when based on his possession thereof before marriage, p. 430.

Cited to same effect in In re Lamb, 95 Cal. 405, as to homestead patent where application made before marriage and term of residence completed during coverture; Estate of Boody, 119 Cal. 405, where title initiated before marriage.

**52 Cal. 430-434. BRANDT v. WHEATON.**

Action to Quiet Title under section 738 of the Code of Civil Procedure is one in equity, p. 434.

Cited to same effect in Hancock v. Plummer, 66 Cal. 338, holding further, jury not demandable therein notwithstanding plea of statute of limitations; Reynolds v. Lincoln, 71 Cal. 186, discussing misjoinder of parties defendant therein; Benson v. Shotwell, 87 Cal. 60, applying thereto maxim that he who seeks equity must do equity; Montana Ore etc. Co. v. Boston etc. Min. Co., 27 Mont. 309, defendant in action under Code of Civil Procedure to determine adverse interests in realty

is not entitled to jury. Note citations: Scott v. Onderdonk, 67 Am. Dec. 112, on general subject.

General Verdict in Equity Case is to be disregarded by court, p. 434.

Cited to same effect in Warring v. Freear, 64 Cal. 56, discussing effect of general and special verdicts in such action; and see Richardson v. Eureka, 110 Cal. 446, on point that express findings are necessary in such case (injunction against nuisance) unless waived; concurring opinion in Simpson v. Harris, 21 Nev. 376, holding insufficiency, however, waived by failure to object thereto.

Action to Quiet Title is Maintainable, although title is in United States, p. 434.

Cited to same effect in Orr v. Stewart, 67 Cal. 277, as to action between mortgagee and mortgagor of homestead entry; Wilson v. Triumph etc. Co., 19 Utah, 74, 75 Am. St. Rep. 723, but holding possession by alien insufficient as against qualified locator; Davidson v. Calkins, 92 Fed. 239, denying jurisdiction of federal court in action to quiet title to mining claim brought against one in possession by claimant out of possession; and on same point cf. Cosmos etc. Co. v. Gray Eagle Oil Co., 112 Fed. 20.

#### 52 Cal. 435-437. WHITE v. ADAMS.

Judgment against Married Woman is not void where coverture not pleaded, p. 437.

Cited to same effect in Vantilburg v. Black, 3 Mont. 468, holding, further, as to relief from such judgment.

#### 52 Cal. 438-440. JARVIS v. SANTA CLARA VALLEY RAILROAD COMPANY.

Public Nuisance.—Private action will not lie for abatement unless special damage to plaintiff shown, p. 440.

Note citations: Stetson v. Faxon, 31 Am. Dec. 132, and Tate v. Ohio etc. Co., 71 Am. Dec. 312, on general subject.

#### 52 Cal. 440-442. DYER v. CHASE.

Demand for Street Assessment must be only for amount legally chargeable against property, p. 441.

Cited to same effect in Schirmer v. Hoyt, 54 Cal. 281, holding insufficient a demand against each of two lots for lump sum due from both; Donnelly v. Howard, 60 Cal. 292, where demand (following assessment) included charge not authorized, and holding, further, remedy by appeal to supervisors not exclusive; and see on last point Dyer v. Scalaminini, 69 Cal. 641, and Perine v. Forbush, 97 Cal. 312; Partridge v. Lucas, 99

Cal. 523; and *Ryan v. Altschul*, 103 Cal. 176, on point that assessment is not enforceable at all when entire and containing unauthorized charges.

**52 Cal. 442-445. SPRING v. HEWSTON.** S. C. Freeman v. Bellegarde, 108 Cal. 184, 49 Am. St. Rep. 78, construing same description.

**Description in Mortgage.**—Courses and distances yield to visible boundaries, p. 444.

Cited to same effect in *Castro v. Barry*, 79 Cal. 448, holding wrong course controlled by direction to go "down slough" to specified point.

**52 Cal. 445-446. MARQUARD v. WHEELER.**

**Surplusage in Verdict** may be disregarded when party not prejudiced thereby, p. 446.

Cited to same effect in *Hancock v. Buckley*, 18 Mo. App. 465, as to provision that costs be divided.

**52 Cal. 446-447. PEOPLE v. KERRICK.**

**Criminal Law—Reasonable Doubt.**—Conviction is improper unless jury satisfied beyond reasonable doubt that crime was committed by defendant, p. 447.

Cited to same effect, holding instructions erroneous, in *People v. Brown*, 56 Cal. 406; reported. 59 Cal. 345; *People v. Carrillo*, 70 Cal. 645; *State v. Ryan*, 12 Mont. 299, further stating conflict between main and prior cases; *People v. Cheong Foon Ark*, 61 Cal. 529, holding instruction improperly refused. Distinguished in *People v. Kaiser*, 119 Cal. 459, holding modification of instruction as to reasonable doubt immaterial, and sustaining it as modified; *State v. Anderson*, 10 Oreg. 461, sustaining instruction and refusal of another equally correct requested by defendant. Note citations: *Rippey v. Miller*, 62 Am. Dec. 183; *Burt v. State*, 48 Am. St. Rep. 574, on general subject.

**52 Cal. 447-449. SCHACHT v. ODELL.**

**Undertaking on Appeal.**—Defect in affidavit may be remedied by filing new bond in supreme court, p. 449.

Cited to same effect in *Gross v. Kelleher*, 73 Cal. 640, denying power of supreme court, however, to grant order for filing of stay bond in unlawful detainer case where original stay granted below was dissolved for failure of sureties to justify on former bond; but see *Tompkins v. Montgomery*, 116 Cal. 123, as to appeal from ordinary money judgment.

**Undertaking on Appeal.**—Failure of sureties to justify does not render appeal ineffectual, but avoids stay of execution. p. 449.

Cited to same effect in *Tompkins v. Montgomery*, 116 Cal. 123, and *Hill v. Finnigan*, 54 Cal. 314, holding void second appeal taken there-

after on theory that first was ineffectual; and see S. C. 54 Cal. 494, permitting filing of further bond in supreme court; Wittram v. Crommelin, 72 Cal. 90, holding further stipulation extending time to justify not a waiver of objection that transcript not filed in time; State v. District Court, 22 Mont. 456, 74 Am. St. Rep. 622, discussing liability of sureties.

**52 Cal. 452-455. PEOPLE v. JEFFERSON.**

Indictment for Burglary need not specify degree, but may charge crime generally, p. 453.

Cited to same effect in People v. Barnhart, 59 Cal. 383, as to information, holding, further, that jury can find defendant guilty of either degree on such indictment.

Indictment for One Crime will sustain conviction for less offense also charged therein, p. 454.

Cited in People v. Muhlnner, 115 Cal. 306, on point that defendant cannot complain of verdict more favorable to him than warranted by evidence.

Indictment for Burglary will not sustain conviction for "house breaking," p. 454.

Cited in People v. Smith, 136 Cal. 209, on point that indictment for burglary in first degree will not sustain conviction in second degree.

**Burglary—Plea of Guilty.**—Under such plea court cannot sentence defendant without first fixing degree, p. 454.

Cited to same effect in People v. Travers, 73 Cal. 582, holding proper practice to be to remand for new trial, for omission in this respect, and People v. Lee Yune Chong, 94 Cal. 386, on same point, where defendant convicted by jury, refusing to discharge defendant, although no new trial demanded.

**52 Cal. 459-462. WEED v. MAYNARD.**

**Statutory Construction.**—Title of act may be referred to where legislative intent ambiguous, p. 462.

Cited to same effect in Ex parte Kohler, 74 Cal. 45, construing Pure Wine Act (Stats. 1887, p. 46.)

Mandamus was Granted to compel issuance of warrant by auditor, p. 462.

Cited in support of such rule in Hunt v. Broderick, 104 Cal. 315, holding remedy by appeal to supervisors not applicable under facts.

**52 Cal. 463-464. EX PARTE CAHILL.**

Discharge from Custody on failure of grand jury to indict is no bar to subsequent prosecution for same offense, p. 464.

Cited to same effect in *Ex parte Clarke*, 54 Cal. 418, where charge had been resubmitted to grand jury under section 941 of the Penal Code; *Kallock v. Superior Court*, 56 Cal. 235, 236, holding second information not barred by dismissal of first because testimony not reduced to writing; *Dulin's Case*, 91 Va. 722, where first indictment dismissed on court's own motion for want of jurisdiction and without prejudice to further proceedings.

**52 Cal. 465-466. ESTATE OF CUNNINGHAM.**

**Will—Undue Influence.**—Evidence of intoxication at time of execution is admissible in connection with facts showing such influence, p. 466.

Note citation: *In re Hess's Will*, 31 Am. St. Rep. 690, on general subject.

**52 Cal. 466-468. YOUNG v. HOGLAN.**

**Partnership Accounting—Parties.**—All partners are necessary parties to action involving settlement of firm accounts, p. 468.

Cited to same effect in *Wright v. Ward*, 65 Cal. 529, as to action for accounting brought against one partner by execution purchaser of interest of other.

**52 Cal. 468-470. SWEENEY v. MAYNARD.**

**Mandamus will Lie to compel issuance of warrant by auditor**, p. 470.

Cited to same effect in *Hunt v. Broderick*, 104 Cal. 315, holding remedy by appeal to supervisors not applicable under facts.

**52 Cal. 470-471. PEOPLE v. BEVANS.**

**Locus Delicti must be proven as charged, under plea of not guilty**, p. 470.

Cited to same effect in *People v. Aleck*, 61 Cal. 138 (see, also, note to opinion).

**52 Cal. 471-473. OPERA HOUSE AND ART BUILDING ASSOCIATION v. BERT.**

**Unlawful Detainer against Tenant, for breach of covenant other than payment of rent, will not lie unless three days' notice to quit served**, p. 473.

Distinguished under amended statute in *Kelly v. Teague*, 63 Cal. 69, as to covenant to pay taxes, holding no notice necessary.

**52 Cal. 473-475. DE BAKER v. CARILLO.**

**Tax Paid under Protest cannot be recovered back, though illegal, when threatened sale would not create cloud**, p. 475.

Cited to same effect in *Cooper v. Chamberlain*, 78 Cal. 453, where property not assessed, description being defective; *El Paso Co. v. Colorado Springs Co.*, 5 Colo. App. 281, where one having contract interest in land paid taxes by check which was not paid, and on land being advertised for sale owner paid them by own check, owner could not recover from county amount of his check; *Newcomb v. Davenport*, 86 Iowa, 294, where tax was merely irregular and collection could have been enjoined. Note citations. *Mayor v. Lefferman*, 45 Am. Dec. 164, on general subject.

#### 52 Cal. 476-477. CARDINELL v. BENNETT.

Replevin cannot be Maintained unless plaintiff has either general or special property in article, p. 477.

Cited to same effect in *Keech v. Beatty*, 127 Cal. 283, denying right of action under facts stated; *Garcia v. Gunn*, 119 Cal. 317, as to claim and delivery, but sustaining action under facts.

Sale.—Contract to buy personality on performance of certain conditions gives no general or special ownership, p. 477.

Cited in *Yukon etc. Co. v. Gratto*, 136 Cal. 540-542, denying right to bring trover by persons contracting for building of barge to be paid for in installments; *Hilmer v. Hills*, 138 Cal. 139, distinguishing between "cash" and "credit" sales; *Keech v. Beatty*, 127 Cal. 183, denying right to trover under facts stated.

#### 52 Cal. 479-481. PEOPLE v. GAINES.

Record on Appeal—Presumption.—It will not be presumed that proceedings in criminal case were had beyond such as shown in transcript, p. 480.

Cited in *People v. Moore*, 103 Cal. 511, on point that error will be deemed prejudicial in criminal cases unless record shows otherwise; *People v. Kelly*, 120 Cal. 273, construing record as to admission of prior convictions.

Plea to Indictment is necessary to sustain conviction, p. 481.

Cited to same effect in *People v. Monaghan*, 102 Cal. 233, holding plea not waived by trial without objection; *Territory v. Clayton*, 8 Mont. 14, holding, however, record amendable at subsequent term to show making of plea, when actually made. Distinguished in *People v. Miller*, 137 Cal. 645, holding due arraignment sufficiently shown.

#### 52 Cal. 482-487. LINCOLN v. ALEXANDER. 28 Am. Rep. 639.

Guardian of Minor has authority coupled with interest, p. 486.

Cited to same effect in *De Greayer v. Superior Court*, 117 Cal. 645, denying right of court to order funds to remain in specified bank, to be withdrawn only as authorized by court.

52 Cal. 487-489. **TULLY v. BAUER.** See *De Greayer v. Superior Court*, 117 Cal. 645; *State v. Omaha etc. Bridge Co.*, 113 Iowa, 34.

52 Cal. 489-491. **BROWN v. RICE.**

**Jurisdiction.**—Legality of tax is not involved in action to recover back from toll-gatherer excessive tolls collected, p. 491.

Cited to same effect in *Perkins v. Ralls*, 71 Cal. 88, as to action against assessor for damages caused by his wrongful and fraudulent assessment.

52 Cal. 493-495. **GLASCOCK v. ASHMAN.**

**Sheriff—Sureties on Bond** are not liable for statutory penalty for neglect to levy, p. 495.

Cited to same effect in *Boyd v. Desmond*, 79 Cal. 256, as to failure to file return, limiting their liability to actual loss sustained thereby; and *Robinson v. Kinney*, 2 Idaho, 1174, ruling similarly as to liability for failure to pay over moneys collected under writ. Note citations: *People v. Palmer*, 95 Am. Dec. 437, on general subject.

52 Cal. 495-496. **REESE v. CORCORAN.**

**Contradictory Findings** will not support judgment, p. 496.

Cited to same effect in *Learned v. Castle*, 78 Cal. 460, holding findings contradictory in action for abatement of nuisance; *Gwin v. Gwin*, 5 Idaho, 277, applying rule in will contest; *Kountz v. Kountz*, 15 S. Dak. 69, applying rule when in suit to quiet title, findings of fact as to ownership are conflicting; *Walley v. Bank*, 14 Utah, 322, as holding that special control general, findings.

52 Cal. 496-500. **PENRY v. RICHARDS.** Rereported, 52 Cal. 672.

**Deed—Description.**—Official map referred to in deed becomes part thereof and may be identified by parol, p. 499.

Cited to same effect in *Pettigrew v. Dobbelaar*, 63 Cal. 397, sustaining description; *Cadwalader v. Nash*, 73 Cal. 45, as to reference to official map, but rejecting parol evidence when reference is equally applicable to two different maps; *Whiting v. Gardner*, 80 Cal. 80, holding, further, that survey controls map in case of conflict, when both referred to in deed.

**Description in Deed.**—Monuments control courses and distances, p. 499.

Cited to same effect in *Shaffer v. Weech*, 34 Kan. 599, sustaining instruction, as to location of road; *Turnbull v. Schroeder*, 29 Minn. 51, as to conflict with distances, and holding, further, location of such monuments provable if destroyed.

**General Citation.**—*McKinney v. Doane*, 155 Mo. 298.

**52 Cal. 502-503. BABCOCK v. BRIGGS.**

Attachment will not lie in action to recover moneys of plaintiffs lost to defendant by plaintiffs' clerk in gambling, p. 503.

Cited to same effect in Tabor v. Mining Co., 4 McCrary, 301, 14 Fed. Rep. 638, as to action for taking ore from mines although trespass waived and suit brought as for money had and received.

**52 Cal. 504-506. JENNER v. STROH.**

Complaint in Action on Undertaking must allege happening of act for which undertaking given, p. 506.

Cited to same effect in Coburn v. Pearson, 57 Cal. 308, as to undertaking to prevent completion of levy.

**52 Cal. 508-508. LARRABEE v. SELBY.**

Contempt Proceedings.—Issue of title to property cannot be tried therein, p. 508.

Cited to same effect in *Ex parte Hollis*, 59 Cal. 413, as to refusal to turn over to assignee in insolvency property claimed adversely to insolvent; *Ex parte Casey*, 71 Cal. 271, as to refusal to deposit moneys in bank, for like reason, under section 1459 et seq. of the Code of Civil Procedure; *Rodgers v. Pitt*, 89 Fed. 426, holding respondent guilty of contempt for violation of injunction against withdrawal of water. Note citations: *Morley v. Green*, 42 Am. Dec. 114, on jurisdiction over strangers to action.

Contempt.—Appeal does not lie from order, p. 508.

Cited to same effect in *Tyler v. Connolly*, 65 Cal. 31, although fine imposed was within pecuniary jurisdiction of appellate court. Note citation: *Mullin v. People*, 22 Am. St. Rep. 417, on general subject.

General Citation.—*In re Wolford*, 10 Kan. App. 286.

**52 Cal. 509-513. ROSENCRANS v. ELLSWORTH.**

Ejectment.—Intervention by third parties is not allowed when sought to quiet title as against plaintiff to property not involved between original parties, p. 511.

Cited in *McNamara v. Crystal etc. Co.*, 23 Wash. 32, noted under *Porter v. Garrissimo*, 51 Cal. 559.

**52 Cal. 513-515. HAWKINS v. MANSFIELD GOLD MINING COMPANY.**

Corporation.—Promoters' Agreements prior to incorporation do not bind company, p. 515.

Cited to same effect in *Hardware Co. v. Hardware Co.*, 87 Ala. 211, 13 Am. St. Rep. 26, and note 29, cited under *Morrison v. Mining Co.*, 52 Cal. 306.

Notes Cal. Rep.—167.

**52 Cal. 516-517. CHESTER v. COLBY.**

Writ of Prohibition will not be issued until question of jurisdiction submitted to and passed upon by court a quo, p. 517.

Distinguished and criticised in Havemeyer v. Superior Court, 84 Cal. 391, 402, 405, 18 Am. St. Rep. 233, 242, 244, stating general rules of issuance at page last cited.

**52 Cal. 521-538. OAKLEY v. STUART.**

Public Lands are "Surveyed" when lines run in field and monuments or marks established, p. 535.

Overruled as dictum in Medley v. Robertson, 55 Cal. 398, holding survey not completed till approved by surveyor general.

**52 Cal. 538-540. ESTATE OF BARTON.**

Administrator with Will Annexed need not be selected in order prescribed by (original) section 1365 of the Code of Civil Procedure, where no executor named in will, p. 540.

Distinguished, under amendment of section, in Estate of McDonald, 118 Cal. 278, granting such letters to public administrator over sister and executrix of deceased executrix of decedent's will; but see Estate of Von Buncken, 120 Cal. 343, holding amendment not applicable where no executor named in will.

**52 Cal. 540-550. NISBET v. NASH.**

Mining Partnership.—Conveyances of interest of one partner substitutes transferee in his place, p. 550.

Note citation: Skillman v. Lachman, 83 Am. Dec. 106, on general subject; p. 109, on dissolution of such partnership.

**52 Cal. 550-553. BIHLER v. PLATT.**

Patent to Mexican Grant relates back to filing of petition for confirmation, p. 552.

Cited in McDonald v. McCoy, 121 Cal. 67, noted under Moore v. Wilkinson, 13 Cal. 478.

**52 Cal. 553-561. HARRIS v. SUPERVISORS.**

Statutory Construction.—Act held permissive and not mandatory, p. 560.

Cited in Brady v. Bartlett, 56 Cal. 358, holding act to be directory and stating general rules of construction.

Statutory Construction.—Title may be resorted to to determine intention, when body of act ambiguous, p. 560.

Cited to same effect in *Swann v. Jenkins*, 82 Ala. 483, discussing value thereof in construction.

**52 Cal. 561-565. McCARTHY v. POPE.**

Statute of Frauds does not apply to agreement by one who has contracted by parol to buy lands, to allow another to purchase in his stead when deed is made to latter, p. 565.

Cited to same effect in *Byers v. Locke*, 93 Cal. 496, 27 Am. St. Rep. 215, holding agreement stated not to be within statute as relating to sale of real property; dissenting opinion in *Kelly v. Ruble*, 11 Oreg. 114, discussing right to vendor's lien of holders of parol contracts.

**52 Cal. 565-568. BILLINGS v. DREW.**

Fraudulent Conveyances.—Instruction held erroneous under pleadings, p. 567.

Note citation: *Clark v. Foxcroft*, 20 Am. Dec. 315, on general subject.

Inconsistent Defenses.—Answer may in special defense admit allegations previously denied, p. 568.

Cited to same effect in *Banta v. Siller*, 121 Cal. 418, noted under *Bell v. Brown*, 22 Cal. 678; *Botto v. Vandament*, 67 Cal. 334, holding judgment on pleadings improper where such answer filed; *McDonald v. Southern California etc. Co.*, 101 Cal. 213, holding such admissions not evidence against defendants on issues tendered on other defenses; and *Miles v. Woodward*, 115 Cal. 316, on same point; *Meyers v. Merillion*, 118 Cal. 359, as to denials in answer and admissions in cross-complaint, and holding demurrer to answer based on such inconsistency improperly sustained; *Lake Shore etc. Co. v. Warren*, 3 Wyo. 137, holding denials not qualified by subsequent admissions in other pleas. Distinguished in *McLaughlin v. Alexander*, 2 S. Dak. 236, holding admissions in one defense available as to denials in another, where not made unavoidably for presentation of such defenses.

**52 Cal. 568-577. ESTATE OF McCausland.**

"Claim or Demand" against Estate within section 1880 of the Code of Civil Procedure does not include claim for family allowance, p. 576.

Cited to same effect in *Stuttmeister v. Superior Court*, 72 Cal. 489, as to demand of attorney for services rendered administrator, construing section 963 of the Code of Civil Procedure; *Meyers v. Reinstein*, 67 Cal. 92, admitting testimony of cestui in action to enforce resulting trust against executors of deceased trustee; *Booth v. Pendola*, 88 Cal. 43, ruling similarly as to action to enforce mechanic's lien; *Verdier v. Roach*, 96 Cal. 472, holding, however, covenant of indemnity a contingent claim to be presented, although no breach had yet occurred; *In re Welch*, 106

**52 Cal. 605-606. PULLIAM v. CHEROKEE FLAT BLUE GRAVEL COMPANY.**

Action to Quiet Title.—Defendant's possession is not shown by application to purchase land from United States, p. 606.

Distinguished in Goodwin v. McCabe, 75 Cal. 588, admitting swamp land certificates to show color of title in entry, in action of ejectment.

**52 Cal. 606-611. EX PARTE FRANK.** 28 Am. Rep. 642.

License of Occupations.—Power of city to "license and regulate" includes power to levy and collect license tax, p. 609.

Cited to same effect in Ex parte Braun, 141 Cal. 206, sustaining license tax under freeholders' charter; San Jose v. San Jose etc. Co., 53 Cal. 481, as to street railroad, although line extended beyond city limits. Note citation: Oil City v. Oil City etc. Co., 31 Am. St. Rep. 773, on general subject.

Requisites of municipal ordinances as to validity, stated, p. 609.

Cited to same effect in South Pasadena v. Terminal etc. Co., 109 Cal. 321, holding void an ordinance regulating rates of transportation of street railway connecting city with another; Champer v. Greencastle, 138 Ind. 349, 46 Am. St. Rep. 396, holding unreasonable an ordinance regulating place of sale of liquors; Swindell v. State, 143 Ind. 166, on point that statute must be followed in enactment of ordinances; Meyers v. Railroad Company, 57 Iowa, 558, 42 Am. Rep. 52, holding unreasonable an ordinance regulating speed of trains; Des Moines etc. Co. v. Des Moines, 90 Iowa, 772, ruling similarly, as to ordinance regulating method of constructing sewers; Campbell v. Cincinnati, 49 Ohio St. 474, on point that provision as to reading of ordinance is mandatory and failure to pursue it avoids the ordinance; Kirkham v. Russell, 76 Va. 965, holding void, as unreasonable, ordinance as to elections; Laundry Ordinance Case, 7 Saw. 531, 13 Fed. Rep. 232, ruling similarly as to ordinance directed against Chinese laundries.

Municipal License Ordinance will not be declared invalid unless clearly in violation of law, p. 610.

Cited to same effect in Ex parte Mirande, 73 Cal. 373, sustaining license for grazing and herding sheep, and discussing grounds of invalidity generally.

Question of validity of municipal ordinance is one of law for court, p. 610.

Cited to same effect in Merced County v. Fleming, 111 Cal. 51, excluding evidence as to effect of ordinance to show its unreasonableness; Greensboro v. Ehrenreich, 80 Ala. 582, 60 Am. Rep. 131 (cited in note to Train v. Boston etc. Co., 59 Am. Rep. 117), holding ordinance void prohibiting sale of bedclothes, et cetera.

Municipal Ordinance.—Discrimination between merchants in same place will render invalid, p. 610.

Cited in dissenting opinion in *Rode v. Siebe*, 119 Cal. 524, discussing constitutionality of sections 3820, 3824, Political Code, holding ordinances void under facts, in *Cairo v. Feuchter*, 159 Ill. 162, as to license on wholesale liquor dealers; *Graffty v. Rushville*, 107 Ind. 510, 57 Am. Rep. 135, as to nonresident hawkers and peddlers; *Citizens etc. Co. v. Elwood*, 114 Ind. 338, as to grant to one company of exclusive right to use streets; *Indianapolis v. Bieler*, 138 Ind. 37, as to exemption of wholesale dealers from tax; *Simrall v. Covington*, 90 Ky. 450, 29 Am. St. Rep. 402, as to discrimination against nonresident insurance companies' agents; *Sipe v. Murphy*, 49 Ohio St. 547, as to ordinance imposing special auctioneer's license where goods sold were brought from another city. Distinguished in *In re Zhizhuzza*, 147 Cal. 333, upholding Oakland ordinance providing for exclusive removal of garbage by city or its employees, to be consumed in city crematory; *Ex parte Haskell*, 112 Cal. 420, holding ordinance not void, though discriminating between traveling salesmen and those having fixed local places of business; note citation: *Robinson v. Mayor*, 34 Am. Dec. 637, on general subject.

**Void Ordinance.**—Person convicted for violation of will be discharged on habeas corpus, p. 611.

Cited to same effect in dissenting opinion in *Ex parte Henshaw*, 73 Cal. 509, as to imprisonment for contempt under void judgment.

**52 Cal. 611-616. DAVIS v. RUSSELL. 28 Am. Rep. 647.**

**Warehouse Receipt.**—Assignment of operates as transfer of title to goods covered, p. 615.

Cited to same effect in *Cavallaro v. Texas etc. Co.*, 110 Cal. 359, 52 Am. St. Rep. 102, discussing negotiability thereof; *Durr v. Hervey*, 44 Ark. 307, 51 Am. Rep. 597, sustaining transferee's power to pledge for own advances; *Conrad v. Fisher*, 37 Mo. App. 368, holding, further, attorneyment by warehouseman unnecessary. Note citations: *Rice v. Cutler*, 84 Am. Dec. 754, on general subject; *Griggs v. Day*, 32 Am. St. Rep. 715, on rights of holders of collaterals.

**Factor's Acts—Pledge.**—Factor who is assignee of warehouse receipts may pledge goods, p. 616.

Note citations: *Bigelow v. Walker*, 58 Am. Dec. 166, on general subject.

Pre-existing debt is sufficient as consideration, p. 616.

Cited to same effect in *Stroud v. Thomas*, 139 Cal. 276, noted under *Frey v. Clifford*, 44 Cal. 342; *Sackett v. Johnson*, 54 Cal. 109, as to consideration for indorsement of note. Note citations: *Bank v. Strauss*, 14 Am. St. Rep. 583, on right of collecting bank over paper sent for collection; *Griggs v. Day*, 32 Am. St. Rep. 713, on rights over collateral security.

**General Citation.**—*Rock Springs Nat. Bank v. Luman*, 6 Wyo. 151.

**52 Cal. 616. PEOPLE v. GRIFFIN.**

Criminal Law.—Declarations of third person not made in defendant's presence are inadmissible against him, p. 617.

Cited in People v. Warren, 134 Cal. 204, reversing verdict for admission thereof.

**52 Cal. 617-619. CLARK v. CUSHING.**

Execution Against Partner.—Entire firm property may be seized thereunder, p. 619.

Note citations: Morrison v. Blodgett, 29 Am. Dec. 663, Russell v. Cole, 57 Am. St. Rep. 439, on general subject, and 452 as to rights of purchaser of interest.

**52 Cal. 619-620. PEOPLE v. BLANKENSHIP.**

Statute of Limitations—Fraud.—Action to cancel patent because obtained by fraud must be brought within three years after discovery of facts, p. 620.

Cited to same effect in Murphy v. Crowley, 140 Cal. 147, but holding three years' statute inapplicable under facts stated, and see dissenting opinion, p. 152; Duff v. Duff, 71 Cal. 530, discussing period in relation to fraud concerning real property; Watkins v. Bryant, 91 Cal. 503, as to action to annul judgment obtained by fraud, but holding facts as to discovery not sufficiently pleaded; People v. Noyo etc. Co., 99 Cal. 461, as to action to cancel patent, and holding relator not to be the "aggrieved party" within the code section; Castro v. Geil, 110 Cal. 295, 52 Am. St. Rep. 85, as to action to cancel deed obtained by undue influence, and holding facts of discovery not sufficiently pleaded; Morgan v. Morgan, 10 Wash. 107, as to action to set aside deed from wife to husband because fraudulently obtained. Distinguished and criticised in Goodnow v. Parker, 112 Cal. 446, holding five years' limitation applicable to action to quiet title, although based on mistake.

**52 Cal. 622-623. COVARRUBIAS v. SUPERVISORS.**

Removal of Officer.—Appeal operates as supersedeas in proceedings under Stats. 1873-4, p. 623.

Cited to same effect in Day v. Gunning, 125 Cal. 529, holding Code of Civil Procedure, section 949, inapplicable to judgment entered in election contest; Morton v. Broderick, 118 Cal. 485, as to removal of supervisors for failure to fix water rates (Stats. 1881, p. 54). Distinguished in Woods v. Varnum, 83 Cal. 48, as to proceedings under sections 770 and 772 of the Penal Code. Note citation: Caldwell v. Wilson, 61 Am. St. Rep. 674, on general subject.

**52 Cal. 624-628. SNOW v. KIMMER.**

Illegal Contracts—Pre-emption Laws.—Agreement not to oppose pre-emptioner's application in land office is void, p. 628.

Cited to same effect in Mitchell v. Cline, 84 Cal. 415, as to agreement to share sham mining locations, and refusing to impose constructive trust in conveyance made in violation of such contract. Note citations: Tyler v. Green, 87 Am. Dec. 134, on general subject.

**52 Cal. 629-630. BABCOCK v. GIBBS.**

**Homestead.**—Actual residence at time of declaration is essential, p. 630.

Cited to same effect in Dorn v. Howe, 52 Cal. 635, holding homestead invalid under facts; Aucker v. McCoy, 56 Cal. 527, ruling similarly as to "additional" homestead; Pfister v. Dassey, 68 Cal. 573, sustaining finding of validity on conflict of evidence, and holding further such residence not provable by general understanding and report; Lubbock v. McMann, 82 Cal. 228, 16 Am. St. Rep. 110, holding further as to addition of second dwelling to homestead property, and as to method of abandonment; Tromas v. Mahlman, 92 Cal. 7, 8, holding actual residence not shown by mere temporary occupation; Power v. Burd, 18 Mont. 26, holding homestead not created under facts.

**52 Cal. 630-635. DORN v. HOWE.**

**Homestead.**—Actual residence at time of declaration is essential, p. 635.

Cited to same effect in Auker v. McCoy, 56 Cal. 527; Pfister v. Dassey, 68 Cal. 573; Lubbock v. McMann, 82 Cal. 228; 16 Am. St. Rep. 110, cited under Babcock v. Gibbs, 52 Cal. 629; King v. Gotz, 70 Cal. 239, sustaining homestead as to portion resided on, although including other property also; and see on same point in In re Crowey, 71 Cal. 305, as to probate homestead.

**52 Cal. 636-638. GRAFF v. MESMER.**

**Guardian's Account.**—Settlement may be had in probate court even after letters revoked, p. 637.

Cited in Reynolds v. Brumagim, 54 Cal. 258, on point that settlement of administrator's account is conclusive as against his successor; and Trumper v. Cottons, 109 Cal. 255, 256, ruling similarly as to conclusiveness of settlement of guardian's account as against sureties on bond; citing main case further as to their liability; Silva v. Santos, 138 Cal. 541, but sustaining jurisdiction of equity to vacate settlement of account when procured by fraud; Cook v. Ceas, 143 Cal. 225, discussing limitations of action on guardian's bond.

**52 Cal. 638-643. WETZLER v. FITCH.**

**Accounts of Deceased Executor** cannot be settled in probate court on application of his executor, p. 643.

Cited to same effect in In re Allgier, 65 Cal. 230, as to accounts of deceased guardian, holding jurisdiction solely in court of equity: Cross

v. Baskett, 17 Oreg. 86, holding administrator of administrator not compellable by probate court to account in original estate, and on same point in Reed v. Wilson, 73 Wis. 504; Moulton v. Smith, 16 R. I. 129, 27 Am. St. Rep. 730, holding such accounts properly settled in equity, and bill not barred by facts stated. Note citations: Commonwealth v. Stub, 51 Am. Dec. 534, on judgments against executors; Deck v. Gerke, 73 Am. Dec. 559, on equity jurisdiction in probate matters; Peel v. McCarthy, 8 Am. St. Rep. 684, on general subject.

#### 52 Cal. 645-650. SIMPSON v. CASTLE.

**Mortgage Foreclosure—Redemption.**—Deficiency judgment is not lien on property as to right of redemption, when purchased by other than mortgagor, p. 648.

Cited to same effect in Black v. Gerichten, 58 Cal. 58, denying right of holder of such judgment to redeem from proper prior redemptioner: Hervey v. Krost, 16 Ind. 276, construing local statute, and holding generally as to subsequent mortgagee's right to redeem; Horn v. Bank, 125 Ind. 394, 21 Am. St. Rep. 241 (and note 246), on point that where sale is made to satisfy two judgments no redemption can be had although both are not satisfied; and on same point in Anderson v. Anderson, 129 Ind. 574, 28 Am. St. Rep. 212, holding, further, as to legislative power to repeal redemption laws. Distinguished in Pollard v. Harlow, 138 Cal. 392, construing later statutes, and Flanders v. Aumack, 32 Or. 23, 67 Am. St. Rep. 506 (and note, page 514), and held inapplicable under local statutes.

#### 52 Cal. 650-653. BARBER v. BARNES.

**Dissolution of Partnership** is not affected by seizure of firm property under attachment, p. 652.

Cited in note to Breaux v. Le Blanc, 69 Am. St. Rep. 416, on general subject.

#### 52 Cal. 653-655. THOMPSON v. CORPSTEIN.

"Estray Cattle" are not such as are under herders' care, although casually straying therefrom, p. 654.

Cited to same effect in Beeson v. Tice, 17 Ind. App. 83, construing "running at large" under local statutes. Note citations: Wright v. Clark, 28 Am. Rep. 501, and Stewart v. Hunter, 8 Am. St. Rep. 272, on general subject.

#### 52 Cal. 655-656. WALLACE v. MILLER.

**Deed—Construction.**—Conveyance of given number of acres out of larger tract makes grantee tenant in common in proportion to fractional interest so conveyed, p. 656.

Cited to same effect in Cullen v. Sprigg, 83 Cal. 62, as to deed of lot of specified area lying in specified block; Doboney v. Wowack, 1 Tex. Civ. App. 362, construing similar deed.

**52 Cal. 658-661. ESTATE OF FREY.**

**Community Property—Election.**—Widow does not renounce right to share in community by claiming and taking under will, p. 661.

Cited to same effect in In re Gwin, 77 Cal. 315, holding widow not estopped by facts from making election, even if it were necessary; In re Gilmore, 81 Cal. 242, 243, stating general rules as to construction of devise of such property and of election.

**Will.—Husband can devise only one-half of common property,** p. 661.

Cited in Estate of Wickersham, 138 Cal. 363, noted under Beard v. Knox, 5 Cal. 256.

**52 Cal. 661-664. BILLINGS v. EVERETT.**

**Failure of Consideration of Note.**—Verbal understanding that note should not be paid on happening of specified event is sufficient to show failure of consideration, p. 663.

Cited to same effect in concurring opinion in Langan v. Langan, 89 Cal. 195, holding, however, evidence is admissible to add to considerations stated; Jefferson v. Hewitt, 103 Cal. 630, on facts similar to those in main case.

**Findings are Insufficient to Support Judgment where material issue omitted therefrom,** p. 664.

Cited to same effect in Mahoney v. Braverman, 54 Cal. 571, and Gull etc. Co. v. School District, 1 N. Dak. 509, holding judgment reversible therefor, and on same point in Brady v. Bartlett, 56 Cal. 364; Cassidy v. Cassidy, 63 Cal. 353, as to issues raised by counter charges in divorce suit; Murphy v. Bennett, 68 Cal. 531, holding, however, findings unnecessary on affirmative defenses where plaintiff not prejudiced by failure; San Diego etc. Co. v. Neale, 78 Cal. 65, on point that new trial may be granted in lower court as to part of issues; and Duff v. Duff, 101 Cal. 4, on same point, sustaining such granting although motion made generally; and Lake v. Bender, 18 Nev. 373, as to new trial in divorce case as to property issues alone.

**52 Cal. 664-672. FROST v. MEETZ.**

**New Trial—Notice of Intention.**—Regularity as to form and time of giving will be presumed from recital of giving contained in statement, p. 670.

Cited to same effect in Randall v. Duff, 79 Cal. 123, holding giving of

notice shown from recitals in statement; *Harrigan v. Lynch*, 21 Mont. 42, noted under *Williams v. Gregory*, 9 Cal. 76.

**52 Cal. 672-675. PENRY v. RICHARDS.** Rereported, 52 Cal. 496.

**Description in Deed.**—Map referred to in deed becomes part thereof for purposes of description, p. 675.

Cited to same effect in *People v. Blake*, 60 Cal. 508, discussing dedication, and holding such map to control imaginary lines or streets; dissenting opinion in *Crosby v. Dowd*, 61 Cal. 606, as to reference in mortgage and foreclosure proceedings to records of deeds.

**Description.**—Monuments will control courses and distances, p. 675.

Cited to same effect in *Irrigation District v. DeLappe*, 79 Cal. 355, as to petition for formation of irrigation district, and holding statement of distance controlled by location of stake; *Bullard v. Kempff*, 119 Cal. 14, as to conflict between fences and description in assessment roll; and see *Oglesby v. Santa Barbara*, 119 Cal. 119, discussing survey considered in main opinion.

## **VOLUME LIII.**

By CHARLES T. BOONE.

**Revised to include citations to Volume 147, by CHARLES L. THOMPSON.**

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### **53 Cal. 9-10. WENTWORTH v. MILLER.**

**Sale.**—Under contract to pay part of crop as rent, and to give lessor possession of whole crop until rent is paid, a sale by lessee does not pass title as against the lessor, p. 10.

Cited, in approval of the doctrine, in Sunol v. Molloy, 63 Cal. 370; Howell v. Foster, 65 Cal. 173; so in De Vaughn v. Howell, 82 Ga. 344, 14 Am. St. Rep. 164; Consolidated Land etc. Co. v. Hawley, 7 S. Dak. 233; and in Horseley v. Morse, 5 Tex. Civ. App. 345, maintaining the right of the parties to contract in regard to their ownership in the crops raised. Distinguished in Stockton Sav. and Loan Soc. v. Purvis, 112 Cal. 243, 53 Am. St. Rep. 216, in which case the contract was construed as intended to create a secret lien, as security for the payment of the rent, without complying with the Chattel Mortgage Act. Disapproved in Lawrence v. Phy, 27 Oreg. 510, holding that the lessee in such case has an interest in the crop that he may sell or mortgage before condition broken; Sanford v. Modini, 51 Neb. 735, quoting Consolidated etc. Co. v. Hawley, 7 S. Dak. 233; 37 Am. Dec. 321, note; and 14 Am. St. Rep. 166, note.

### **53 Cal. 13-14. KELLEY v. MCKIBBEN.**

**Judgment** must be certain as to property recovered, p. 14.

Cited to same effect in Cooke v. Aguirre, 86 Cal. 483, holding that a judgment merely describing the property as "two stallions," and not referring to any pleading or other paper for further description, is bad for uncertainty.

### **53 Cal. 15-16. CROGHAN v. SPENCE.**

**Parties to Foreclosure.**—Persons claiming title adversely to mortgagor are not proper parties to a foreclosure suit, p. 16.

Affirmed in Houghton v. Allen, 75 Cal. 105, holding that a title claimed adversely to the mortgagor cannot be litigated in an action to foreclose the mortgage; Murray v. Etchepare, 129 Cal. 319, 321, noted under San Francisco v. Lawton, 18 Cal. 474; note to 68 Am. St.

Rep. 355; so, in approval of the doctrine in *Wells v. Francis*, 7 Colo. 415; *Faubion v. Rogers*, 66 Tex. 475; *Wolf v. Harris*, 20 Tex. Civ. App. 101; to the contrary in *Bradley v. Parkhurst*, 20 Kan. 465. Distinguished in *Johnston v. San Francisco Sav. Union*, 75 Cal. 140, 7 Am. St. Rep. 132, holding that while adverse interests cannot properly be litigated in foreclosure, yet if they are put in issue, tried and determined, the judgment is not void on a collateral attack. Cited in 89 Am. Dec. 434, extended note, discussing the subject.

#### 53 Cal. 16-18. ALLEN v. TIFFANY.

**Probate Jurisdiction.**—Probate judge has exclusive jurisdiction to determine state of accounts between guardian and ward, p. 17.

Affirmed in *Brodrrib v. Brodrrib*, 56 Cal. 565. Cited in *Silva v. Santos*, 138 Cal. 541, and *Cook v. Ceas*, 143 Cal. 225, 234, noted under *Graff v. Mesmer*, 52 Cal. 638; *Hautzch v. Massolt*, 61 Minn. 364, as to nature of accounting between guardian and ward; 73 Am. Dec. 560, note, to ruling stated.

Action against guardian for default will not lie in district court until after an accounting and settlement in probate court, p. 18.

Cited in *Chaqueute v. Ortet*, 60 Cal. 599, 600, in approval; so in *Bisbee v. Gleason*, 21 Neb. 539; and *Hantzeh v. Massolt*, 61 Minn. 364, to same effect; *Reither v. Murdock*, 135 Cal. 198, holding surety not liable when guardian's account was not legally settled; 51 Am. Dec. 534, note.

#### 53 Cal. 18-19. PIERCE v. FELTER.

Action to determine adverse claim may be maintained by the owner of an estate in land less than an estate in fee, p. 19.

Approved in *Stephenson v. Deuel*, 125 Cal. 663, sustaining action by one in possession under sheriff's deed; *Mora v. Le Roy*, 58 Cal. 10, action by sole corporation, alleged in complaint to be the owner seised in fee of the land in controversy in trust for the use and benefit of the Roman Catholic Church; *McKinnie v. Shaffer*, 74 Cal. 616, action by owner of homestead interest to quiet his title thereto against the claim of others; *Pennie v. Hildreth*, 81 Cal. 130, action by administrator to quiet title to real estate which belonged to his intestate; *Wisconsin etc. R. R. Co. v. Land Co.*, 71 Wis. 102, action of ejectment for lands brought before issue of patent from United States, against persons making an unlawful claim to the lands under a tax deed fair on its face; *Rincon Water etc. Co. v. Anaheim etc. Water Co.*, 115 Fed. 548; 67 Am. Dec. 112, note.

#### 53 Cal. 23-24. LIVINGSTON v. MORGAN.

Justice of Peace has jurisdiction of action for trespass on real

property, if the damages are laid at less than three hundred dollars, p. 24.

Cited in *Schroeder v. Wittram*, 66 Cal. 640, holding that the jurisdiction of a justice's court is not ousted by the fact that the title to land is incidentally called in question on the trial, but that, in order to occasion a loss of jurisdiction, the title or right of possession must be directly involved.

**53 Cal. 24-26. LORENZ v. JACOBS.** S. C. 59 Cal. 262, 263.

**Partition.**—Whether a partition is to be ordered or a sale directed, an interlocutory decree must be first entered, definitely ascertaining the rights and interests of the respective parties, p. 26.

Ruling affirmed in *Emeric v. Alvarado*, 64 Cal. 618. So, to same effect in *Grant v. Murphy*, 116 Cal. 431, 432, 58 Am. St. Rep. 191. Cited in *Wood v. Etiwanda etc. Co.*, 122 Cal. 156, discussing time for appeal from judgment under Code of Civil Procedure, section 939; *Quirk v. Rooney*, 130 Cal. 509, on point that interlocutory decree is final if not duly appealed from; *Bell v. Staacke*, 137 Cal. 308, dismissing appeal taken before entry of judgment; *In re Rose*, 80 Cal. 168, bearing on appeal from interlocutory order.

**53 Cal. 26-28. CHRISTIE v. CHRISTIE.**

**Nonsuit.**—Order refusing, is not appealable, p. 28.

Affirmed in *Witkowski v. Hern*, 82 Cal. 607.

**53 Cal. 28-29. AMBROSE v. McDONALD.**

**Attorney at Law** has no authority, in the absence of express instructions, to compromise a claim of his client, or receive any money thereon, until after suit brought, p. 29.

Cited in *Whipple v. Whitman*, 13 R. I. 514, 43 Am. Rep. 45, in approval, but holding that a fair and judicious compromise made by the attorney with the assent of the party in interest, although without the knowledge of the plaintiff of record, will not be disturbed; 76 Am. Dec. 262, extended note, discussing "powers of attorney at law."

**53 Cal. 31-32. JAMES v. CENTER.**

Judgment of dismissal may be entered by clerk, although a cross-complaint has been filed, if it does not set up a counter claim, p. 32.

Explained and distinguished in *McLeran v. McNamara*, 55 Cal. 511, in which case the clerk did not enter judgment of dismissal but there was a stipulation on file upon which he might have done so, and the court could not have vacated the judgment so entered; *Page v. Superior Court*, 76 Cal. 375, to same effect; *Boyd v. Steele*, 6 Idaho, 629,

omission to enter judgment of dismissal does not defeat plaintiff's dismissal of action; 83 Am. Dec. 254, note.

**Counterclaim.**—Matter constituting, must arise out of the transaction set forth in the complaint, and be connected with the subject of the action, p. 32.

Approved in Carpenter v. Hewel, 67 Cal. 590, action of ejectment, wherein defendant, after denying ownership of plaintiff, and averring title in himself, set up a lease of the premises in controversy by himself to plaintiff, and an indebtedness by the latter for rent accruing under the lease, and it was held that such indebtedness could not be pleaded as a counterclaim; so in Wigmore v. Buell, 116 Cal. 97, as to claim for damages in consequence of trespass of cattle upon lands of defendant contiguous to the demanded premises in ejectment, set up as a counterclaim; Leavitt v. Peabody, 62 N. H. 192, holding that in an action by indorsee in good faith for value of an overdue promissory note, the maker cannot set off debts due to him from the payee.

#### 53 Cal. 32-34. SHAFTER v. EVANS.

**Negligence.**—If the circumstances out of which negligence is said to arise have been established by proof, or can be shown, the ultimate fact of negligence is an inference to be drawn therefrom by the jury without the aid of experts, p. 33.

Ruling approved in Chidester v. Ditch Co., 59 Cal. 202; McKeever v. Market Street R. R. Co., 59 Cal. 300; Conniff v. San Francisco, 67 Cal. 47; McDermott v. Railroad Co., 68 Cal. 34; Sappenfield v. Railroad Co., 91 Cal. 60, and Redfield v. Oakland etc. Ry. Co., 112 Cal. 225.

#### 53 Cal. 34-35. SMITH v. LAWRENCE.

**Findings.**—Fact of nonwaiver of, must affirmatively appear in the statement or bill of exceptions. p. 35.

Cited in Carr v. Cronan, 54 Cal. 601, in approval; so in Weeks v. Gold Min. Co., 73 Cal. 602; Gordon v. Donahue, 79 Cal. 503; Goyhinech v. Goyhinech, 80 Cal. 411; Garr v. Spaulding, 2 N. Dak. 419; Chandler v. Kennedy, 8 S. Dak. 59; Haynes v. Roberts, 4 Utah, 406, all to the effect that if the record on appeal does not show that findings were not waived, a waiver will be presumed in support of the judgment; Baker v. Baker, 139 Cal. 628, holding mere specification of the absence of findings as error of law, insufficient.

#### 53 Cal. 35-36. McDONALD v. HAZELTINE.

**Negligence.**—Common employer is not liable for injuries to servant caused by negligence of fellow servant, unless he was negligent in the selection of the servant in fault, p. 36.

Approved in *Brown v. Sennett*, 68 Cal. 228, 58 Am. Rep. 10, holding that the foreman of a gang of men to whom a stevedore delegates the entire management of the work of unloading a vessel, with full discretion to control and supervise it, is not a fellow servant with his subordinate employees, and the stevedore is liable if an injury results to such an employee through the negligence of the foreman; *Congrave v. Railroad Co.*, 88 Cal. 365, 368, holding that a brakeman and a conductor on a railroad train are "fellow-servants" within the ruling stated; *Daves v. Southern Pacific Co.*, 98 Cal. 22, 35 Am. St. Rep. 136, in approval. So in *Stevens v. Railroad Co.*, 100 Cal. 567, as to who are fellow-servants in the same general business, and holding that a fireman, and oiler, and engineer of a ferry-boat, are such. Cited in 36 Am. Dec. 280, extended note, discussing the subject at length.

**53 Cal. 37-38. JOHNSON v. SQUIRES.**

**Findings.**—General finding of all issues in favor of either party is insufficient, p. 37.

Cited to same effect in *Harlan v. Ely*, 55 Cal. 344; *McCormack v. Phillips*, 4 Dak. Ter. 534, as asserting the rule that the court or a jury should find or pass upon all the issues; *Alameda Co. v. Crocker*, 125 Cal. 103, but holding findings sufficiently certain; *Krug v. Lux etc. Co.*, 129 Cal. 323, noted under *Ladd v. Tully*, 51 Cal. 277; so in *Gull River Lumber Co. v. School District*, 1 N. Dak. 509; *Maynard v. Insurance Assn.*, 14 Utah, 462, as authority that when facts are found it must affirmatively appear therefrom that they support the judgment.

**53 Cal. 39-43. UNGER v. ROPER.**

**Ejectment.**—In action of, where defendant pleads statute of limitations, a judgment-roll, in a forcible entry case, is admissible as evidence of defendant's adverse possession, p. 43.

Cited, holding to same effect, in *McCourtney v. Fortune*, 57 Cal. 619; *Fredericks v. Judah*, 73 Cal. 608.

**53 Cal. 44-45. BRADY v. KING.**

**Street Assessment.**—Legislature has no power to validate a void assessment for street work, p. 45.

Affirmed in *Fanning v. Schammel*, 68 Cal. 430; and cited to ruling in 76 Am. Dec. 529, extended note on subject.

**Same.**—Nor has the legislature power to levy an assessment not uniform and equal, in an incorporated city, for the purpose of street improvement, p. 45.

Cited to same effect in *People v. Houston*, 54 Cal. 539, case of levy by the legislature of an assessment upon the lands of a reclamation district. Followed in *People v. McCune*, 57 Cal. 153; *Kelly v. Luning*, 76 Cal. 311, declaring invalid act of March 19, 1878.

Notes Cal. Rep.—168.

**53 Cal. 46-49. WEIL v. JONES.**

Where Parties to Contract use word "rescind" when it was evident they meant "cancel," it will be construed to mean cancel, p. 47.

Approved in Clark v. American etc. Min. Co., 28 Mont. 476, holding option contract not to have been rescinded where deeds placed in escrow were on default of installments demanded and received by defendant.

**53 Cal. 49-50. BRADY v. FEISEL.**

**Street Assessment.**—Sufficiency of notice inviting sealed proposals for grading of street, p. 50.

Explained in S. C. again, 54 Cal. 181, upon appeal from order denying motion for new trial, and affirming judgment and order of court below.

**53 Cal. 52-54. SAN FRANCISCO v. QUACKENBUSH.**

**Street Assessment.**—Assessment must show locality of street assessed, and if a diagram is used it must contain such references as will enable the description to be understood, p. 53.

Cited to same effect in Blanchard v. Ladd, 135 Cal. 216, but holding description sufficient when collected from all the record; People v. Mahoney, 55 Cal. 289, assessment held void because of insufficiency in description of the lands; so in Labs v. Cooper, 107 Cal. 657. Distinguished in Whiting v. Quackenbush, 54 Cal. 310, and holding that the point of a scroll on such diagram is as competent as the barb of an arrow to denote north.

**53 Cal. 54-55. LUCE v. ZEILE.**

**Statute of Frauds.**—Parol contract to answer for the debt of another is void, p. 55.

Cited in Kansas City Sewer Pipe Co. v. Smith, 36 Mo. App. 623, sustaining validity of a similar contract, on the ground that the promise was original and not collateral; 95 Am. Dec. 254, extended note, as so holding.

**53 Cal. 55-56. CREIGHTON v. EVANS.**

**Waters.**—Right of riparian owner to have the water of a stream run through his land is a vested right, any interference with which imports damages, p. 56.

Cited in Lux v. Haggin, 69 Cal. 274, 393, in approval of the doctrine.

**53 Cal. 56-58. CHIDESTER v. CONSOLIDATED PEOPLE'S DITCH COMPANY.**

**Instructions.**—If contradictory, error in one instruction will not be held to be cured by the other instruction, p. 58.

Cited to same effect in *Black v. Sprague*, 54 Cal. 272, and holding that in such case the judgment must be reversed. So in *Haight v. Vallet*, 89 Cal. 249; 23 Am. St. Rep. 468; and *Sappenfield v. Railroad Co.*, 91 Cal. 59.

#### 53 Cal. 58-59. PEOPLE v. JONES.

**Robbery.**—Under indictment for, jury may find defendant guilty of larceny, p. 59.

Affirmed in *People v. Nelson*, 56 Cal. 80; *People v. Chuey Ying Git*, 100 Cal. 439; *People v. Crowley*, 100 Cal. 480. Approved in *Haley v. State*, 49 Ark. 152. Cited in 70 Am. Dec. 190, extended note, discussing subject of robbery.

**Same.**—Indictment for robbery must aver every fact necessary to constitute larceny, and more, p. 59.

Cited in *People v. Crowley*, 100 Cal. 480, in approval; so in *People v. Ammerman*, 118 Cal. 25, as to necessity of stating the ownership of the property taken from the person robbed; 70 Am. Dec. 191, extended note, as to stating name of person, if known.

#### 53 Cal. 60-62. PEOPLE v. GREEN.

When viewing premises where offense is charged to have been committed, no person can be allowed to speak to the jury on any subject connected with the trial, p. 61.

Cited to same effect in *People v. Milner*, 122 Cal. 184, 185, as having been reversed in *People v. Bush*, 71 Cal. 602; *People v. Bush*, 68 Cal. 632, and holding that view by jury must be had in the presence of the defendant; S. C. again, 71 Cal. 606, holding that during the view, a person appointed by the court to show the jury the places named may point out and designate such places to the jury; *Garcia v. State*, 34 Fla. 334; and *State v. Lopez*, 15 Nev. 411, in approval of the ruling stated; so in 92 Am. Dec. 343, extended note on subject.

#### 53 Cal. 62-64. PEOPLE v. ROYAL.

Force is a necessary element in crime of rape, distinguishing crime of seduction from that of rape, p. 63.

Approved, recognizing the distinction in *People v. Fleming*, 94 Cal. 313; so in *State v. Charley Lung*, 21 Nev. 213, 216, 37 Am. St. Rep. 507, 509, holding, further, that the force necessary to complete the offense of rape may be constructive, as where sexual intercourse is had with a woman who is unconscious or mentally unable to fairly comprehend the nature and consequences of the sexual act. Cited in *State v. Carter*, 8 Wash. 277. See notes, 76 Am. St. Rep. 672 and 87 Am. Dec. 405.

**53 Cal. 65-86. PEOPLE v. McKELLER.**

Witnesses cannot be cross-examined as to any fact, collateral and irrelevant to the issue, merely for the purpose of contradicting him, p. 66.

Cited in Clinton v. State, 33 Ohio St. 34, in approval of the rule; so, in Union Pac. Ry. Co. v. Reese, 56 Fed. Rep. 291; People v. Rodriguez, 134 Cal. 142, reversing conviction therefor; 88 Am. Dec. 321, 322, note.

If a collateral or irrelevant question is put to a witness, his answer is conclusive against the party putting it, p. 66.

Followed in People v. Bell, 53 Cal. 120. Ruling approved in People v. Durrant, 116 Cal. 211; Pullen v. Pullen, 43 N. J. Eq. 138; Hart v. State, 15 Tex. App. 234; Fenstermaker v. Publishing Co., 12 Utah, 471; and State v. Payne, 6 Wash. 569.

**53 Cal. 66-87. PEOPLE v. BROWN.**

**Criminal Law.**—It is error to permit counsel to comment upon failure of accused to testify in his own behalf, p. 67.

Cited to same effect in State v. Chisnell, 36 W. Va. 667, but holding that where the court admonishes the jury to disregard the comments, it will not be ground for a new trial.

**53 Cal. 68-89. PEOPLE v. METHVIN.**

**Witness.**—For purpose of impeaching veracity of, it is not competent to base belief on personal knowledge as distinguished from general reputation, p. 69.

Cited to same effect in People v. Webster, 89 Cal. 574. Distinguished in People v. Ramirez, 56 Cal. 538, in which a similar question was asked and answered without objection.

**53 Cal. 69-74. REIDY v. SCOTT.**

Default set aside, where defendant made a mistake as to the day he was served with a copy of complaint and summons, p. 73.

Cited in Hanthorn v. Oliver, 32 Or. 63, 67 Am. St. Rep. 520, reversing order refusing to vacate default. See note 58 Am. Dec. 395. Distinguished in Williamson v. Cummings etc. Drill Co., 95 Cal. 653, case of mistake on part of defendant's attorney in marking time for answer, and it was held no error to refuse to set aside the default.

**53 Cal. 74-76. JACOBS v. SCOTT.**

**Husband and Wife.**—In action against husband for goods furnished wife, complaint must allege that the goods were sold and delivered to the husband, p. 76.

Cited in **Bashore v. Parker**, 146 Cal. 530, holding erroneous instruction that if husband permits wife to use property as her own for considerable time, she incurring obligations and obtaining credit on belief of creditors that property is her own, husband is estopped from claiming property as his own as against her creditors. Referred to as decided in accordance with the common-law rule in **Nissen v. Bendrixsen**, 69 Cal. 523, and holding the complaint sufficient under sections 174 and 175 of the Civil Code, notwithstanding the failure to allege that the goods were sold and delivered to the husband.

#### 53 Cal. 77-80. **HERSHEY v. DENNIS.**

**Redemption.**—Lien for docketed deficiency forms no basis of redemption of homestead premises, although the homestead was subject to mortgage, p. 80.

Cited in **Black v. Gerrichten**, 58 Cal. 58, in approval of the doctrine; **California Fruit Transp. Co. v. Anderson**, 79 Fed. Rep. 406, as authority that the homestead can be conveyed or encumbered only in the mode prescribed by law, and that under the laws of California, a mortgage of the homestead by the wife to secure the antecedent debt of the husband is not binding on her; 93 Am. Dec. 352, extended note, discussing subject of "estates and interests affected by judgment lien"; note to 67 Am. St. Rep. 516, on redemption.

**Execution Sale.**—Tender of redemption money defeats purchaser's lien, p. 80.

Cited in **Leet v. Armbruster**, 143 Cal. 668, 671, 672, applying rule to foreclosure sale and discussing effect of refusal of such tender.

#### 53 Cal. 84-85. **ELLIOTT v. PECK.**

**Estate of Decedent.**—In action to recover disallowed claim, the findings must show when the claim became due, p. 85.

Cited in **Maynard v. Insurance Assn.**, 14 Utah, 462, as authority that the findings of fact must support the judgment.

#### 53 Cal. 87. **PHIPPS v. HARLAN.**

Where answer sets up an affirmative defense the findings must respond thereto, p. 87.

Cited in **McCourtney v. Fortune**, 57 Cal. 619, **Cassidy v. Cassidy**, 63 Cal. 353, as authority that the findings must respond to all material issues made by the pleadings; **San Diego Land etc. Co. v. Neale**, 78 Cal. 65, as authority that upon an appeal from the judgment, the appellate court may order a new trial as to a part of the issues. So, to same effect, in **Lake v. Bender**, 18 Nev. 373. Approved in **Wilson v. Wilson**, 6 Idaho, 605, applying rule in foreclosure of mortgage.

**53 Cal. 88-90. BAGGS v. SMITH.**

**Findings.**—Material issues made by the pleadings must be responded to by the findings, p. 89.

Cited to same effect in *Knight v. Roche*, 56 Cal. 25, holding, also, that the findings must support the judgment.

**Same.**—After appeal taken, the court below has no authority to make new or further findings, p. 90.

Cited to same effect in *People v. Center*, 54 Cal. 237; *Wells, Fargo & Co. v. Smith*, 2 Utah, 53; *Mill Co. v. Johnston*, 5 Utah, 150. Distinguished in *Hayes v. Wetherbee*, 60 Cal. 399, in which case additional findings were filed prior to the entry of judgment, and it was held that they were not improperly filed.

**53 Cal. 90-97. WANZER v. SOMERS.**

**State Lands.**—Act of March 24, 1870, legalizing certain applications, for purchase of state lands, validated the defective applications covered thereby, p. 97.

Affirmed in *Rowell v. Perkins*, 56 Cal. 223.

**53 Cal. 97-99. HURD v. BARNHART.**

**Wrongful Attachment.**—Measure of damages is market value of use during detention, p. 99.

Cited in note to *Tisdale v. Major*, 68 Am. St. Rep. 269, on general subject.

**53 Cal. 99-102. BANK OF SAN LUIS OBISPO v. JOHNSON.**

**Foreclosure.**—In absence of express agreement that the principal shall become due, agreement for foreclosure upon failure to pay interest applies only to foreclosure for such interest, p. 102.

Cited and rule applied in *Byrne v. Hoag*, 116 Cal. 4. Distinguished in *Brickell v. Batchelder*, 62 Cal. 631, the clause in the mortgage being entirely different.

**53 Cal. 102-106. ATKINSON v. AMADOR AND SACRAMENTO CANAL COMPANY.**

**Statute of Limitations** runs against trespass upon a parcel of land not included in the original complaint, until amendment of complaint, including such parcel, pp. 105, 106.

Ruling approved and applied in *Jeffers v. Clark*, 58 Cal. 150, where a supplemental complaint was filed naming new parties defendant in foreclosure suit; Cited in *Nellis v. Pacific Bank*, 127 Cal. 168, noted under *Barber v. Reynolds*, 33 Cal. 501; *Frost v. Witter*, 132 Cal. 428, 84 Am. St. Rep. 59, noted under *Lorenzana v. Camarillo*, 45 Cal. 125;

**Schwartz v. Stock**, 26 Nev. 157, where complaint in suit brought against executrix alleged conversion by defendant, but by amendment conversion by testator alleged, and deceased had had exclusive control of property for more than four years prior to amendment, suit barred by limitations; **Bowen v. Needles Nat. Bank**, 79 Fed. Rep. 50, as to amendment of complaint by joining an additional cause of action.

**53 Cal. 106-110. SANTA CRUZ RAILROAD COMPANY v. SCHWARTZ.**

**Stock Subscription.**—Agreement to subscribe for shares of stock upon a stipulated condition is not binding, unless the condition be complied with, p. 10.

Affirmed in **California Southern Hotel Co. v. Russell**, 88 Cal. 280. Cited, recognizing the rule, in **Eaton v. Pacific Nat. Bank**, 144 Mass. 274; 81 Am. Dec. 398, extended note, treating of the subject.

**53 Cal. 113-118. KELLER v. LEWIS.**

Court of equity will never enforce a penalty or forfeiture, p. 118.

Cited in **McCormick v. Rossi**, 70 Cal. 475, case of failure on part of vendee to pay purchase price of land within time stipulated, reversing decree declaring a forfeiture of his rights.

**Vendor and Purchaser.**—If payments are not made when due, vendor may, if out of possession, bring ejectment and recover his possession, p. 118.

Affirmed in **Central Pacific R. R. Co. v. Mudd**, 59 Cal. 590; **Hicks v. Lovell**, 64 Cal. 21, 49 Am. Rep. 683, case of repudiation of contract by vendee, and refusal to surrender possession.

Vendor's remedy in equity for persistent default of vendee is to institute proceedings to foreclose his right to purchase under the contract, p. 118.

Approved in **Fairchild v. Mullan**, 90 Cal. 194; so in **Southern Pac. R. R. Co. v. Allen**, 112 Cal. 462. Cited in **Glock v. Howard etc. Co.**, 123 Cal. 11, 69 Am. St. Rep. 25, discussing rights of respective parties, under executory contract for sale of land; **Odd Fellows' Sav. Bank v. Brandler**, 124 Cal. 257, 258, noted under **Sparks v. Hess**, 15 Cal. 186.

**General Citation.**—In **Barsolou v. Newton**, 63 Cal. 227, in approval of form of judgment in principal case.

**53 Cal. 119-120. PEOPLE v. BELL.**

**Impeaching Witness.**—Where question is put to witness which is irrelevant to the issue, his answer is conclusive against the party who asked the question, pp. 119, 120.

Cited to same effect in **Faulkner v. Rondoni**, 104 Cal. 149; so in **Pullen v. Pullen**, 43 N. J. Eq. 138; **Hart v. State**, 15 Tex. App. 234; **State v. Payne**, 6 Wash. 569; **Union Pac. Ry. Co. v. Reese**, 56 Fed. Rep.

291; 88 Am. Dec. 322; extended note, discussing subject of impeachment of witnesses. See *People v. McKeller*, 53 Cal. 65, ante, 748.

**53 Cal. 123-129. MONTEREY AND SALINAS VALLEY RAILROAD COMPANY v. HILDRETH.**

**Corporation.**—Only subscribers named in articles of incorporation with amount subscribed can be compelled to pay a preliminary subscription, p. 129.

Cited in *San Joaquin etc. Water Co. v. Beecher*, 101 Cal. 79, as to liability on subscription for shares of capital stock of corporation, subsequently to be formed; so in *Marysville etc. Min. Co. v. Johnson*, 109 Cal. 195, 50 Am. St. Rep. 35. Referred to in *Same v. Same*, 93 Cal. 551, 27 Am. St. Rep. 221, and holding that where the complaint upon a subscription to the stock of a proposed corporation does not show upon its face that the articles of incorporation failed to state that the defendant was a subscriber to its stock, it is not liable to a general demurrer on that ground. Cited in 43 Am. Dec. 697, extended note, discussing the subject; 81 Am. Dec. 395, extended note, as authority that form of subscription is immaterial if the intent of the parties can be collected from the writing.

**53 Cal. 135-141. CAVE v. CRAFTS.** (See *Craig v. Crafton W. Co.* 141 Cal. 180.)

**Estoppel by Judgment** must be pleaded, p. 137.

Cited in *McLean v. Baldwin*, 136 Cal. 569, holding evidence thereof otherwise inadmissible.

**Water Rights.**—Interruption to adverse user of water, however slight, prevents acquisition of title by prescription, p. 138.

Cited in *Bree v. Wheeler*, 129 Cal. 147, and *Smith v. Water Co.*, 16 Utah, 203, noted under *American Co. v. Bradford*, 27 Cal. 368. But see *Montecito Valley Co. v. Santa Barbara*, 144 Cal. 596, defining "peaceable" use; *Alhambra Water Co. v. Richardson*, 72 Cal. 601, case of prescriptive right of diversion acquired by adverse user; *Ball v. Kehl*, 95 Cal. 613, in which case the evidence did not disclose an uninterrupted adverse user; *Faulkner v. Rondoni*, 104 Cal. 146, as to loss of right to use of water by adverse possession and user of another; *Authors v. Bryant*, 22 Nev. 247, in approval, as to character of adverse user necessary to establish a prescriptive right to the use of water; so in *Union Mill and Min. Co. v. Dangberg*, 81 Fed. 91, in approval of the ruling stated.

Act of Congress of 1866 confirmed water rights appropriated as against subsequent grantees of the United States, p. 138.

Approved and applied in *South Yuba Water etc. Co. v. Rosa*, 80 Cal. 337.

**Easements.**—The grant of a thing by implication carries with it what-

ever is incident thereto and necessary to its beneficial enjoyment, p. 140.

Affirmed in *Farmer v. Ukiah Water Co.*, 56 Cal. 15, and water right held to pass as appurtenant to the land conveyed. So, to same effect, in 69 Cal. 221, 58 Am. Rep. 561; *Eshelman v. Snyder*, 82 Ind. 502; *Frank v. Hicks*, 4 Wyo. 530; *Tucker v. Jones*, 8 Mont. 231; *Simmons v. Winters*, 21 Oreg. 45; 28 Am. St. Rep. 733; *Hindman v. Rizor*, 21 Oreg. 118, in approval of the doctrine; *Smith v. Cooley*, 65 Cal. 47, applied to grant of "mining right;" *Quinlan v. Noble*, 75 Cal. 252, case where owner of an entire estate conveys portions thereof to different purchasers; so in *Smith v. Corbit*, 116 Cal. 591; *Kennedy v. Burnap*, 120 Cal. 492; and *Life Ins. Co. v. Patterson*, 103 Ind. 588; 53 Am. Rep. 555; *North etc. Co. v. Coughanour*, 34 Or. 18, construing grant of water right; *Conant v. Irrigation Co.*, 23 Utah, 629, where stream rises in Idaho and flows into Utah, court of former state has no jurisdiction to determine title and right to use of water flowing in stream in Utah, and there diverted; *Scheel v. Alhambra Min. Co.*, 79 Fed. Rep. 825, grant of a tunnel right through a piece of ground. Cited in extended notes to 57 Am. Dec. 759, 763; 40 Am. Rep. 385.

If case is tried upon theory that the issues are properly joined in the trial court, and no objection or exception is there taken, it is too late to raise such objection on appeal, p. 141.

Ruling approved and applied in *Spiers v. Duane*, 54 Cal. 177, objection to sufficiency of answer for first time on appeal; so in *Crowley v. Railroad Co.*, 80 Cal. 630, objection that verdict was against an admission made by the pleadings. In *re Doyle*, 73 Cal. 569; *Kimball v. Richardson-Kimball Co.*, 111 Cal. 397, failure to object to introduction of evidence in court below; *Kirsch v. Kirsch*, 83 Cal. 635, failure to object to sufficiency of cross-complaint; *Gallup v. Wortman*, 11 Colo. App. 312, holding objection to form of denial so waived.

**General Citations.**—Referred to, explaining scope of decision, in *Byrne v. Crafts*, 73 Cal. 642; *Mulrooney v. O'Bear*, 80 Mo. App. 476. Distinguished in *Oppenlander v. Ditch Co.*, 18 Colo. 152, in which case the water rights were represented by shares of stock transferable by assignment.

#### 53 Cal. 141-147. **DE LA GUERRA v. NEWHALL.**

**Trespass.**—Complaint may unite several acts when constituting parts of one continuous trespass, p. 147.

Cited in *Wilson v. Sullivan*, 17 Utah, 347, as to successive acts of sheriff under wrongful attachment; *Boyce v. Odell etc. Co.*, 107 Fed. 60, as to continued daily dealings constituting gambling on margin.

#### 53 Cal. 147-149. **PEOPLE v. VAN DELEER.**

**Criminal Law.**—Meaning of word "poison" as used in section 216, California Penal Code, pp. 148, 149.

Cited in *People v. Keeley*, 81 Cal. 212, holding that an information charging malicious mischief in the use of a poisonous substance in the language of the statute is sufficient.

**53 Cal. 149-151. HOLLAND v. MOUNT AUBURN GOLD QUARTZ MINING COMPANY.**

**Mining Claim.**—Posting of notice upon a tree at each end of a mining claim is not sufficient compliance with the statute as to location thereof, p. 151.

Cited in *Donahue v. Meister*, 88 Cal. 131, 22 Am. St. Rep. 290, as to value and effect of notice of location of mining claim; *Lebanon Min. Co. v. Con. Rep. Min. Co.*, 6 Colo. 379, location held defective in not having the boundaries of the lode staked out upon the surface; *Doe v. Waterloo Min. Co.*, 70 Fed. Rep. 458, in approval, as regards sufficiency of location. Dissented from in *Gleeson v. Martin White M. Co.*, 13 Nev. 469, so far as to be understood as holding that the marking of the center line of the claim is not sufficient to satisfy the requirements of the law.

**53 Cal. 152-180. WILLS v. AUSTIN.**

**Duress.**—Tax deed void upon its face casts no cloud upon title, and a threat by the tax collector to sell property and execute such a deed is not duress, p. 178.

Approved in *Cooper v. Chamberlin*, 78 Cal. 453, case of void assessment, and threat to sell. Cited in 45 Am. Dec. 180, extended note, discussing subject of "compulsory payment."

**Taxation.**—Levy of state tax for fiscal year 1872-73, declared void, p. 178.

Affirmed in *Harper v. Rowe*, 53 Cal. 235; *De Fremery v. Austin*, 53 Cal. 382; *Grimm v. O'Connell*, 54 Cal. 522, as to invalidity of sales for taxes, where the levy was made without authority of law. Cited, to same effect, in 56 Am. Dec. 694, note.

In absence of acts amounting to duress, payment of taxes is voluntary, although made under protest, and cannot be recovered back, p. 180.

Doctrine affirmed in *Dear v. Varnum*, 80 Cal. 90; *Phelan v. San Francisco*, 120 Cal. 5. Approved in *Rutledge v. Price County*, 66 Wis. 40; *San Francisco etc. R. R. Co. v. Dinwiddie*, 8 Saw. 316; *Spring Valley W. W. v. Bartlett*, 8 Saw. 568, 16 Fed. Rep. 625; *Justice v. Robinson*, 142 Cal. 201, noted under *McMillan v. Richards*, 9 Cal. 417; note to 26 Am. Dec. 378.

**53 Cal. 181-182. HOUGHTON v. HARDENBERG.**

**Patent.**—Delivery of patent of United States for land is not essential to its validity, p. 182.

Cited to same effect in *Cruz v. Martinez*, 53 Cal. 243, holding that such

patent, being duly signed and recorded, passes the legal title without delivery.

**53 Cal. 183-185. PEOPLE v. KEYSER.**

Contents of Bill of Exceptions on application for new trial, stated, p. 184.

Cited in Lin Tai v. Hewill, 56 Cal. 119, in approval; so in State v. O'Brien, 18 Mont. 6; Walker v. Superior Court, 135 Cal. 373, 374, and People v. Walker, 142 Cal. 93, denying mandamus to compel settlement of bill.

Mandamus may issued to compel judge to settle bill of exceptions, p. 185.

Cited in People v. Bitancourt, 74 Cal. 190; Wood v. Strother, 76 Cal. 550, 9 Am. St. Rep. 253; and Keane v. Murphy, 19 Nev. 95, as authority to ruling stated.

**53 Cal. 185-187. PEOPLE v. COLLINS.**

Entry by concert with sheriff with intent to entrap another is not burglary, and the person entrapped is not a privy to a burglary, p. 187.

Cited, in approval of ruling, in Love v. People, 160 Ill. 608; notes to 81 Am. Dec. 366; 91 Am. Dec. 483. Distinguished in State v. Abley, 109 Iowa, 64, 77 Am. St. Rep. 522, holding acts of agent not those of principal so as to amount to defense to charge of burglary of latter's store; note to State v. Hull, 72 Am. St. Rep. 704, on consent to crime.

**53 Cal. 188-190. ANDERSON v. COLEMAN.**

To Sustain Action for Malicious Prosecution, malice and want of probable cause must concur, p. 189.

Cited to same effect in Jones v. Jones, 71 Cal. 91; Smith v. Insurance Co., 107 Cal. 436, holding, also, that burden of establishing want of probable cause is on plaintiff; Davis v. Pacific etc. Co., 127 Cal. 319, noted under Potter v. Seale, 8 Cal. 221; Dowdell v. Carpy, 129 Cal. 172, noted under Hibbing v. Hyde, 50 Cal. 206.

**53 Cal. 190-196. BOARD OF EDUCATION v. DONAHUE.**

Evidence.—Sufficiency of, map identifying lots reserved for school purposes, p. 196.

Explained and approved in Board of Education v. Keenan, 55 Cal. 546; also referred to, p. 650, in dissenting opinion of McKinstry, J.; San Francisco v. Bradbury, 92 Cal. 417, case of reservation of engine lot for public use.

**53 Cal. 196-197. ESTATE OF RUNYON.**

Estate of Decedent.—Where it appears, by reason of irregularities in

the proceedings, that parties in interest have not been heard in the settlement of the annual account of an administrator, the cause will be remanded for further proceedings, p. 197.

Cited in *In re Rose*, 80 Cal. 170, as authority that an order settling account of administrator may be opened; 86 Am. Dec. 143, 145, extended note, treating of the subject.

#### 53 Cal. 197-199. YBARRA v. LORENZANA.

**Conveyance in Fraud of Creditors** is valid as against the grantor, and he cannot be relieved against its operation, p. 199.

Cited, in approval of the doctrine, in *Ullrich v. Ullrich*, 68 Conn. 588; so in *Kitts v. Wilson*, 130 Ind. 502, holding, further, that the heirs of the grantor cannot question the validity of the conveyance, but that the wife may, if she was ignorant of the intended fraud; *Davy v. Kelley*, 66 Wis. 457, in approval. Held inapplicable in *O'Connor v. Ward*, 60 Miss. 1033, and relief granted, the parties being in *delicto*, yet not in *pari delicto*.

Cited in 3 Am. St. Rep. 744, extended note, discussing at length subject of "recriminatory fraud."

#### 53 Cal. 201-203. BANK OF CALIFORNIA v. FRESNO CANAL AND IRRIGATION COMPANY.

Injunction will not be granted when the complaint does not show that the plaintiff has been or will be injured, p. 203.

Cited in *Los Angeles Univ. v. Swarth*, 107 Fed. 803, noted under *Branch etc. Co. v. Board*, 13 Cal. 190; *William Rogers Mfg. Co. v. Rogers*, 58 Conn. 364, 18 Am. St. Rep. 280, denying an injunction in aid of specific performance of a contract for personal services; *McLaughlin v. Sandusky*, 17 Neb. 113, as sustaining the rule that unauthorized acts which have no injurious effects constitute no grounds for relief by injunction.

#### 53 Cal. 204-208. EX PARTE SMITH.

Disobedience of an order of final distribution of an estate is a contempt of court, and obedience may be enforced in proceedings for contempt, p. 207.

Cited in *Ex parte Cohn*, 55 Cal. 196; and *Wiggin v. Superior Court*, 68 Cal. 400, in approval; *Estate of Kennedy*, 129 Cal. 388, discussing nature of such decree.

Office of writ of certiorari in reviewing proceedings for contempt discussed, p. 207.

Cited as authority in *Ex parte Hollis*, 59 Cal. 408; *Sayers v. Superior Court*, 84 Cal. 645; *In re Barrows*, 33 Kan. 679; *State v. Markuson*, 5 N. Dak. 151; notes to 56 Am. Rep. 365; 22 Am. St. Rep. 421; 40 Am. St. Rep.

.36, approving the views set forth as to scope of review in such case; *Ex parte Tinsley*, 37 Tex. Cr. App. 531, 66 Am. St. Rep. 825, quoting *Ex parte Hollis*, 59 Cal. 408.

Money in hands of executor is held by him in trust, and as trustee for heirs and creditors, and as an officer of the court, is subject to attachment for contempt, p. 208.

Cited to same effect in *Wheeler v. Bolton*, 54 Cal. 305, *Ex parte Hollis*, 59 Cal. 412; and *In re Clary*, 112 Cal. 294. Cited in *O'Donnell v. Slack*, 123 Cal. 288, but not applied.

**General Citations.**—In *Carpenter v. Superior Court*, 75 Cal. 599, holding that probate proceedings are not to be deemed "civil actions" within the meaning of the provisions of the code relative to guardians ad litem; *Light v. Canadian County Bank*, 2 Okl. 553, denying right to jury trial in probate proceedings; *In re Taber*, 13 S. D. 67.

.53 Cal. 208-212. **VILHAC v. STOCKTON & IONE RAILROAD COMPANY.**

**Eminent Domain.**—Bond for damages upon taking possession of property pending the condemnation proceedings is void, p. 211.

Cited in *Steinhart v. Superior Court*, 137 Cal. 578, noted under *Davis v. Railroad Co.*, 47 Cal. 517; *Callahan v. Dunn*, 78 Cal. 370, as holding that the occupation of land by the corporation for its own purposes pending the condemnation proceedings is a "taking" of the property within the meaning of the constitution; *People v. Munroe*, 100 Cal. 670, 37 Am. St. Rep. 327, as authority that instruments which are merely void on the ground that they are against public policy or ultra vires, are the subject of forgery. So, to same effect, in *State v. Brett*, 16 Mont. 371; *Coburn v. Townsend*, 103 Cal. 235, in affirmance of the ruling stated; and cited to same effect in *Moody v. Railroad Co.*, 20 Fla. 614.

.53 Cal. 212-213. **CHURCHILL v. ANDERSON.**

**Public Lands.**—Title to lieu land does not pass until certified over to the state, p. 213.

Cited to same effect in *Roberts v. Columbet*, 63 Cal. 24.

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.53 Cal. 213-217. **HEWELL v. LANE.**

**Tax Sale.**—Sale of land to highest bidder in one parcel is illegal, and a deed given in pursuance of it is void, p. 216.

Cited in *Frink v. Roe*, 70 Cal. 320; *McGrath v. Wallace*, 116 Cal. 552; *Mora v. Nunez*, 7 Saw. 460, 10 Fed. Rep. 637, in affirmance.

**Same.**—Sheriff may voluntarily correct his return of a tax sale after the same has been filed, p. 217.

Cited in *People v. Goldenson*, 76 Cal. 345, holding it not error to direct

the officers of the court to amend the return of service so as to conform to the facts.

**Same.**—Mandamus will not lie to compel sheriff to deliver deed to purchaser at tax sale, containing recitals contradicted by return of the tax sale, p. 217.

Cited in *Grimm v. O'Connell*, 54 Cal. 523; *Hubbell v. Campbell*, 56 Cal. 532, holding that if the officer fails to make a deed which complies with the law, it would seem that he can be compelled by mandamus to execute a proper deed.

#### 53 Cal. 217-220. **GELCICH v. MORIARTY.**

**Mining Claim.**—Boundaries and extent of claim must be plainly defined, p. 220.

Cited in *Gleeson v. Mining Co.*, 13 Nev. 469, in approval; so in *Lebanon Min. Co. v. Mining Co.*, 6 Colo. 379, holding that the location was defective in not having the boundaries of the lode staked out upon the surface; *Doe v. Waterloo Min. Co.*, 70 Fed. Rep. 458, in approval.

#### 53 Cal. 221-223. **PREScott v. SALTHOUSE.**

**Attorney at Law.**—Order associating a new attorney is not authorized by the Code of Civil Procedure, but provision is made for substitution of attorney after notice to adverse party, p. 222.

Cited in *Whittle v. Renner*, 55 Cal. 395, as authority that service of notice of appeal upon any other attorney than the attorney of record is void, unless the objection be waived; so in *Beardsley v. Frame*, 73 Cal. 635; *McMahon v. Thomas*, 114 Cal. 591, as authority that a notice of motion for new trial must be signed by the attorney of record; *Territory v. Harris*, 7 Mont. 431, as to dismissal of appeal. Harmonized in *Jones v. Spears*, 56 Cal. 165, holding that the issue of an execution is not such an act as requires the direct agency of the attorney in the case. Distinguished in *Livermore v. Webb*, 56 Cal. 490, holding that the requirement that notice of change of attorneys be served upon the adverse party may be waived by him or his attorney.

#### 53 Cal. 223-228. **SOUTHERN PACIFIC RAILROAD COMPANY v. RAYMOND.**

**Eminent Domain.**—Whether particular workshops for repairing and keeping cars are necessary appendages to a railroad is a question of fact, p. 228.

Explained and distinguished in *Moran v. Ross*, 79 Cal. 164, treating of allegation of right of eminent domain. Cited in *O'Hare v. Railroad Co.*, 139 Ill. 161, discretion of railway company as to amount of land necessary to be taken.

**General Citation.**—*Ryan v. Louisville etc. Terminal Co.*, 102 Tenn. 119.

**53 Cal. 233-239. HARPER v. ROWE.**

Judgment is inadmissible in evidence unless accompanied by judgment roll to show jurisdiction, p. 234.

Cited in Wickersham v. Johnston, 104 Cal. 415, 43 Am. St. Rep. 123, as to proof of jurisdiction. Explained and distinguished in Simmons v. Threshour, 118 Cal. 101, 102; note 11 Am. Dec. 709. Distinguished in Mayer v. Bressinger, 180 Ill. 122, 72 Am. St. Rep. 204, as to decree of distribution when offered merely to establish a collateral fact.

**Void Tax Sales.**—Sale of land for a sum in excess of that authorized by law is void, p. 235.

Cited in Grimm v. O'Connell, 54 Cal. 522; Axtell v. Gerlach, 67 Cal. 483; Knox v. Higby, 76 Cal. 267. So, to same effect, in Mining Co. v. Juab County, 10 Utah, 237; Olsen v. Bagley, 10 Utah, 498; Miller v. Williams, 135 Cal. 184, noted under Bucknall v. Story, 36 Cal. 67; 56 Am. Dec. 694, note, as authority to ruling stated.

**Taxation.**—Political Code, section 3803, does not authorize tax collector to include interest from date of delinquency in tax sale, p. 236.

Affirmed in People v. Reis, 76 Cal. 278. Cited in People v. N. P. C. etc. Co., 68 Cal. 553, construing Political Code, section 3803.

**Action to Determine Adverse Claim** may be maintained against one who claims under a void deed, p. 238.

Cited to same effect in Kittle v. Bellegarde, 86 Cal. 564. Dranga v. Rowe, 127 Cal. 510, quoting Kittle v. Bellegarde, 86 Cal. 564.

**Tax Sale.**—Equity will not require refunding of purchase money upon a void tax sale as a condition of quieting owner's title, p. 238.

Cited in O'Brien v. County of Colusa, 67 Cal. 505, as authority that money voluntarily paid in satisfaction of an illegal tax cannot be recovered back; so in Grimley v. Santa Clara County, 68 Cal. 575; Pennoch v. Douglass County, 39 Neb. 301; 42 Am. St. Rep. 586; Dowell v. City of Portland, 13 Oreg. 252; American Ins. Co. v. County of Beadle, 5 S. Dak. 415; McCormick v. Edwards, 69 Tex. 109; Hamer v. Weber County, 11 Utah, 20, dissenting opinion of Bartch, J. Distinguished in Hayes v. County of Los Angeles, 99 Cal. 78, holding that the doctrine of caveat emptor, as applied to purchasers at tax sales, has no application to cases where the attempted sale for taxes is absolutely void by reason of the taxes having been previously paid. Cited in 42 Am. St. Rep. 589, note, bearing on the subject.

**53 Cal. 239-243. CRUZ v. MARTINEZ.**

Patent of United States for land, being duly signed and recorded, passes the legal title without delivery, p. 243.

Ruling affirmed in Eltzroth v. Ryan, 89 Cal. 139; Alvarado v. Nordholt, 95 Cal. 128.

**Patent to Land,** regular on face, is conclusive against collateral attack, p. 243.

Cited in *Miller v. Grunsky*, 141 Cal. 457, noted under *Moore v. Wilkinson*, 13 Cal. 478.

#### 53 Cal. 243-245. **ESTATE OF MORGAN.**

**Administration.**—Recommendation of party for appointment as administrator made by one incapable of administering is of no legal consequence, p. 245.

Distinguished in *Estate of Cotter*, 54 Cal. 218, holding that the surviving husband or wife of a deceased person, though incompetent to serve on account of nonresidence, may nevertheless nominate a suitable person for administrator. Cited in *Estate of Healy*, 122 Cal. 165, sustaining appointment of public administrator as against nominee of nephews and nieces of decedent; *Hutchings v. Clark*, 64 Cal. 228, as authority that a public administrator is entitled to letters of administration in preference to a creditor of an intestate decedent, or to the nominee of a nonresident heir; *In re Allen*, 78 Cal. 585, as authority to the ruling stated; so in *In re Muersing*, 103 Cal. 587; and *State v. Woody*, 20 Mont. 418, to same effect.

#### 53 Cal. 245-246. **LINDEN GRAVEL-MINING COMPANY v. SHEPLAR.**

**Dismissal.**—Action is properly dismissed where the summons was not issued within one year after the complaint was filed, and appearance for the purpose only of making a motion to dismiss is not a general appearance, p. 246.

Cited in *Coombs v. Parish*, 6 Colo. 296, 297, in approval; 95 Am. Dec. 215, note, as to dismissal of action for want of prosecution.

#### 53 Cal. 246-247. **EX PARTE AH YEM.**

**Gaming.**—One who merely bets at a game of faro is not guilty of gaming, nor is he accessory to the crime, p. 247.

Cited in 33 Am. Dec. 135, 136, discussing subject of gaming.

#### 53 Cal. 247-251. **McCOY v. BRIANT.**

**Municipal Corporation** can only act in the cases and in the mode prescribed by its charter, p. 250.

Cited to same effect in *Smith Canal Co. v. Denver*, 20 Colo. 87; *Arnott v. Spokane*, 6 Wash. 447; and *German American Sav. Bank v. Spokane*, 17 Wash. 329; *Allen v. Davenport*, 132 Fed. 215, under Iowa Code, sections 478, 479, city cannot recover for cost of paving done under contract which was wholly void; 81 Am. Dec. 107, note; 51 Am. St. Rep. 833.

Persons contracting with must, at their peril, inquire into the powers of the corporation or its officers to make the contract, p. 250.

Cited in *Farmers' etc. Nat. Bank v. School District*, 6 Dak. Ter. 264, in approval; *Morgan v. Menzies*, 60 Cal. 348, holding void an undertaking in attachment given by city and county.

**Municipal Bonds.**—If issued without the resolution of a board authorizing the issue, as the law requires, they are void in the hands of an innocent holder for value, p. 250.

Cited in *Lehman v. San Diego*, 73 Fed. Rep. 109. Affirmed in 83 Fed. Rep. 673, in approval of the doctrine; 51 Am. St. Rep. 833, extended note, discussing the subject at length.

Injunction does not lie to restrain the circulation of such bonds, p. 251.

Cited to same effect in *Hayes v. Davis*, 23 Nev. 321; *Johnston v. Sacramento County*, 137 Cal. 210, noted under *Linden v. Case*, 46 Cal. 171. Distinguished in *Maxwell v. Board of Supervisors*, 53 Cal. 392, certiorari upon application of taxpayer to annul an order or resolution of board of supervisors, made in excess of jurisdiction; *Winn v. Shaw*, 87 Cal. 636, holding that a taxpayer may sue to enjoin the county auditor from drawing his warrant in payment for the purchase of land of which no notice has been published; *George v. Electric Light Co.*, 105 Mich. 5, to same effect; 2 Am. St. Rep. 104, extended note, to the ruling stated.

#### 53 Cal. 253-254. PEOPLE v. WEIL.

Default cannot be entered by clerk in action to recover a school tax, p. 254.

Distinguished in *Keybers v. McComber*, 67 Cal. 398, holding that a judgment rendered in justice's court after personal service on defendant is voidable only, and not subject to collateral attack.

#### 53 Cal. 255-259. JACKSON v. LEBAR.

**Pleading.**—Averment tending to state a cause of action should not be stricken out. The remedy is by special demurrer, p. 259.

Ruling affirmed in *Swain v. Burnette*, 76 Cal. 303, suit to compel specific performance.

#### 53 Cal. 259-261. ESTATE OF AVELINE.

**Authority of Public Administrator** as to unfinished business, continues after expiration of his term of office, and the sureties on his bond remain liable, p. 260.

Cited in *Estate of Lermond*, 142 Cal. 586, noted under *Rogers v. Hoberlein*, 11 Cal. 120; 51 Am. Dec. 524, note distinguished in *Los Angeles County v. Kellogg*, 146 Cal. 593, where public administrator is salaried officer and required to turn commissions into treasury and he continues to act after expiration of term, in partially distributed estates, he must pay all commissions thereafter received, into treasury; *In re Pingree*, 100 Notes Cal. Rep.—169.

Cal. 80, holding that it is the status of the public administrator at the time of the grant of administration, and not at the time of filing of his petition, that determines his competency.

Settlement of accounts of without citation, and in his absence, where the statute requires notice to be served, will not bind him, p. 261.

City in Trumpler v. Cotton, 109 Cal. 255, as to guardian's presumed consent to service of notice by publication.

### 53 Cal. 261-262. BABE v. COYNE.

**Attachment.**—Sheriff is *prima facie* justified by affidavit and writ in seizing property in possession of defendant, p. 262.

Ruling affirmed in Brichman v. Ross, 67 Cal. 604; Fuller Desk Co. v. McDade, 113 Cal. 363. Cited in 21 Am. Dec. 208, extended note, treating of justification of officers by their process.

### 53 Cal. 262-263. HUSTON v. LEACH.

**Water Rights.**—Decree enjoining interference with the waters of certain springs construed, p. 263.

Cited in Katz v. Walkinshaw, 141 Cal. 129, discussing right to waters of underground stream; notes to 64 Am. Dec. 730; and 51 Am. Rep. 549.

### 53 Cal. 281-283. SPINETTI v. BRIGNARDELLO.

**On Appeal from Judgment** the only papers that can be considered, where there is no bill of exceptions, are the notice of appeal and judgment roll, p. 283.

Ruling affirmed in San Francisco Sav. Union v. Myers, 76 Cal. 625; Sichler v. Look, 93 Cal. 607. Cited in Mock v. Santa Rosa, 126 Cal. 347, as to order denying motion to strike out parts of pleading.

**Demurrer is Waived** when judgment is entered on consent, p. 283.

Cited in Estate of Lorenz, 124 Cal. 498, noted under Coryell v. Cain, 16 Cal. 572.

### 53 Cal. 284-287. PEOPLE v. ABBOTT. 31 Am. Rep. 59.

Bank's broker, who appropriates a check given him to buy silver with, is guilty of larceny, p. 287.

Cited in People v. Martin, 116 Mich. 450; Murphy v. People, 104 Ill. 534, in approval, a case similar in controlling principle. Approved in People v. Delbos, 146 Cal. 737, where defendant received money to buy lodging house and made false statement as to price so as to keep difference, he is guilty of larceny; Grin v. Shine, 187 U. S. 196, where check is given to clerk with instructions to draw money, take it to depot and forward it to another city, if he converts money to own use he is guilty of embezzlement; 57 Am. Dec. 286, note; and 43 Am. Rep. 138, note.

**53 Cal. 289-293. MAURER v. MITCHELL.**

Writ of Prohibition mentioned in the constitution, is the common-law writ, and its office is to restrain subordinate courts and inferior judicial tribunals from exceeding their jurisdiction, p. 292.

Approved in People v. Election Commissioners, 54 Cal. 406, denying application for writ to board of election commissioners; Camron v. Kenfield, 57 Cal. 553, denying the power of the legislature to extend the office of the writ beyond its scope at common law; Coker v. Superior Court, 58 Cal. 180, holding that writ of prohibition cannot be used to take the place of an appeal, or other mode of review; Day v. Superior Court, 61 Cal. 490, denial of writ in the particular case; Hobart v. Tillson, 66 Cal. 212, denial of writ to restrain tax collector from performing his official duties; City of Colorado v. San Diego, 97 Cal. 441, denial of writ to restrain tax levy; Hevren v. Reed, 126 Cal. 221, holding writ properly denied where respondents are not official board of trustees either de jure or de facto; State v. District Court, 22 Mont. 231, denying writ in case of removal of corporate trustees; State v. Hogan, 24 Mont. 381 (quoted in Winsor v. Bridges, 24 Wash. 546), ruling similarly as to act of Secretary of State in certifying candidate for election, and of county clerk in printing his name on official ballot; State v. Superior Court, 15 Wash. 674, 55 Am. St. Rep. 911, maintaining the jurisdiction of the supreme court to restrain the superior courts from proceeding without, or in excess of, jurisdiction; Dobson v. Westheimer, 5 Wyo. 37, in approval of the ruling stated. Distinguished in People v. Hiram House, 4 Utah, 381, the laws of Utah having provided for the issuance of writs of prohibition to arrest the doing of ministerial acts. Cited, in discussion of the subject, in 18 Am. Dec. 238, note.

**53 Cal. 293-296. ELDER v. SPINKS.**

Amended Complaint must be served on all the adverse parties who are to be bound by the judgment, p. 294.

Cited as authority to ruling stated, in Linott v. Rowland, 119 Cal. 454. Distinguished in McGary v. Pedrorena, 58 Cal. 93, in which case the complaint was not amended "of course," nor before demurrer filed nor before the trial of the issue of law thereon.

General denial puts in issue only issuable facts, and not immaterial allegations, pp. 294, 295.

Cited in Beronio v. Ventura etc. Co., 129 Cal. 238, 79 Am. St. Rep. 122, as to allegations of claim of adverse interest in foreclosure suit; and cf. on this point note to Provident etc. Co. v. Marks, 68 Am. St. Rep. 362; Tompkins v. Sprout, 55 Cal. 36, action to quiet title, and answer of defendant held to raise a material issue; so in Pennie v. Hildreth, 81 Cal. 132, also an action to quiet title; so in Sichler v. Look, 93 Cal. 608, action to foreclose mortgage, and averment in complaint to defendant's claim or interest held not to be issuable. Disapproved in Horton v.

Long, 2 Wash. 438, 26 Am. St. Rep. 868, holding that in a foreclosure suit the allegation that a party, who is made codefendant with the mortgagor, has, or claims to have, some interest in, or claim upon, the mortgaged premises, is sufficient without averring the character of the interest.

**53 Cal. 300-302. SHAW v. WANDESFORDE.**

**Findings.**—When made, there must be a finding upon all of the material issues, or judgment will be reversed, p. 301.

Approved in Mahoney v. Braverman, 54 Cal. 571; Knight v. Roche, 56 Cal. 25.

**53 Cal. 303-304. SEYMOUR v. WOOD.**

**Mining Claim.**—Evidence in the particular case held to clearly establish an abandonment, pp. 303, 304.

Approved in Trevaskis v. Peard, 111 Cal. 605, and holding that if the intention to abandon has been formed and once acted upon, the abandonment is as absolute, if it exists for a moment, as though it continued for years. Cited in 40 Am. Dec. 466, note, treating of the subject.

**53 Cal. 304-305. PEAT FUEL COMPANY v. TUCK.**

**Failure of Consideration.**—If money has been paid upon a consideration which has entirely failed, the law implies a promise to refund it, p. 305.

Principle of decision approved in Sutro v Rhodes, 92 Cal. 128, dissenting opinion of Garoute, J. Affirmed in Rose v. Foord, 96 Cal. 154, case of purchase of shares of stock to be issued, but which never were issued; Hayes v. County of Los Angeles, 99 Cal. 79, holding that where by mistake the same property has been twice assessed, and the taxes twice collected, the moneys collected by mistake must be refunded. Cited in Richter v. Union etc. Co., 129 Cal. 373, holding action maintainable under facts stated. Brooks v. Tulare, 117 Cal. 488, distinguishing the case last cited, and holding that the purchaser at a delinquent tax sale of government land of the United States, which was not subject to taxation, is a mere volunteer, and cannot recover of the county the money so paid by him on the ground that it had been illegally collected.

Attachment lies where money has been paid upon a consideration which fails, p. 305.

Approved in Nethery v. Belden, 66 Miss. 493. Doubted in Tabor v. Mining Co., 4 McCrary, 301, 14 Fed. Rep. 638, holding that under the Colorado statute attachment is not allowed in trespass, although the plaintiff waives the trespass and sues as for money had and received; Nevada Co. v. Farnsworth, 89 Fed. 166, holding attachment procurable in action on implied contract, under Utah statutes.

**53 Cal. 306-312. CLARK v. SAN FRANCISCO.**

**Corporations.**—After dissolution the directors continue to be the trustees of the creditors and stockholders for certain purposes, pp. 311, 312.

Cited in *Kohl v. Lilenthal*, 81 Cal. 385, as authority that the legal title to the property of the corporation remains in the corporation, and not in the shareholders; *Smith v. Putnam*, 61 N. H. 635, in approval, holding, also, that directors are presumed to perform the duties of their trust gratuitously; 57 Am. St. Rep. 76, extended note, to ruling stated.

**53 Cal. 312-316. SCHERR v. HIMMELMANN.**

**Judgment.**—Bill in equity lies to set aside satisfaction or credit, and to revive judgment, p. 316.

Cited in *Merguire v. O'Donnell*, 139 Cal. 8, discussing remedy under section 708, Code of Civil Procedure; 53 Am. Dec. 705, note.

**53 Cal. 321-346. HEINLEN v. MARTIN.** S. C. 59 Cal. 181, in affirmance; referred to, giving history of case, in *Heinlen v. Beans*, 71 Cal. 297.

**Deed.**—Defective deed of agent with power, though inoperative to pass the legal title, treated in equity as a valid contract of sale, entitling the purchaser to a conveyance of the legal title, p. 338.

Cited as authority in *Brock v. Pearson*, 87 Cal. 584, holding that a deed to a portion of land for which the grantor holds only an executory contract of purchase operates as an assignment of a proportionate interest in the contract.

**Equity.**—A court of equity molds its relief according to the particular circumstances of the case, p. 343.

Principle approved and applied in *Woodroof v. Howes*, 88 Cal. 202, discussing right of stockholders to come into equity for relief against acts of directors.

**Use and Occupation.**—Equitable owner cannot maintain an action at law for mesne profits, but is entitled to relief in equity in a suit to compel a conveyance, p. 341.

Approved, applying the principle of the decision, in *Hidden v. Jordan*, 57 Cal. 187, So, to same effect, in *Swain v. Burnette*, 76 Cal. 303; explained and distinguished in *Noonan v. Nunan*, 76 Cal. 48, holding that a plaintiff who bases his right to an accounting upon allegation of a partnership between himself and defendant, is not entitled to such relief upon the mere proof of a tenancy in common.

**53 Cal. 346-351. PEOPLE v. RECLAMATION DISTRICT NO. 108.**

Reclamation District is a public corporation for municipal purposes, p. 248.

Affirmed in *People v. Williams*, 56 Cal. 647; *Irrigation District v. De Lappe*, 79 Cal. 353, holding, further, that proceedings for formation of are to be liberally construed; *Reclamation District v. Gray*, 95 Cal. 605; *Swamp Land District v. Silver*, 98 Cal. 53; *Angus v. Browning*, 130 Cal. 503, as to district formed under section 3446 et seq., Political Code; *Morrison v. Morey*, 146 Mo. 561, noted under *Dean v. Davis*, 51 Cal. 406; Approved in *Irrigation District v. Collins*, 46 Neb. 423, applied to irrigation district; so in *Sels v. Greene*, 81 Fed. Rep. 555, and held not liable to a private action for negligence, or for a nuisance. Cited in 74 Am. Dec. 594, extended note, to ruling stated.

The creation of reclamation district may be shown by acts recognizing its existence, p. 350.

Affirmed in *Reclamation District v. Gray*, 95 Cal. 605; *Glide v. Superior Court*, 147 Cal. 25, prohibition lies to prevent Superior Court from proceeding with trial of suit to enjoin supervisors from acting on application for organization of reclamation district on alleged ground that lands were reclaimed; *Swamp Land District v. Silver*, 98 Cal. 53, and holding that the validity of its organization cannot be coliterally attacked in an action to recover an assessment levied upon land by a de facto district; *People v. Levee Dist.*, 131 Cal. 31, holding levee district so recognized by subsequent legislation.

**General Citations.**—In *People v. Haggin*, 57 Cal. 585, discussing the question, In whose name should an action to recover an assessment be brought? *Reclamation District v. Hagar*, 6 Sawyer, 572, 4 Fed. Rep. 371, affirming the power of the legislature under California constitution to authorize the formation of such district at expense of the lands reclaimed; so in *Lamb v. Reclamation District*, 73 Cal. 133, 2 Am. St. Rep. 781, affirming right of such district to maintain a levee along a navigable river.

#### 53 Cal. 351-354. *JOHNSON v. PERRY.*

Judgment will not be reversed through failure to find upon certain issues which would not require a different judgment, p. 352.

Cited, but ruling disapproved, in *Estill v. Irvine*, 10 Mont. 513.

#### 53 Cal. 354-355. *PEOPLE v. HICKS.*

**Maxim**, *Falsus in uno, falsus in omnibus*, does not require absolute rejection of testimony of witness willfully false, p. 355.

Explained in *White v. Dishier*, 67 Cal. 403, holding that a witness false in one part of his testimony is to be distrusted in others, and an instruction to the jury that such a witness may be distrusted is error; so in *People v. Treadwell*, 69 Cal. 238, holding that an instruction that "a witness false in one part of his testimony is to be distrusted in other parts" is not erroneous, although the word "willfully" is not inserted immediately before the word "false" in the instruction. Cited in Camer-

on v. Wentworth, 23 Mont. 78, holding instruction erroneously given 86 Am. Dec. 330, note.

**53 Cal. 355-360. ESTATE OF CLARK.**

If an executor mingles the trust fund with his own, and employs it in his business, he should be charged with legal interest, computed with annual rests, p. 359.

Affirmed in In re Eschrich, 85 Cal. 101, case of use of wards' money by guardian; Miller v. Lux, 100 Cal. 615, explaining the object and intention of the rule stated; Estate of Cousins, 111 Cal. 445, settlement of guardian's account, and the rule applied. Cited in In re Hilliard, 83 Cal. 428; Guardianship of Dow, 133 Cal. 450, noted under Estate of Stott, 52 Cal. 403; Scheib v. Thompson, 23 Utah, 567, where guardian without authority of court purchased land with ward's money, and value of land had depreciated when ward attained majority, ward may recover from guardian amount invested, with commercial rate of interest during minority, compounded annually; In re Ricker's Estate, 14 Mont. 188, 191; Westover v. Carmans Estate, 49 Neb. 402, as authority sustaining the doctrine that the law requires executors, administrators, and guardians, not only to account for all profits realized from the use of the money intrusted to them, but also for both principal and interest, in case of loss by their unauthorized use of the money; 99 Am. Dec. 298, extended note, discussing the subject.

**53 Cal. 360-362. PEOPLE v. CASEY.**

**Good Character.**—Evidence of in criminal case is admissible on question of guilt, p. 361.

Cited in People v. French, 137 Cal. 219, noted under People v. Ashe, 44 Cal. 288.

**53 Cal. 362-372. HANCOCK v. LOPEZ.**

**Partition.**—Judgment in is conclusive as to title upon all parties and privies, p. 371.

Cited in Livermore v. Webb, 56 Cal. 491, in approval, as to judgment that may be entered, namely, that one of the defendants is the owner in fee of all the land described in the complaint; Martin v. Walker, 58 Cal. 594; and Jameson v. Hayward, 106 Cal. 687, 46 Am. St. Rep. 270, to same effect as ruling stated, and upholding the right of a tenant in common to maintain a suit for partition where he has a right to the present possession, although not in actual possession; Morrill v. Morrill, 20 Oreg. 104, 23 Am. St. Rep. 100, in approval of ruling stated; so in Kromer v. Friday, 10 Wash. 640; Mabie v. Whittaker, 10 Wash. 664, as authority that a tenant in common can maintain ejectment against a cotenant in possession who disputes his right; 89 Am. Dec. 433, extended note, as to right of cotenant to partition.

53 Cal. 372-374. **DE CELIS v. BRUNSON.** See **Strong v. International Building etc. Union**, 183 Ill. 102.

53 Cal. 375-379. **HIBERNIA SAVINGS AND LOAN SOCIETY v. HERBERT.**

**Statute of Limitations—Death.**—Where debt has not matured at debtor's death, the statute does not begin to run till administrator's appointment, p. 375.

Cited in **Casey v. Gibbons**, 136 Cal. 372, holding foreclosure suit and barred.

**Foreclosure.**—If mortgagor conveys the mortgaged premises to a third person, and dies before suit in foreclosure, his personal representative is not a necessary party to the suit, if judgment for deficiency is not demanded, p. 378.

Ruling affirmed in **Gutzeit v. Pennie**, 98 Cal. 328.

**Statute of Limitations.**—In such case, notes maturing more than four years before death of mortgagor's grantee are barred, and time is not prolonged by administration, pp. 378, 379.

Distinguished in **In re Bullard**, 116 Cal. 358, holding that where a note and mortgage were not mature at the date of the death of the mortgagor, they are not barred by the statute, although letters of administration were not issued until more than four years after the maturity of the note and mortgage.

53 Cal. 379-380. **MERRILL v. AUSTIN.**

**Taxation.**—Payment of tax under protest, before the tax is delinquent, is voluntary, and the amount paid cannot be recovered back, p. 380.

Cited, approving the doctrine, in **Lumber Co. v. Township of Manistee**, 100 Mich. 470; **City of Houston v. Feeser**, 76 Tex. 368; 45 Am. Dec. 164, 165, extended note, discussing the subject.

53 Cal. 380-383. **DE FREMERY v. AUSTIN.**

**Taxation.**—Illegal item in tax levy will not invalidate the levy as to other items, if the levy is so made that the illegal item may be separated from the others, p. 382.

Cited in **Mackay v. San Francisco**, 113 Cal. 402, in approval notes to 26 Am. Dec. 378, and 45 Am. Dec. 164, 165, as authority, discussing subject of "recovery of illegal taxes paid under compulsion." See **Wills v. Austin**, 53 Cal. 152; **Mowry v. Mowry**, 20 R. I. 79; and **Morrill v. Austin**, 53 Cal. 379, ante, 764. Cited in **Sioux City etc. Co. v. Dakota Co.**, 61 Neb. 82, but holding conversely where whole tax is entirely void; **Nalle v. City**, 91 Tex. 426, sustaining tax judgment for valid portion where separable.

**53 Cal. 383-385. MAHONEY v. BOARD OF SUPERVISORS OF SAN FRANCISCO.**

**Eminent Domain.**—Act of March 27, 1876, relative to San Francisco water works, construed, holding that right of condemnation only arises after unavailing attempt to purchase, p. 385.

Explained and distinguished in Bishop v. Superior Court, 87 Cal. 234, denying a writ of prohibition to restrain the prosecution of an action by city authorities to condemn right of way for a sewer.

**53 Cal. 386-389. PEOPLE v. LATHAM.**

**Dismissal of Action.**—Term was first used in equity, p. 388.

Cited in People v. Jefferds, 126 Cal. 300, sustaining right of court to dismiss for want of prosecution.

**53 Cal. 389-394. MAXWELL v. BOARD OF SUPERVISORS.**

Taxpayer may apply for certiorari to annul order of board of supervisors, made in excess of jurisdiction when exercising judicial functions, p. 393.

Approved as authority in Gibson v. Board of Supervisors, 80 Cal. 366, sustaining the rule that a taxpayer can restrain any illegal action which would increase the burden of taxation; Eby v. School Trustees, 87 Cal. 175, holding that a taxpayer of a school district may maintain a proceeding for a writ of mandate to compel the board of school trustees to comply with the instructions of the electors as to the location of the schoolhouse site; Frederick v. City of San Luis Obispo, 118 Cal. 393, holding it sufficient in a complaint for mandamus to show that the complainant is a "party beneficially interested," to aver that he is a property-owner and taxpayer; Elliott v. Superior Court, 144 Cal. 509, but denying writ under facts stated, and discussing rights of persons not parties to the record; Dunn v. Sharp, 4 Idaho, 103, taxpayer may bring suit to determine whether road commissioners have exceeded legal authority in letting contract for construction of road; Champion v. Board of Commissioners, 5 Dak. Ter. 428, to same effect as the ruling stated; so in Orr v. Board of Equalization, 2 Idaho, 926, 927, a parallel case.

**County Printing.**—Board of supervisors has no power to contract for, except in strict conformity to the statute, p. 394.

Approved as authority to ruling stated in Woodruff v. Berry, 40 Ark. 256; State v. Coad, 23 Mont. 137, noted under Zottman v. San Francisco, 20 Cal. 97; 40 Am. St. Rep. 40, extended note, discussing subject of certiorari.

**53 Cal. 394-399. STODDART v. BURGE.**

**Appeal.**—Order dismissing cross-complaint cannot be reviewed on ap-

peal from the judgment entered for plaintiff, in absence of bill of exceptions or statement, p. 398.

Cited in *Gilman v. Bootz*, 80 Cal. 565, as authority sustaining the rule that for the review, upon appeal from the judgment, of an intermediate, nonappealable order affecting the merits there must be a bill of exceptions.

Complaint in action to determine adverse claim is sufficient, if it appears that the plaintiff claims an interest in the land, and that defendant asserts a claim of title adverse to plaintiff's claim, p. 399.

Approved in *Peterson v. Gibbs*, 147 Cal. 5, in action to quiet title when it appears that plaintiff has legal title to premises, subject to contract made by predecessor giving to defendant right to remove all timber therefrom, nonsuit is error; *Butterfield v. Graves*, 138 Cal. 156, holding complaint sufficient; *Hancock v. Plummer*, 66 Cal. 338, maintaining the equitable nature of the action; *McKinnie v. Shaffer*, 74 Cal. 616, as authority that a party having a homestead interest may maintain an action to quiet title thereto against the claim of others; so in *Pennie v. Hildreth*, 81 Cal. 130, holding that an administrator may maintain an action to quiet title to real estate that belonged to his intestate; *Goldberg v. Taylor*, 2 Utah, 491, to same effect as ruling stated. Cited in 67 Am. Dec. 112, note, to ruling stated.

#### 53 Cal. 401-403. **WATSON v. RODGERS.**

**Statute of Frauds.**—Sale of personal property, unaccompanied by immediate delivery, is void as to creditors, though delivery before levy, p. 403.

Affirmed in *Edwards v. Sonoma* Bk. 59 Cal. 149; *Ruggles v. Cannedy*, 127 Cal. 300; *Dean v. Walkenhorst*, 64 Cal. 80; *Kelly v. Murphy*, 70 Cal. 563, holding such sale void, not only as against creditors of the vendor, but also as against the executrix of his last will; *Brown v. O'Neal*, 95 Cal. 267, 29 Am. St. Rep. 114, applied to case of sale by co-owner of his interest in the personality owned in cotenancy; *Rohrbough v. Johnson*, 107 Cal. 149, applied to chattel mortgages, other than those authorized by statute. Distinguished in *Adams v. Weaver*, 117 Cal. 48, in which case the finding was that the sale was accompanied by immediate delivery, and continued change of possession; *Roberts v. Hawn*, 20 Colo. 80, in which case the sale was conditional; *Gilbert v. Deeker*, 53 Conn. 404, 405, as being controlled by special provisions of statute, and holding that the retention of possession raises a presumption of fraud only in favor of attaching creditors or those who stand in their position. Approved in *Autrey v. Bowen*, 7 Colo. App. 411. Cited as authority in 97 Am. Dec. 345, extended note, discussing the subject at length.

#### 53 Cal. 403-405. **BIGLEY v. NUNAN.**

**Nuisance.**—To maintain action for special damages caused by ob-

struction of highway, plaintiff must have suffered injury different in kind from that sustained by the public at large, p. 404.

Cited in approval of the ruling, and the principle of the decision applied in the following cases: Payne v. McKinley, 54 Cal. 533; Crowley v. Davis, 63 Cal. 462; Marini v. Graham, 67 Cal. 133; Hogan v. Railroad Co., 71 Cal. 87; San Jose Ranch Co. v. Brooks, 74 Cal. 467; McCloskey v. Kreling, 76 Cal. 513 (holding that depreciation in value of property is not a ground of special damage); Hargro v. Hodgdon, 89 Cal. 627, where it is said that the doctrine asserted in the principal case, "that it is pecuniary damage which constitutes the basis of the action, is expressly limited to actions at law for damages." Stufflebeam v. Montgomery, 2 Idaho, 770, also in approval. Cited in notes to 28 Am. Dec. 306; and 31 Am. Dec. 132, 133, in discussion of the subject.

#### 53 Cal. 405-407. THOMAS v. LAWLOR.

**State Lands.**—Equitable title to, dismissal of equitable defense in ejectment, pp. 406, 407.

Cited in O'Connor v. Frasher, 53 Cal. 436, as authority for sustaining demurrer to ambiguous pleading; so, in S. C., 56 Cal. 301, Kentfield v. Hayes, 57 Cal. 411, as to sufficiency of equitable defense in ejectment. So, to same effect, in Burling v. Thompkins, 77 Cal. 261.

#### 53 Cal. 408-409. SPRAGUE v. FAWCETT.

**Mandamus** ought not to issue to compel judge to settle bill of exceptions, unless refusal involves an abuse of discretion, p. 409.

Affirmed in Brown v. Prewett, 94 Cal. 508; and ruling approved in Welty v. Campbell, 37 W. Va. 801.

#### 53 Cal. 409-410. CLARK v. PORTER.

**Street Assessment.**—In action on, it is erroneous to order judgment for amount of assessment against only one of defendants, p. 410.

Cited to same effect in Harney v. Applegate, 57 Cal. 207; Driscoll v. Howard, 63 Cal. 440; and Robinson v. Merrill, 87 Cal. 13, 15. Distinguished in Park v. Altschul, 60 Cal. 381; and Doane v. Houghton, 75 Cal. 363, in which case there was nothing to show that the defendants dismissed from the case were ever served.

#### 53 Cal. 410-412. EX PARTE DUNCAN.

**Habeas Corpus**—**Bail.**—On application to reduce bail after indictment, the guilt of the prisoner is presumed, p. 411.

Affirmed in Ex parte Duncan, 54 Cal. 78. Cited in In re Scott, 38 Neb. 507, but holding that evidence may be received to repel that presumption; 37 Am. Dec. 304, extended note, discussing the subject.

**Same.**—To authorize interference by appellate court the bail demanded must be *per se* excessive, p. 411.

Affirmed in *In re Williams*, 82 Cal. 183. Cited in *In re Scott*, 38 Neb. 508, 509.

#### 53 Cal. 412-414. EX PARTE McCARTHY.

**Criminal Law.**—County court could try indictment for misdemeanor, but justices of the peace had exclusive jurisdiction of misdemeanors, when no indictments were found, p. 414.

Cited in *Green v. Superior Court*, 78 Cal. 562, as to jurisdiction of superior court in cases of misdemeanor; *State v. Myers*, 11 Mont. 369, as to concurrent jurisdiction in such cases. Distinguished in *Ex parte Wallingford*, 60 Cal. 103, holding that the superior court has no jurisdiction of such misdemeanors as have been committed by the legislature to the justice's court.

#### 53 Cal. 415-416. PEOPLE v. SOTO.

**Burglary.**—Intent with which defendant entered the building is a question of fact for the jury, and may be inferred from the surrounding circumstances, p. 416.

Ruling approved in *Alexander v. State*, 31 Tex. Cr. App. 362; *State v. Worthen*, 111 Ind. 270; *Hughes v. Territory*, 8 Okla. 39; and *Mullens v. State*, 35 Tex. Cr. Rep. 160.

#### 53 Cal. 416-420. WELLS, FARGO & CO. v. COLEMAN.

**Banks.**—Incorporated commercial banks are liable to examination by the bank commissioners, under act of March 30, 1878, p. 420.

Cited in *People v. Superior Court*, 100 Cal. 120, and holding that the act applies to both savings and commercial banks; 32 Am. Dec. 300, note, to ruling stated.

#### 53 Cal. 420-422. PEOPLE v. WHITNEY.

When record does not present any of the evidence upon a point to which an instruction relates, it will be assumed that the instruction was correct, p. 421.

Cited to same effect in *Hinkle v. Railroad Co.*, 55 Cal. 632.

Correct instruction is not rendered erroneous by adding thereto the clause, "A juror is not at liberty to disbelieve as a juror what he believes as a man," p. 421.

Approved in *People v. Worden*, 113 Cal. 576; *State v. Lyons*, 7 Idaho, 537, following rule.

#### 53 Cal. 422-425. PEOPLE v. SPRAGUE.

**Bill of Exceptions.**—Refusal to settle and certify is justified, if the

proposed bill is a mere skeleton, or in a form "reprehensible," or, in a criminal case, the required notice has not been given to the district attorney, p. 423.

Approved in *Winters v. Buck*, 121 Cal. 280, noted under *People v. Getty*, 49 Cal. 581; *Page v. Superior Court*, 122 Cal. 211, holding settlement properly refused where only oral notice was given; *People v. Gonzales*, 136 Cal. 669, but holding decision of trial court on excuse for failure to give notice not reversible except for abuse of discretion; *Frazer v. Superior Court*, 62 Cal. 50, applied to defective statement on motion for new trial; *January v. Superior Court*, 73 Cal. 540, in approval; *People v. Goldenson*, 76 Cal. 351, holding it to be within the discretion of the court to delay settlement of bill of exceptions beyond the statutory time; *People v. Hill*, 78 Cal. 406, in approval; so in *Sansome v. Myers*, 80 Cal. 488; and *Visher v. Smith*, 92 Cal. 62, refusal to settle bill after expiration of time. Limited in *Cohen v. Wallace*, 107 Cal. 139, holding that it would be better as a rule for the judge of the trial court to disregard as far as possible technical objections, and endeavor to settle a bill of exceptions rather than refuse it. Distinguished in *People v. Raschke*, 73 Cal. 379, in which case the bill was settled after the statutory period, and the appellate court refused to inquire into the reasons which may have induced such action.

#### 53 Cal. 425-428. STEINBURG v. MEANY.

**Cross-examination.**—Interest of witness may be inquired into by means of, p. 428.

Cited in *Estate of Kasson*, 127 Cal. 500, noted under *People v. Benson*, 52 Cal. 380.

#### 53 Cal. 428-432. WINTER v. BELMONT MINING COMPANY.

**Bona Fide Purchaser** without notice, of a stolen certificate of stock properly indorsed, is protected against the true owner, p. 432.

Cited, in approval of the doctrine, in *Farmers' Nat. Gold Bank v. Wilson*, 58 Cal. 604; *Spreckels v. Nevada Bank*, 113 Cal. 276; 54 Am. St. Rep. 350; *Walker v. Detroit Transit Railway Co.*, 47 Mich. 348; *International Bank v. German Bank*, 71 Mo. 195, 36 Am. Rep. 478. Cited in *West Coast etc. Co. v. Wulff*, 133 Cal. 317, 85 Am. St. Rep. 172, noted under *Western v. Bear River etc. Co.*, 5 Cal. 186; *Hall v. Cayot*, 141 Cal. 17, on point that entry upon books is not essential to validity of transfer except as to certain specified classes. Disapproved in *Barstow v. Savage M. Co.*, 64 Cal. 392, 393, 49 Am. Rep. 707, 708, holding a bona fide purchaser in such case acquires no title as against the true owner, if the certificates were stolen without the fault or negligence of the owner.

**Certificates of Stock** are not negotiable instruments in the commercial sense, 432.

Cited in *Graves v. Mining Co.*, 81 Cal. 326; *Continental Nat. Bank v. Eliot Nat. Bank*, 7 Fed. Rep. 372, 373, 37 Am. Rep. 354, in approval, as to nature of certificates of stock; so, as authority to ruling stated, in 14 Am. Dec. 427, note.

#### 53 Cal. 433-435. RICHARDS v. KIRKPATRICK.

Injunction.—Party is not entitled to, if he has an adequate remedy at law, p. 434.

Distinguished in *Moore v. Clear Lake Water Works*, 68 Cal. 150, asserting the rule that where the plaintiff complains of a continuous wrongful act and consequent infringement of his rights an injunction will be granted, although there is no allegation or proof of actual damage.

Claim and Delivery lies to recover property wrongfully sold under execution, p. 435.

Cited to same effect in *Lilander v. Longstaff*, 7 S. D. 161, case of exempt property seized and wrongfully detained by an attaching officer; so in *Ladd v. Ramsby*, 10 Oreg. 211, holding that if the judgment on which execution issued was void, there was an adequate remedy at law against the sheriff as a trespasser. Cited, to ruling stated, in 25 Am. St. Rep. 258, extended note, on subject of "replevin against officer."

#### 53 Cal. 435-436. O'CONNOR v. FRASHER.

Pleading of defendant, not showing what parts are intended as a legal defense in ejectment, and what parts are intended as a cross-complaint, will be held bad on demurrer for ambiguity, p. 436.

Cited in *O'Connor v. Frasher*, 56 Cal. 501, in approval.

Findings must support a judgment, p. 436.

Affirmed in *Knight v. Roche*, 56 Cal. 25, holding that, in ejectment, where the complaint alleges seisin in the plaintiff, a finding of prior possession in the defendant does not meet the issue as to title.

#### 53 Cal. 437-451. PEOPLE v. POPE.

No One Can Acquire Title by Adverse Possession to land which has been dedicated to public use as a street, p. 451.

Affirmed in *Visalia v. Jacob*, 65 Cal. 435; 52 Am. Rep. 304; *San Leandro v. LeBreton*, 72 Cal. 177; *County of Yolo v. Barney*, 79 Cal. 379, 380; 12 Am. St. Rep. 155, 156; cases of land dedicated to hospital purposes; *Ex parte Taylor*, 87 Cal. 95; *Ames v. City of San Diego*, 101 Cal. 394. Cited in *S. P. Co. v. Hyatt*, 132 Cal. 244-246, *Schneider v. Hutchinson*, 35 Or. 257, 76 Am. St. Rep. 478, *London etc. Bank v. City*, 90 Fed. 701, and *Proctor v. San Francisco*, 100 Fed. 351, noted under *Hoadley v. San Francisco*, 50 Cal. 265. Approved in *Territory v. Deegan*,

3 Mont. 87, note; Moose v. Carson, 104 N. C. 434; 17 Am. St. Rep. 682; Grogan v. Town of Hayward, 6 Saw. 503, 4 Fed. Rep. 166; London etc. Bank v. Oakland, 86 Fed. Rep. 35. Distinguished in Baldwin v. Trimble, 85 Md. 402, holding, that when the use of a highway has been totally abandoned by the public, and private rights have grown up in consequence thereof, an equitable estoppel is created against the public to assert a right to the use of the highway. Cited in extended notes to 27 Am. Dec. 569; 32 Am. Dec. 721; 1 Am. St. Rep. 844; and 14 Am. St. Rep. 278, wherein the subject is very fully discussed.

**General Citation.**—In People v. Beaudry, 91 Cal. 220, as authority that the attorney general may bring an action in the name of the people to abate a public nuisance caused by obstructions in a city street.

**53 Cal. 451-456. BARKER v. STANFORD.**

**Estate of Decedent.**—Bond of administrator does not cover duties imposed upon him as trustee in pursuance of the will of the deceased, p. 456.

Cited in Morflew v. Railroad Co., 107 Cal. 594, in approval of the doctrine; 51 Am. Dec. 522, extended note, as authority to ruling stated.

**53 Cal. 456-461. MARLOW v. BARLEW.**

**Married Woman** may make a promissory note, and execute a mortgage of her separate real estate to secure its payment, pp. 459, 460.

Affirmed in Brickell v. Batchelder, 62 Cal. 639; Goad v. Moulton, 67 Cal. 540; Bogart v. Woodruff, 96 Cal. 611. Cited in Bank v. Leonard, 36 Or. 394, quoting Goad v. Moulton, 67 Cal. 540. Approved in Mortgage Co. v. Stevens, 3 N. Dak. 268, 269, holding a married woman liable on a note signed by her as surety for her husband, although she does not charge her separate estate with the payment thereof.

Judgment may be rendered against her for amount due on note, and ordering that the mortgaged premises be sold, and judgment be docketed for the deficiency, p. 461.

Cited in Alexander v. Bouton, 55 Cal. 20, holding to same effect; so in 55 Am. Dec. 608, 609, extended note, discussing the subject.

In suit to foreclose mortgage a title claimed adversary to mortgagor cannot be litigated, p. 461.

Affirmed in Houghton v. Allen, 75 Cal. 105. Cited in Murray v. Etchepare, 129 Cal. 319, noted under San Francisco v. Lawton, 18 Cal. 474; note to Provident etc. Co. v. Marks, 68 Am. St. Rep. 355, on general subject. Distinguished in Johnston v. S. F. Sav. Union, 75 Cal. 140, 7 Am. St. Rep. 132, and holding that if adverse interests are put in issue, tried, and determined, the judgment is not void on a collateral attack. Cited in 89 Am. Dec. 434, extended note, discussing the subject at length.

**General Citations.**—In 86 Am. Dec. 631, 635, extended note, discussing

subject of increase and profits of separate property; 95 Am. Dec. 199, note, as to right of wife to maintain action against husband upon promissory note made before marriage.

**53 Cal. 466-469. FARMERS' AND MERCHANTS' BANK OF LOS ANGELES v. DOWNEY.** 31 Am. Rep. 62.

Directors of Corporation act in a fiduciary capacity, and are trustees of the stockholders, p. 468.

Affirmed in Wickersham v. Crittenden, 93 Cal. 29; so in People v. Turnbull, 93 Cal. 631, and applied to directors of an irrigation district organized under the Wright Act. Cited in McClure v. Law, 161 N. Y. 82, 76 Am. St. Rep. 204 (note, page 265), sustaining action by corporation against directors for moneys received by latter *virtute officii*. 13 Am. St. Rep. 606, note; and 57 Am. St. Rep. 74, note.

Same.—Director or other officer of bank cannot be permitted to make a profit out of loans made by him of the money of the bank, p. 468.

Affirmed in Oakland Bank of Savings v. Wilcox, 60 Cal. 140, and holding further that if losses occur in the attempt he must bear the loss. So, to same effect, in Wickersham v. Crittenden, 93 Cal. 29; and cited as authority bearing on the subject in extended notes to 53 Am. Dec. 642; 17 Am. St. Rep. 303.

**53 Cal. 469-475. LOS ANGELES v. BALDWIN.**

City of Los Angeles is not owner of corpus of water in Los Angeles river, p. 469.

Approved in Salt Lake City v. Water etc. Co., 24 Utah, 266, a prior appropriator of water in a river acquires no right to corpus of water until such appropriator has conducted it into his canal for use.

**53 Cal. 475-482. CITY OF SAN JOSE v. SAN JOSE AND SANTA CLARA RAILROAD COMPANY.**

Legislature may tax occupations, and permit municipal corporations to tax them for purposes of revenue, p. 481.

Cited to same effect in Little Rock v. Prather, 46 Ark. 478. City of Wyandotte v. Corrigan, 35 Kan. 25 (license tax on street railway). Referred to in Santa Cruz v. Santa Cruz R. R. Co., 56 Cal. 149, holding that a person carrying on business for which a license is required owes nothing for a license until he has taken one out, and that an action to recover an amount alleged to be due as a license cannot be maintained; Ex parte Braun, 141 Cal. 206, noted under Ex parte Frank, 52 Cal. 606; Ogden v. Crossman, 17 Utah, 79, sustaining license tax on telephone instruments; Lent v. Portland, 42 Or. 493, under Portland charter of 1898, section 32, subdivision 33, council may license occupation of practicing

law; State v. French, 17 Mont. 59, as authority that the uniformity clause of the constitution does not apply to license fees upon occupations; so in Denver City Ry. Co. v. Denver, 21 Colo. 354, 52 Am. St. Rep. 243. Cited in 34 Am. Dec. 639, extended note, discussing subject at length.

**53 Cal. 482-487. JUDSON v. PORTER.**

**Notary Public.**—Correction of defective certificate of acknowledgment of execution of instrument by married woman, p. 486.

Cited in 52 Am. Dec. 523, extended note, discussing subject of "amending and perfecting certificate of acknowledgment."

**53 Cal. 491-495. PEOPLE v. SPRAGUE.**

Court may make an order excluding from the courtroom such of the jurors summoned for the term as are not impaneled to try the case, p. 493.

Cited in 28 Am. St. Rep. 309, extended note, as to "public trial."

Affidavit of juror is not admissible to impeach his verdict, p. 493. Cited in 24 Am. Dec. 479, extended note on subject.

Instruction that jury is at liberty to reject the whole of the testimony of a witness who has willfully sworn falsely as to a material point, is good, p. 494.

Ruling approved in People v. Hicks, 53 Cal. 355; People v. Soto, 59 Cal. 369; People v. Righetti, 66 Cal. 185; White v. Dishier, 67 Cal. 403 (to same effect); so in People v. Treadwell, 69 Cal. 238; People v. Clark, 84 Cal. 583; People v. Oldham, 111 Cal. 655; People v. Luchetti, 119 Cal. 507; Minich v. People, 8 Colo. 453; McPherrin v. Jones, 5 N. Dak. 261; Bonnie v. Earll, 12 Mont. 241; and State v. Kyle, 14 Wash. 557. Cited in People v. Plyler, 121 Cal. 163, holding proposed instruction improperly refused; People v. Arlington, 131 Cal. 233; People v. Wilder, 134 Cal. 184; People v. Stevens, 141 Cal. 492; and State v. Sexton, 10 S. Dak. 131, sustaining instruction given; Cameron v. Wentworth, 23 Mont. 78, noted under People v. Hicks, 53 Cal. 354; Singer etc. Co. v. Cramer, 109 Fed. 658, holding instruction properly refused. Harmonized in People v. Flynn, 73 Cal. 516, holding that the court may instruct the jury to distrust or reject in its entirety the testimony of a witness who has willfully testified falsely in regard to any one person or any particular fact in the case. Cited in notes to 81 Am. Dec. 270; 86 Am. Dec. 330, discussing the subject.

Judgment will be given without regard to technical errors or defects, which do not affect substantial rights of defendant, p. 495.

Approved in People v. Gilbert, 57 Cal. 99 (omission to record verdict before reading it to the jury); so in People v. Smith, 59 Cal. 604; and People v. Smalling, 94 Cal. 119; People v. Nichols, 62 Cal. 521 (mere irregularity in order of proceeding); People v. Murback, 64 Cal. 372 (cler-

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ical mistake in entry of statement of nature of charge); and *People v. Majors*, 65 Cal. 149 (irregularity in challenge of juror). Cited in *People v. Reggel*, 8 Utah, 25, noted under *People v. Brotherton*, 47 Cal. 388.

**General Citation.**—In *Sprague v. Fawcett*, 53 Cal. 408, denying mandamus to compel the judge to settle proposed bill of exceptions.

**53 Cal. 495-554. LA SOCIETE FRANCAISE v. DISTRICT COURT.**

Order appointing is not appealable, and cannot be reviewed on appeal from judgment, p. 550.

Cited as authority in *Emeric v. Alvarado*, 64 Cal. 622, 625, 626, holding that an order appointing a receiver in an action for partition is not appealable; *Popp v. Daisy etc. Co.*, 22 Utah, 461, construing local statute.

Equity cannot appoint a receiver of a corporation in the absence of a statute conferring the jurisdiction, pp. 550-554.

Cited in *Batement v. Superior Court*, 54 Cal. 288, denying jurisdiction of late district court to appoint a receiver in action of ejectment; *Smith v. Superior Court*, 97 Cal. 350, in approval of ruling stated. So, to same effect, in *State Investment etc. Co. v. San Francisco*, 101 Cal. 146; *Fischer v. Superior Court*, 110 Cal. 140, 141; *Jones v. Bank of Leadville*, 10 Colo. 473; *Wallace v. Publishing Co.*, 101 Iowa, 333, holding that dissensions between two equal owners of the stock of a corporation, who are also its officers, will not justify the appointment of a receiver so long as no actual legal wrong is committed by either; *Murray v. Superior Court*, 129 Cal. 632, denying right to appoint in action by stockholder of life insurance company on ground of its insolvency; *White v. White*, 130 Cal. 599, ruling similarly as to receiver in divorce case to take possession of husband's property; *McNarry v. Bush*, 35 Or. 118, but holding order of appointment not collaterally attackable; note to *Cameron v. Groveland etc. Co.*, 72 Am. St. Rep. 46, 52, on receivers. *State v. Ross*, 118 Mo. 59, in approval, dissenting opinion of Sherwood, J.; S. C. 122 Mo. 461; *State v. District Court*, 14 Mont. 594; *Land Co. v. Bindle*, 5 Tex. Civ. App. 21. Explained in *Savings Bank v. Superior Court*, 103 Cal. 34, as deciding "that a court of equity has no jurisdiction, in a suit by a private person against the corporation alone, to appoint a receiver to wind up its business, the practical effect of such a decree being a dissolution of the corporation, a result which could be accomplished only at the suit of the state; but that an action might be maintained against the directors of a corporation in a proper case was expressly decided; so in *State v. District Court*, 15 Mont. 331, 333, 48 Am. St. Rep. 684, 686, where the power of a court of equity to appoint a receiver was sustained, but the case held to be a precedent only as to its own facts; *Aiken v. Irrigation Co.*, 72 Fed. Rep. 592, 593, to same effect, the appointment of a receiver in the particular case being held

a proper remedy. Cited in notes to 19 Am. Dec. 429, 430; 64 Am. Dec. 485, discussing the subject. Distinguished in Security Sav. etc. Co. v. Piper, 4 Idaho, 467, under Revised Statutes, sections 5185-5187, trustees and stockholders of corporation may apply to district court for its dissolution, and under section 4329, court may appoint a receiver for it.

**General Citation.**—Dudley v. Dakota Hot Springs Co., 11 S. D. 562.

**53 Cal. 557-559. NEWMARK v. CHAPMAN.**

**Foreclosure Sale** is not void, although made on copy of judgment issued to sheriff, p. 558.

Cited in Granger v. Sheriff, 140 Cal. 194, 195, discussing and sustaining commissioner's sale, under decree amending prior foreclosure decree.

**Foreclosure.**—Copy of judgment of, issued to sheriff, will be regarded as process for the execution of the judgment, p. 558.

Cited in Northern etc. Trust v. Cadman, 101 Cal. 204.

**Copy of Judgment of Foreclosure** issued to sheriff as process for execution of judgment, though erroneous, is not void, may be amended, p. 559.

Approved in Hager v. Astorg, 145 Cal. 553, order of sale issued under signature of clerk without seal, but which embodies certified copy of decree of foreclosure certified under seal of court is only erroneous and not collaterally attackable; Janes v. Bullard, 107 Cal. 132, and holding that the validity of the sale thereunder is not thereby affected. Cited in Hibernia Savings etc. Soc. v. Lewis, 117 Cal. 580, as to office of writ of assistance; Wilson v. Gray, 5 Idaho, 221, process authorized by Revised Statutes, section 4473, may be amended on proper showing; 99 Am. Dec. 413, note.

**53 Cal. 563-566. STEIN COAL COMPANY v. KERN ISLAND IRRIGATING CANAL COMPANY.**

**Water Rights.**—Diversion of waters of stream may be enjoined at suit of prior appropriator of right, p. 565.

Cited in Geddes v. Parrish, 1 Wash. 591, in approval.

**Water Rights Construed,** p. 565.

Cited in Montecito Valley Co. v. Santa Barbara, 141 Cal. 594, as instance of acquisition of water rights by corporation.

**53 Cal. 566-571. PEOPLE v. YOAKUM.**

**Affidavit for Change of Venue** must state facts and circumstances from which the conclusion is deduced that a fair trial cannot be had, p. 567.

Approved in Territory v. Egan, 3 Dak. Ter. 125, denying change of

venue on ground of insufficiency of affidavit; so in *Territory v. Manton*, 8 Mont. 103; *State v. Spotted Hawk*, 22 Mont. 53, noted under *People v. McCauley*, 1 Cal. 379; *State v. Douglass*, 41 W. Va. 539; *Peters v. United States*, 2 Oklahoma, 135.

Granting or refusing application for change of venue is not a matter of arbitrary discretion, but the decision must find warrant in the facts disclosed by the record, pp. 567, 568.

Ruling approved in *Kennon v. Gilmer*, 5 Mont. 262, *Territory v. Manton*, 8 Mont. 103, *State v. Humphreys*, 43 Or. 57, all following rule. Cited in *State v. Pomeroy*, 30 Oreg. 20, holding that the granting of the order for change of venue on the ground that a fair and impartial trial cannot be had is a matter resting in the sound discretion of the trial court; 74 Am. Dec. 241, extending note, change of venue as matter of right.

Order refusing change of venue reversed in the particular case, no counter-affidavits having been filed, p. 570.

Cited in *People v. Majors*, 65 Cal. 147, as authority for allowance of counter-affidavits, controverting defendants' statements; *State v. Goddard*, 146 Mo. 183, holding change improperly refused. Distinguished in *People v. Goldenson*, 76 Cal. 339, as a case in which there was no counter-showing made by the prosecution, and holding that where error is assigned, a clear case should be made by the record, or the appellate court will not interfere; *People v. Vincent*, 95 Cal. 427, in which case the only affidavits filed by the defendant on the motion for change of venue were made by himself and his counsel; *People v. Fredericks*, 106 Cal. 558, denial of motion, with another opportunity to renew it, which was not availed of, and such failure to urge the motion was held to be an abandonment and waiver of it; and such was the case of *People v. Goldenson*, *supra*.

**General Citations.**—In *Joslyn v. State*, 128 Ind. 163, 25 Am. St. Rep. 427, as an instance of one indictment charging more than one felony; *Tennison v. State*, 79 Miss. 714.

#### 53 Cal. 571-574. EX PARTE NEWTON.

**Municipal Corporation.**—Possesses only such power in regulating or collecting licenses as may be granted by the legislature, p. 573.

Cited in *Ex parte Mount*, 66 Cal. 450, in approval, construing act of April 24, 1862, amending charter of city of Oakland.

#### 53 Cal. 574-576. PEOPLE v. HERSEY.

Oral charge to jury in criminal case, in absence of official reporter, and without the consent of the respective counsel, is error, p. 575.

Approved in *People v. Carrillo*, 70 Cal. 645. Cited in *State v. Fisher*, 23 Mont. 552, noted under *People v. Chares*, 26 Cal. 78; *State v. Pres-*

ton, 4 Idaho, 222, unless record affirmatively shows that court reporter failed to take down all oral instructions, presumption is that he did so; People v. Cox, 76 Cal. 282, holding that where the record shows that the language used, which was not taken down by the reporter, merely led up to an instruction which was properly taken down, and did not affect nor in any way qualify the charge which was taken down, it is not ground for reversal; and so, to same effect, in People v. Leary, 105 Cal. 497, Beatty, C. J., dissenting, pp. 500, 501, adhering strictly to the ruling stated; 99 Am. Dec. 122, extended note, discussing subject of charge to jury.

#### 53 Cal. 576-578. PEOPLE v. MONTGOMERY.

Court may, in the exercise of a sound discretion, permit the prosecution to interpose a peremptory challenge after the juror has been accepted, p. 577.

Approved in People v. Bemmerly, 87 Cal. 120, holding that such challenge may be permitted after the juror has been sworn, good reasons being shown therefor. Cited in People v. Durrant, 116 Cal. 198, as to the exercise of discretion by the court in such cases; State v. Peel, 23 Mont. 363, 75 Am. St. Rep. 532, noted under People v. Ah You, 47 Cal. 121.

Error in admission of part of dying declaration as to a certain fact is not prejudicial to defendant, if his witnesses subsequently testify to all the particulars and details of such fact, p. 577.

Cited to same effect in People v. Ketchum, 73 Cal. 638.

#### 53 Cal. 578-585. HALE v. McLEA.

If underground currents flow in well-defined channels, the rules of law which govern the use of similar streams flowing upon the surface apply, p. 584.

Cited to same effect in Lux v. Haggin, 69 Cal. 393, 395; so in Tampa Water Works Co. v. Cline, 37 Fla. 602, 53 Am. St. Rep. 268; and Willis v. City of Perry, 92 Iowa, 301, recognizing the general rule and considering exceptions thereto; Katz v. Walkinshaw, 141 Cal. 129, defining and discussing rights to percolating water in underground stream; and cf. McClinton v. Hudson, 141 Cal. 280; notes to 67 Am. St. Rep. 666, and 64 Am. Dec. 730.

#### 53 Cal. 597-600. HEGLER v. EDDY.

When contract for purchase by installments gives right of possession to vendor upon default, the legal title is not thereby transferred or changed, p. 598.

Approved in Van Allen v. Francis, 123 Cal. 477, noted under Putnam v. Lamphier, 38 Cal. 151; Perkins v. Mettler, 126 Cal. 105, noted under Kohler v. Hayes, 41 Cal. 455; Palmer v. Howard, 72 Cal. 295, 1 Am. St.

Rep. 61, holding that in such case a bona fide purchaser from the vendee acquires no valid claim to the property; so in Simpson v. Shackelford, 49 Ark. 66; and Rodgers v. Bachman, 109 Cal. 556. Cited in Lowe v. Woods, 100 Cal. 412, 38 Am. St. Rep. 304, holding that no lien is created in favor of a livery stable keeper for the feeding of a horse left with him by one having possession thereof under such conditional sale; Vermont Marble Co. v. Brow, 109 Cal. 241, 50 Am. St. Rep. 40, affirming right of seller to enter into such contract; and so in Rodgers v. Bachman, 109 Cal. 556; McGinnis v. Savage, 29 W. Va. 374; 89 Am. Dec. 127, note, where authorities bearing on the subject are collected.

If default be made, owner's right to resume possession is not lost or waived by a subsequent receipt of part of installment, p. 599.

Cited as authority in Kerns v. McKean, 65 Cal. 416, conditional sale of lands, and holding that the vendor's right to possession was not lost by mere delay in declaring the forfeiture, nor by the death of the vendee before such declaration, nor by a failure to present a claim to the administrator of the vendee; Bennett v. Tam, 24 Mont. 469, holding no waiver of owner's rights established under facts stated; 89 Am. Dec. 128, note.

Tender cannot be given in evidence without being pleaded, p. 600.

Cited as authority in Alexander v. Jackson, 92 Cal. 527, 27 Am. St. Rep. 167, note, dissenting opinion of Patterson, J.

#### 53 Cal. 600-601. PEOPLE v. ESTRADA.

Criminal Law.—Indictment for rape need not aver that the woman was not the wife of the defendant, p. 600.

Cited in State v. Williams, 9 Mont. 181, setting forth the reason of the rule; 80 Am. Dec. 374, extended note, discussing subject of "rape."

Same.—If there is any evidence tending to prove a fact, verdict will not be set aside on ground of insufficiency of evidence to sustain it, p. 601.

Ruling approved in People v. Wong Chong Suey, 110 Cal. 121, case of conviction of grand larceny; People v. Durrant, 116 Cal. 201, conviction of murder; People v. Wilson, 117 Cal. 693, conviction of crime of assault with deadly weapon.

General Citation.—Young v. Territory, 8 Okla. 531.

#### 53 Cal. 601-602. PEOPLE v. GIBSON.

Jury are exclusive judges of credibility of accomplice, p. 602.

Cited in People v. Compton, 123 Cal. 409, noted under People v. Eckert, 16 Cal. 111; People v. Rodley, 131 Cal. 257, sustaining refusal to give requested instruction as to testimony of accomplice; 34 Am. Rep. 410, note.

**53 Cal. 602-604. PEOPLE v. TAING.**

**Challenge to Juror.**—Disallowance of on ground of actual bias is not ground of exception, p. 603.

Affirmed in *People v. Riley*, 65 Cal. 108; *People v. Bemmerly*, 87 Cal. 120. Cited to same effect in *State v. Gray*, 19 Nev. 218.

**Homicide.**—Threats made by deceased against defendant, and communicated to him prior to the homicide, are not necessarily admissible in evidence, p. 603.

Referred to in *Yates v. State*, 26 Fla. 501, as to discretion of the trial court in such cases. Cited in 61 Am. Dec. 53, extended note, discussing the subject at length.

**53 Cal. 608-611. SAN FRANCISCO v. SPRING VALLEY WATER WORKS.**

**Appeal.**—Decision upon point in a case is not a dictum, though the question was not necessarily involved, p. 611.

Affirmed in *Gwinn v. Hamilton*, 75 Cal. 266.

**General Citation.**—*Los Angeles v. Los Angeles City Water Co.*, 177 U. S. 572.

**53 Cal. 612-613. PEOPLE v. BUSTER.**

**In Criminal Case**, if there is substantial conflict in evidence, it is error for court in charge to assume fact as proved, p. 613.

Approved in *State v. Taylor*, 7 Idaho, 138, holding prejudicial remarks of judge in murder prosecution, made when sustaining objection to question.

**53 Cal. 613-615. PEOPLE v. AH YUTE.**

**Continuance.**—Affidavits for, on ground of absence of witness, should show that the attendance of the witness can be procured at a future day, p. 614.

Cited to same effect in *People v. Lewis*, 64 Cal. 403; *People v. Leyshon*, 108 Cal. 444; *People v. Wade*, 118 Cal. 673.

Admissibility of statements made to prisoner relative to his connection with the alleged offense, pp. 614, 615.

Cited in *People v. Amaya*, 134 Cal. 536, noted under *People v. McCrea*, 32 Cal. 98. Explained and distinguished in *People v. Louie Foo*, 112 Cal. 24.

Failure of court to instruct jury as to the inadmissibility of such statements for the purpose proposed is not error, when no request was made to the court on the subject, p. 615.

Principle of decision approved in *Hart v. Telegraph Co.*, 66 Cal. 591; 56 Am. Rep. 119. Cited in *State v. Simas*, 25 Nev. 447, holding no

reversible error shown in absence of request for instruction limiting evidence.

**53 Cal. 615-616. PEOPLE v. PALMER.**

**Criminal Law.**—Indictment for making false entry in books of corporation should specify the particular entry complained of, and should at least state the substance of it, according to its legal effect, p. 616.

Cited in People v. Mahony, 145 Cal. 107, indictment for presentation of fraudulent claim against county must set forth particular acts and facts which make claim fraudulent and wherein it is false. Explained and approved in People v. Leonard, 103 Cal. 203, sustaining sufficiency of indictment charging the making of certain false entries, which were set out in *haec verba*.

**53 Cal. 619-621. TURNEY v. DOUGHERTY.**

**Streets.**—Order extending time after expiration of time fixed by contract for performance of street work, is void, pp. 620, 621.

Affirmed in Beveridge v. Livingstone, 54 Cal. 57; Mahoney v. Braverman, 54 Cal. 570. So, to same effect, in Heft v. Payne, 97 Cal. 111; and ruling approved in Rose v. Trestrail, 62 Mo. App. 357; dissenting opinion in Chase v. Trout, 148 Cal. 375, majority holding under curative clause of Street Bond Act objection that time for completion of work extended after time first fixed had expired, conclusively presumed to be unfounded after bonds issued.

**53 Cal. 623-626. HESTHAL v. MYLES.**

**Sale of Personal Property.**—In view of the facts in the particular case, held that the question of actual and continued change of possession should have been submitted to the jury, pp. 625, 626.

Cited in George v. Pierce, 123 Cal. 177, noted under Stevens v. Irwin, 15 Cal. 503; McKee etc. Co. v. Martin, 126 Cal. 559, holding transfer fraudulent under facts stated; Bell v. McClellan, 67 Cal. 285, in which case the sale was held void, because unaccompanied by an actual and continued change of possession; Dubois v. Spinks, 114 Cal. 294, holding delivery and change of possession a question of fact to be determined on the evidence. So, to same effect, in Ewing v. Merkley, 3 Utah, 414, case of mortgage of personal property; 76 Am. Dec. 504, note, as authority that change of possession must be such as to give evidence to the world of the claims of the new owner.

**53 Cal. 627. PEOPLE v. COCH.**

**Arson.**—If jury find defendant guilty, it is their duty to find the degree of the crime, p. 627.

Distinguished in People v. Gilbert, 60 Cal. 110, holding the rule in-

applicable to robbery, because the crime of robbery is not divided into degrees.

**53 Cal. 627-628. PEOPLE v. AH GOW.**

**Criminal Law.**—Verdict must specify offense charged in indictment, or some offense included within the offense so charged, p. 628.

Cited in People v. Tilley, 135 Cal. 63, holding verdict insufficient when omitting essential elements of the charge. Distinguished in People v. West, 73 Cal. 346, holding that in a prosecution for assault with intent to commit murder, a verdict finding the defendant "guilty" is sufficient in form. Approved in Wooldridge v. State, 13 Tex. App. 461, 44 Am. Rep. 715, in which case the verdict was declared a nullity, the jury not having found the degree of murder of which defendant was guilty.

Court should direct jury to return their verdict in proper form, p. 628.

Referred to in People v. Nichols, 62 Cal. 522, in approval.

**53 Cal. 629-630. PEOPLE v. GIRR.**

**Criminal Law.**—An indictment charging an offense substantially in the language of the statute defining it, is sufficient, p. 629.

Approved in People v. Dalton, 58 Cal. 228, indictment for crime of violating sepulture; People v. Burns, 63 Cal. 615, information charging burglary; People v. Tomlinson, 66 Cal. 345, information for embezzlement; so in Webb v. York, 79 Fed. Rep. 621; State v. Hanlon, 62 Vt. 338, indictment for assault with intent to commit rape. Explained in People v. Ammerman, 118 Cal. 26, and holding that an information for robbery, omitting to aver ownership of the property in some person other than the accused, cannot be regarded as within the rule that an information is good because substantially following the language of the statute.

**53 Cal. 630-631. PEOPLE v. VARNUM.**

**Criminal Appeal** from order denying new trial will be dismissed if taken too late, p. 630.

Cited in People v. Walker, 132 Cal. 139, as to appeal from judgment, holding section 1239, Penal Code, mandatory.

**Criminal Law.**—Dismissal of indictment or information is no bar in cases of felony, p. 631.

Ruling approved in People v. Ammerman, 118 Cal. 282.

No error to refuse instructions if they were fully covered by the charge of the court, p. 631.

Ruling approved in People v. Ah Chung, 54 Cal. 403; United States v. Camp, 2 Idaho, 218; and United States v. Cannon, 4 Utah, 140.

**53 Cal. 631-635. ESTATE OF DUNNE.**

Probate Order vacating order settling account is not appealable, p. 632.

Cited in *In re Rose*, 80 Cal. 170, but holding order settling account to be appealable.

**53 Cal. 635-643. BELCHER v. CHAMBERS.**

Decisions of supreme court of United States are conclusive in any case where writ of error lies, pp. 640, 643.

Affirmed in *San Benito County v. Southern Pac. R. R. Co.*, 77 Cal. 520. Approved in *Carr v. Quigley*, 79 Cal. 136, dissenting opinion of Paterson, J.; *United Land Assn. v. Knight*, 85 Cal. 477. Cited in *United L. Assn. v. Pacific Imp. Co.*, 139 Cal. 376, following such decision accordingly; 94 Am. Dec. 769, extended note, discussing the subject; so in 75 Am. Dec. 151, extended note.

**Jurisdiction.**—Presumptions as to service can obtain only where record is silent, p. 639.

Cited in *Latta v. Tutton*, 122 Cal. 282, 68 Am. St. Rep. 33, holding recital of service in judgment to refer to substituted service where rest of record shows such service.

**Judgment by Publication** is valid in personam only as to property actually seized, p. 640.

Cited in *First Nat. Bank v. Eastman*, 144 Cal. 491, applying rule in case of attachment. Distinguished in *Sacramento Bank v. Montgomery*, 146 Cal. 753, where record affirmatively shows summons regularly served by publication within three years and affidavit of publication sworn to within that period, though filed thereafter, recitals of judgment showing defendant regularly served and default duly entered presumed true.

**Jurisdiction.**—Judgment in rem upon publication of summons binds property subjected, but is a nullity as a personal claim, pp. 640, 643.

Approved in *Arnold v. Kahn*, 67 Cal. 473, holding that an adjudication of a debtor to be an involuntary insolvent is a decree in rem as regards the status of the debtor; *Anderson v. Goff*, 72 Cal. 69, 1 Am. St. Rep. 37, sustaining validity of personal judgment against nonresident whose property was attached within the state, though service of summons was by publication; *Mudge v. Steinhart*, 78 Cal. 39, 12 Am. St. Rep. 21, holding that a writ of attachment issued in an action sounding in tort does not confer jurisdiction in rem over the property of a non-resident defendant who is served with summons by publication; *Loaiza v. Superior Court*, 85 Cal. 28, 20 Am. St. Rep. 206, to same effect as ruling stated; *Blumberg v. Birch*, 99 Cal. 417, 37 Am. St. Rep. 68, denying jurisdiction of court to enter a personal judgment against non-resident mortgagor for any deficiency on foreclosure sale. Referred

to in *In re Newman*, 75 Cal. 220, 7 Am. St. Rep. 150, as not in point, and holding that an action for divorce, so far as it affects the status of the parties and the custody of their minor children, is a proceeding in rem, and that a service of summons by publication on a nonresident defendant is good; also noting that so far as the rule established in *Hahn v. Kelly*, 34 Cal. 391, is applicable to proceedings in rem, it has not been overruled; also referred to in *Davis v. Wakelee*, 156 U. S. 689, as following *Pennoyer v. Neff*, 95 U. S. 714, in holding that a personal judgment obtained by service by publication is invalid. Cited in 24 Am. Dec. 543, extended note, treating of "law of the land."

**General Citations.**—Referred to in *Kelley v. Kelley*, 161 Mass. 118, 42 Am. St. Rep. 396, as to presumption of jurisdiction of court of record of sister state; *Palmer v. McMaster*, 13 Mont. 190, 40 Am. St. Rep. 437, as to sufficiency of affidavit for publication of summons; *Lonkey v. Keyes etc. Min. Co.*, 21 Nev. 320, as authority that when the return contradicts the finding in the judgment as to service of process, the finding must be disregarded, and the return of the officer in the record controls; *Odell v. Campbell*, 9 Oreg. 309, as to presumption in favor of courts of general jurisdiction, and noting that the principal case overrules *Hahn v. Kelly*, 34 Cal. 391; 5 Am. St. Rep. 454, note, as to collateral attack on judgment.

#### 53 Cal. 644-647. FRASER v. FREELON.

**Certiorari.**—Transcript of record and proceedings in the action constitute the return, p. 645.

Cited in approval in *Hunter v. Eddy*, 11 Mont. 257, dissenting opinion of De Witt, J.

**Same.**—Will not lie at suit of private person to determine constitutionality of a court, for the reason that the people are interested, and are entitled to be heard in the matter, p. 646.

Followed in *Davis v. Superior Court*, 63 Cal. 582, 583. So to same effect in *Burt v. Railroad Co.*, 31 Minn. 476.

**General Citation.**—Distinguished in *People v. Toal*, 85 Cal. 338, holding that the rule that the right of a de facto officer to hold an existing office cannot be questioned collaterally, does not apply when the office does not exist.

#### 53 Cal. 647-649. PEOPLE v. COOPER.

Indictment which charges two separate and distinct offenses is bad on demurrer, pp. 648, 649.

Affirmed in *People v. De Coursey*, 61 Cal. 135, in which case the defendant was charged in one count with larceny, and in another count with embezzlement of the same property. Distinguished in *McClure v. People*, 27 Colo. 362, holding only one crime included in information;

People v. Gusti, 113 Cal. 180, sustaining an information charging that the defendant did, on a certain date, "furnish and cause to be furnished intoxicating liquors" to an Indian named; and this on the principle that when a statute enunciates a series of acts, either of which separately or all together may constitute the offense, all of such acts may be charged in a single count.

**53 Cal. 649-652. HENDERSON v. GRAMMAR.**

**Public Lands.**—Rights of junior mortgagees of land held by state certificates of purchase, p. 652.

Approved, S. C. on second appeal, in 66 Cal. 334.

**53 Cal. 653-655. BERRY v. IVANICE.**

In action for damages to realty by trespass, judgment declaring plaintiffs were owners and entitled to possession is erroneous, p. 654.

Distinguished in Reiner v. Schroeder, 146 Cal. 415, action to quiet title is maintainable by plaintiff out of possession.

**53 Cal. 655-656. HARPER v. STRUTZ.**

**Estate of Decedent.**—Pending administration of, heir cannot maintain an action of ejectment or to quiet title, p. 656.

Cited in Plass v. Plass, 121 Cal. 133, noted under Meeks v. Hahn, 20 Cal. 620. 23 Am. Dec. 201, note, as being in conflict with the opinion of the court as announced in Crosby v. Dowd (1880), 6 Pac. Coast L. J. 674; but cited as authority to ruling stated in Thorpe v. Sampson, 84 Fed. Rep. 66.

**53 Cal. 656-659. KRAFT v. DE FOREST.**

**Equity.**—Jurisdiction of, over property held in trust for a debt, p. 659.

Cited in Watson v. Sutro, 86 Cal. 529, as authority sustaining the rule that equity will not permit litigation by piecemeal, but will determine the whole controversy, so as to prevent future litigation; and so in Spence v. Sweeney, 2 Idaho, 923.

**53 Cal. 663-664. ALEXANDER v. DENAVEAUX.**

**Attorney and Client.**—Attorney has no authority to direct a sheriff to conduct a business upon which an attachment has been levied, and thereby bind the client for expenses incurred, p. 664.

Affirmed in S. C., 59 Cal. 479. Cited in 76 Am. Dec. 265, extended note, discussing "powers of attorneys at law."

**53 Cal. 666-667. GROTEFEND v. ULTZ.**

It is duty of assessor to ascertain the name of the owner of the

property, and assess it to him, or, failing to ascertain the name, to assess it to "unknown owners," p. 668.

Ruling affirmed in Grimm v. O'Connell, 54 Cal. 522; Hearst v. Egglestone, 55 Cal. 367; Brady v. Dowden, 59 Cal. 51; Greenwood v. Adams, 80 Cal. 76; Jatunn v. O'Brien, 89 Cal. 61; Gwynn v. Dierssen, 101 Cal. 566; and Russ v. Crichton, 117 Cal. 703, in which cases the same defect invalidated the assessments as in the principal case. Cited in San Luis Obispo v. Pettit, 87 Cal. 502, as authority that if an assessment is not made as prescribed by the statute it is void; State v. Ernst, 26 Nev. 127, when assessor returned assessment for E.'s property, and board of equalization ordered him to add thereto name of M. L. & L. Co., and to add certain property to assessment, and E. did not own such property and was only a stockholder in company, board's action was void; Lewis v. Blackburn, 42 Or. 116, an assessment of land to "unknown owners, and to all owners and claimants known and unknown," is void.

#### 53 Cal. 667-675. POTTER v. MERCER.

**License.**—General rule is that an executory license is revocable at will of licensor, p. 673.

Approved in Wheeler v. West, 71 Cal. 129, case of license to enter and work a mine if the licensee saw fit; Emerson v. Bergin, 76 Cal. 201, license and easement distinguished; Flickinger v. Shaw, 87 Cal. 130, 22 Am. St. Rep. 235, to same effect.

**Same.**—Executed or partly executed license excuses licensee from liability for acts done in pursuance thereof, before revocation, p. 674.

Approved as a general rule in Grimshaw v. Belcher, 88 Cal. 219, 22 Am. St. Rep. 299, holding further, however, that in cases where the revocation of the license would be a fraud, courts of equity give a remedy, either by restraining the revocation, or by construing the license as an agreement to give the right, and compelling specific performance. So to same effect in Flickinger v. Shaw, *supra*.

**General Citation.**—In McDonald v. Hanlon, 79 Cal. 443, as to right of lessee against tenant from month to month in possession.

#### 53 Cal. 677-680. PORTER v. MULLER.

**Mortgage Lien** upon real estate can only be created by an instrument in writing, p. 680.

Affirmed, S. C. on third appeal, in 112 Cal. 357, and holding that a mortgage lien cannot be changed or extended by a verbal promise. Cited in 1 Am. St. Rep. 236, note. Distinguished in Continental etc. Assn. v. Wilson, 144 Cal. 783, holding verbal agreement valid creating lien for advances.

**53 Cal. 680-686. GRADY v. PORTER.**

Estate of Decedent.—Settlement of final account is conclusive upon parties consenting thereto, and bars an action for property omitted from inventory, p. 686.

Approved in Tobelman v. Hildebrandt, 72 Cal. 315, as to conclusiveness of decree settling account.

**53 Cal. 686-689. TAYLOR v. REYNOLDS.**

Liability of cosurety to contribute is primary, not conditional, and may be enforced by assumpsit, p. 688.

Referred to in Davis v. Heimbach, 75 Cal. 284, discussing practice on application for summary process to enforce contribution. Cited in Myers v. Sierra etc. Assn., 122 Cal. 673, 674, applying rule to action for contribution among stockholders, some of whom had paid corporate note as sureties thereon; note to Culliford v. Walser, 70 Am. St. Rep. 451, on general subject.

Findings.—When made, they should respond to all the material issues in the cause, p. 689.

Affirmed in Knight v. Roche, 56 Cal. 25.

**53 Cal. 690. PEOPLE v. BAZA.**

Criminal Law.—New trial of same offense for error does not place defendant twice in jeopardy, p. 690.

Cited to same effect in People v. Gilbert, 57 Cal. 98, where the error consisted in recording the verdict before reading it to the jury. Referred to in Parrish v. State, 18 Neb. 415, holding that upon a trial for murder evidence tending to lower the grade of the homicide should be submitted to the jury.

**53 Cal. 691-693. NORTON v. COURTNEY.**

Street Assessment.—Assessment and diagram as recorded must not vary materially from diagram attached to original assessment, p. 693.

Affirmed in Blanchard v. Ladd, 135 Cal. 216, 217, noted under Himmelman v. Bateman, 50 Cal. 15; Loba v. Cooper, 107 Cal. 657, in which case the recorded diagram omitted everything contained in the original indicating the points of the compass. Distinguished in Whiting v. Quackenbush, 54 Cal. 310, a scroll designating the direction of the street being held sufficient; Gillis v. Cleveland, 87 Cal. 219, 220, in which case the superintendent of streets, in recording the warrant of assessment, failed to copy the name and official designation of the mayor, and the omission was held to be immaterial.

**53 Cal. 693-694. LACEY v. BEAUDRY.**

Injunction.—Issuance and service of against removal of fixtures, cannot constitute a conversion by plaintiff, p. 694.

Principle of decision approved in Felcher v. McMillan, 103 Mich. 500.

**53 Cal. 694-697. PEOPLE v. PITTSBURGH RAILROAD COMPANY.**

Eminent Domain.—Where a corporation is organized to impose on a court in exercise of right of eminent domain for private purposes, it may be dissolved at the suit of the state, p. 697.

Cited in People v. Dashaway Assn., 84 Cal. 117, as to right of state to forfeit corporate franchises for abuse thereof by corporation; 22 Am. Dec. 697, extended note, discussing subject of "eminent domain."

**53 Cal. 708-709. BANK OF STOCKTON v. BLIVEN.**

Judgment will be reversed, where instructions are conflicting on a material issue, p. 709.

Affirmed in Haight v. Vallet, 89 Cal. 249, 23 Am. St. Rep. 468, case of conflicting instructions as to the date when statute of limitations commenced to run.

**53 Cal. 709-711. DILLA v. BOHALL. S. C. 62 Cal. 610, in affirmance.**

Pre-emption.—Decision of land department on question of fact not subject to review, p. 711.

Cited in note to Delles v. Bank, 75 Am. St. Rep. 882, on public lands. Distinguished in Chapman v. Quinn, 56 Cal. 287, dissenting opinion of Thornton, J., as involving no question of fraud, but a mere question of law.

**53 Cal. 711-713. POWERS v. LEITH.**

Public Lands.—Decisions of land department upon questions of fact are not subject to review by the courts, p. 713.

Cited to same effect in Plummer v. Brown, 70 Cal. 546. Distinguished in Chapman v. Quinn, 56 Cal. 287, dissenting opinion of Thornton, J. Cited in 20 Am. Dec. 273, extended note on subject.

**53 Cal. 715-720. EPROSON v. WHEAT.**

Homestead.—Agreement between husband and wife to live apart, the husband to pay a certain sum annually to the wife, does not bar the latter's right to a probate homestead, p. 719.

Cited in Estate of Lufkin, 131 Cal. 293, noted under Morrison v. Bowman, 29 Cal. 346. Explained and distinguished in Wickersham v. Comerford, 96 Cal. 439, the terms of agreement of separation being materially different.

**.53 Cal. 721-723. STOCKTON SAVINGS AND LOAN SOCIETY v. HILDRETH.**

**Conditions.**—Covenants to be performed at the same time are mutual conditions precedent, p. 723.

Cited to same effect in Benson v. Shotwell, 87 Cal. 59, where by the terms of the contract the delivery of possession and transfer of title by vendor, and payment of the purchase money by the vendee, were to be simultaneous and concurrent. Approved in Hanson v. Salven, 98 Cal. 382, as to offer to perform where conditions are concurrent.

**53 Cal. 724-734. KEYES v. LITTLE YORK GOLD WASHING AND WATER COMPANY.**

In action for tort against several codefendants, it is essential that the wrong complained of be joint, p. 734.

Cited as authority to same effect in Martinowsky v. City of Hannibal, 35 Mo. App. 77; Loughran v. Des Moines, 72 Iowa, 396. Disapproved in People v. Gold Run etc. Min. Co., 66 Cal. 148, 149, 153, 155; 56 Am. Rep. 85, 86; and said to be "practically overruled" in Hillman v. Newington, 57 Cal. 62. So, to same effect, in Saint v. Guerrerio, 17 Colo. 453; 31 Am. St. Rep. 323; Lockwood Co. v. Lawrence, 77 Me. 307; 52 Am. Rep. 767, 768; and so in Woodruff v. Min. Co., 8 Saw. 632; 16 Fed. Rep. 29, 30, 31; Same v. Same, 9 Saw. 519, 525, 18 Fed. Rep. 791, 795. Referred to in Miller v. Highland Ditch Co., 87 Cal. 433, 22 Am. St. Rep. 256, holding that several tortfeasors, not acting in concert by unity of design, are not liable to a joint action for damages, although the consequences of the several torts have united to produce an injury to the plaintiff, but that an injunction will be sustained in such case against all the tortfeasors; McBride v. Scott, 125 Mich. 529, permitting joinder of owners and contractors in action for injuries received from collapse of building under construction; Heinlen v. Heilbron, 71 Cal. 561, where the question involved in the principal case was avoided by granting a nonsuit as to the defendants alleged to be improperly joined. Cited in notes to 71 Am. Dec. 313, 315; 33 Am. Rep. 526; also in 30 Am. St. Rep. 555, extended note, discussing at length "the debris question."

**.53 Cal. 735-737. WILSON v. SOUTHERN PACIFIC RAILROAD COMPANY.**

**Authority of Attorney.**—Depository is not bound by admissions of his attorney as to how the loss of the deposit occurred, p. 736.

Cited to ruling stated in 53 Am. Dec. 775, extended note, as to "admissions of agents as evidence against principal."

**53 Cal. 737-741. SACRAMENTO SAVINGS BANK v. SPENCER.**

**Summons.**—Service of, on one of the defendants, without delivering a

copy of the complaint to any one of them, does not render the judgment void, p. 740.

Referred to in Keybers v. McComber, 67 Cal. 399, case of service of irregular process, which might have been amended, and holding that the judgment was voidable only and could not be collaterally attacked; In re Eichhoff, 101 Cal. 603, sustaining judgment annulling marriage.

Same.—Party may be sued by fictitious name, p. 740.

Cited in Farris v. Merritt, 63 Cal. 119, holding that a defendant so sued is a party to the action from its commencement.

Same.—Personal service upon an insane person not judicially declared insane, gives jurisdiction, p. 740.

Cited in Speck v. Pullman Palace Car Co., 121 Ill. 51, holding that judgment is not void nor voidable because plaintiff was a lunatic; Maloney v. Dewey, 127 Ill. 404, 11 Am. St. Rep. 134, holding that a judgment against a lunatic is not invalid; and so in Woods v. Brown, 93 Ind. 169, 47 Am. Rep. 373; and Ewing v. Wilson, 63 Tex. 90; so in 32 Am. Dec. 70, note.

#### 53 Cal. 742-745. COBURN v. SMART.

Intervention.—Sureties of defendant in replevin, on a bond given to procure the return of the property, may intervene, p. 744.

Cited to ruling stated in 16 Am. Dec. 182, extended note, discussing subject of intervention.

Same.—Party may intervene at any time before trial, where complaint in intervention tenders only such issue as is already joined by the answer on file, p. 744.

Cited in Cunningham v. Scott, 4 Utah, 448, holding that where a person intervening has taken issue with the material averments of the plaintiff's complaint, the burden is on plaintiff to prove such averments, although the defendant in the action has made default.

Same.—One whose application for leave to intervene is denied, has a remedy by appeal, p. 745.

Cited in notes to 16 Am. Dec. 184, 60 Am. Dec. 431, where the subject of intervention is fully discussed.

#### 53 Cal. 745-749. IN RE STUART.

Office and Officers.—Acts relating to terms of county and municipal officers were not repealed by constitution of 1879, pp. 748, 749.

Cited in Barton v. Kalloch, 56 Cal. 105, 107, 108, in approval; so in People v. Henry, 62 Cal. 557, and holding that a police judge is a municipal officer within the ruling stated; People v. Babcock, 114 Cal. 563, holding that the consolidation act of the city and county of San Francisco was not repealed by the constitution of 1879, and that the supervisors of San Francisco, authorized by said act, are municipal and not county officers.

Notes Cal. Rep.—171.



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By CHARLES T. BOONE.

Revised to include citations to Volume 147, by CHARLES L. THOMPSON.

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Riparian Right is the interest which an owner has in a living stream of water flowing over his land, p. 5.

Cited in Lux v. Haggin, 69 Cal. 359, holding that the principal case was not in conflict with the law as to priority of possession; S. C., 69 Cal. 392, holding that by the common law the right passed with the soil as part and parcel of it; Willis v. City of Perry, 92 Iowa, 302, defining the rights of the riparian owner; Weiss v. Oregon Iron Co., 13 Oreg. 499, to same effect; note to 43 Am. Dec. 280, on doctrine of riparian rights applied to lands of United States.

**54 Cal. 6-24. HILL v. DEN.**

Findings contrary to allegations and admissions in the pleadings must be disregarded, p. 20.

Cited in Silvey v. Neary, 59 Cal. 99, holding that a finding which negatives the existence of a fact admitted by the pleadings is a finding against evidence; White v. Douglass, 71 Cal. 119, to same effect; Ortega v. Cordero, 88 Cal. 226, to same effect; Hendy Machine Works v. Page C. C. Co., 99 Cal. 424, holding that a fact alleged in the complaint and not denied in the answer is conclusive.

**Partition.**—Where land is held by A and trustees of a deed as tenants in common, it is the duty of the court, on the death of A, to partition the land in severalty between the estate of A and the trustees of the deed. Until that is done, A's executors cannot divide the testator's estate, pp. 15-24.

Approved in Richardson v. Loupe, 80 Cal. 500, where a similar decree making the devisees tenants in common of their testator's interest was upheld.

**Law of the Case.**—History and state of facts—validity of the trust deed—want of power in executors to sell—estoppel of heirs—statute of limitations, pp. 15-24.

Cited and referred to in *Huse v. Den*, 85 Cal. 398, 399, 400, 20 Am. St. Rep. 233, 234, 235, being a further appeal on a retrial of the principal case, in which the rulings in the principal case under the above heads were held to be the law of the case. Cited in *Campbell v. Drais*, 125 Cal. 260, but not discussed.

**Agreement for Partition** not signed by one of the tenants in common is void, p. 23.

Cited in *Center v. Davis*, 113 Cal. 309, 54 Am. St. Rep. 353, holding that all the parties are bound or none; *Pacific Bank v. Hannah*, 90 Fed. 77, noted under *Sutter v. San Francisco*. 36 Cal. 112.

**Will.**—Direction to executors to pay debts does not give them a power of sale, p. 21.

Cited in note to 19 Am. St. Rep. 272, on sales and conveyances by trustees.

Purchasers from Trustees in breach of the trust take upon same trusts as their grantors and with no greater title, p. 22.

'Cited in note to 19 Am. St. Rep. 278, on sales and conveyances by trustees.

#### 54 Cal. 28-35. **FOLZ v. HOGE.**

**Hastings Law College**, how affected by affiliation with the University of California, p. 34.

Cited in *People v. Kewen*, 69 Cal. 216, approving the ruling, and S. C., p. 217, by McKinstry, J., in his concurring opinion, doubting whether for all purposes the fact of affiliation had been established by the principal case; *Estate of Royer*, 123 Cal. 619, discussing power of university to accept bequests.

Power of Directors to Exclude intending students does not extend to female students, pp. 34, 35.

Cited in *State v. White*, 82 Ind. 285, 42 Am. Rep. 502, as to Purdue University.

#### 54 Cal. 35-37. **EX PARTE SMALLMAN.**

Bail after Conviction for felony, pending appeal, should only be granted in exceptional cases, p. 36.

Cited in *Ex parte Brown*, 68 Cal. 183, holding that after death sentence, no bail; after imposition of fine, bail is of right; in other cases, bail is discretionary; *Ex parte Smith*, 89 Cal. 80, holding that the appeal court considers the application independently; *Ex parte Turner*, 112 Cal. 629, holding that the determination of the trial court will not be disturbed except in an instance of manifest abuse; *United States v. Hudson*, 65 Fed. Rep. 75, holding that the right of bail after conviction only arises under statute; *In re Boulter*, 5 Wyo. 268, sustaining refusal of bail in manslaughter case under local statute.

**54 Cal. 37-41. PEOPLE v. COLBY.**

Indictment.—Motion to Set Aside can be based only on one of the statutory grounds under section 995 of the Penal Code, p. 38.

Cited to same effect in People v. Hunter, 54 Cal. 65; People v. Ramirez, 56 Cal. 535, holding that order denying motion is not reviewable; People v. Murback, 64 Cal. 372, holding a clerical error not prejudicial to the defendant not ground for reversal; Territory v. Pendry, 9 Mont. 72, holding that when the indictment was not found as prescribed by the act, the proper remedy was a motion to quash; United States v. Cutler, 5 Utah, 609, showing when a motion to quash could be made.

Indictment "not found as prescribed in this Code" means not concurred in by twelve of the grand jury, p. 38.

Cited in Bruner v. Superior Court, 92 Cal. 253, holding that error in impaneling the grand jury could only be reached by prohibition. S. C., pp. 267, 268, in concurring opinion of Garoutte, J., to same effect; Territory v. Staples, 2 Idaho, 780, to same point.

Where Some of Grand Jury are successfully challenged the remaining jurors, if of the requisite number, constitute the grand jury; dissenting opinion of Wallace, C. J., p. 39.

Cited in People v. Gray, 61 Cal. 165, holding indictment properly found in the absence of evidence to the contrary.

**54 Cal. 48-51. DOWD v. CLARKE.**

Specific Performance.—Tender Before Action not necessary when right of purchase is denied, p. 50.

Cited in Barsolon v. Newton, 63 Cal. 226, holding that part performance and readiness to perform the remainder sufficient to maintain the action; Smith v. Phoenix Ins. Co., 91 Cal. 330, 25 Am. St. Rep. 185, holding that a contract of sale and purchase passed the equitable title; Merrill v. Merrill, 95 Cal. 338, holding that withdrawal of deed placed in escrow and denial of right to purchase avoided necessity for tender; Sheplar v. Green, 96 Cal. 221, to same effect as principal case; dissenting opinion in McCowen v. Pew, 147 Cal. 312, majority determining amount of damages for breach of contract to convey timber land when specific performance rendered impossible by removal of timber prior to exercise of option.

**54 Cal. 51-53; 35 Am. Rep. 67. HANKS v. NAGLEE.**

Promise to Marry.—Immoral consideration will not support action, p. 52.

Cited in Boigneres v. Boulon, 54 Cal. 147, the same where the consideration was the continuance of past illicit relations; Saxon v. Wood, 4 Ind. App. 245, to same effect, where the alleged consideration was

future cohabitation and consequent pregnancy; *Burke v. Shaver*, 92 Va. 348, 349, to same effect; note to 44 Am. Dec. 178, on evidence of seduction in action for breach of promise; note to 63 Am. Dec. 536, on promise of marriage on immoral consideration against law or public policy; note to 40 Am. St. Rep. 173, on defenses to actions for breach of promise.

Instruction is Erroneous when hypothesis on which it is based cannot be assumed from the evidence, p. 53.

Cited in *Lathrop v. Flood*, 135 Cal. 461, holding instruction erroneous as foreign to the issues.

#### 54 Cal. 53-54. PEOPLE v. CUDDIHL.

Name of Crime given in indictment differing from that charged is a mere irregularity and not fatal to the indictment, p. 54.

Cited in *State v. Jarvis*, 18 Oreg. 361, holding that the character of the offense was that charged; *State v. Crook*, 16 Utah, 218, noted under *People v. Phipps*, 39 Cal. 326; note to 58 Am. Dec. 246, on exceptions to rule against duplicity; note to 23 Am. St. Rep. 145.

#### 54 Cal. 54-57. BEVERIDGE v. LIVINGSTONE.

Street Work.—Time for completion cannot be extended after expiration of contract, p. 56.

Cited in *Mahoney v. Braverman*, 54 Cal. 570, 571, holding that completion within the contract time was essential to recovery; *Fanning v. Schammel*, 88 Cal. 429, following the principal case; *Dougherty v. Coffin*, 69 Cal. 455, to same point and effect and that an appeal against a void assessment did not create an estoppel; *Raisch v. San Francisco*, 80 Cal. 4, extending the ruling to city contracts for work on accepted streets; *McVerry v. Boyd*, 89 Cal. 306, holding that the date of the extension is fixed by the resolution granting it; *Brock v. Luning*, 89 Cal. 319, to same point; *Brady v. Burke*, 90 Cal. 7, to same point and effect; *Ede v. Knight*, 93 Cal. 163, holding that failure to perform an official duty would not operate to the prejudice of any one but the officer and especially when the statute fixed no time when the act should be done; *Heft v. Payne*, 97 Cal. 111, holding that a direction by the council for further work to be done does not operate as an extension of time; *Palmer v. Burnham*, 120 Cal. 366, holding that when work is to commence within fifteen days from date, and completion to be within one hundred and eighty days thereafter, the word "thereafter" means the date of the contract; dissenting opinion in *Chase v. Trout*, 146 Cal. 375, majority holding under curative clause of Street Bond Act, objection that time for completion of work extended after time first fixed had expired, must be after issuance of bonds, conclusively presumed to be unfounded; *Rose v. Trestrail*, 62 Mo. App. 357, hold-

ing that when a city ordinance fixed a time for completion, time was of the essence of the contract; *Wood v. Brady*, 150 U. S. 22, 23, sustaining the principal case and distinguishing *Taylor v. Palmer*, 31 Cal. 240.

**54 Cal. 58-61. SHARPSTEIN v. FRIEDLANDER.**

Contract to pay A half of two notes of equal value when collected, entitles A, when one note has been paid and no part turned over to him, to claim as against the holder of the other note as held in trust for him, p. 61.

Cited as the law in the case in *Sharpstein v. Friedlander*, 63 Cal. 79, holding that a breach of trust was committed when the second note was collected; *Roach v. Caraffa*, 85 Cal. 444, holding that if property claimed to have been held by a deceased in trust can be ear-marked, the cestui que trust might maintain his action against the administrator to enforce the trust.

**54 Cal. 61-62. HARTMAN v. OLVERA.**

Equity of Redemption, purchase of from mortgagor creates no debt as between purchaser and mortgagee which can be garnished by a creditor of the mortgagee, p. 62.

Cited in *Searing v. Benton*, 41 Kan. 763, to same purpose and effect.

**54 Cal. 63-64. PEOPLE v. CARRILLO.**

Felonious Character of Appropriation cannot be raised by presumption; it is the ultimate fact for the jury, p. 64.

Cited in dissenting opinion in *Liverpool etc. Co. v. S. P. Co.*, 125 Cal. 444, noted under *People v. Walden*, 51 Cal. 588; *People v. Westlake*, 124 Cal. 455, holding instruction erroneous in case of embezzlement by tax collector; *State v. Blue*, 17 Utah, 182, holding proof of intent necessary in embezzlement case; *Helbing v. Svea Ins. Co.*, 54 Cal. 158, 35 Am. Rep. 73, holding that the court is not authorized, except where by statute a legal presumption is created, to instruct that one fact is to be inferred from the existence of another; *People v. Williams*, 73 Cal. 534, holding that the degree of a murder is always for the jury; *People v. Cobler*, 108 Cal. 544, instancing a proper instruction to jury; *Stooksbury v. Swan*, 85 Tex. 572, affirming the ruling as agreeing with the law in Texas; note to 72 Am. Dec. 544, on inferences of fact should not be charged.

**54 Cal. 65-71. PEOPLE v. HUNTER.**

Indictment by Grand Jury may be found by twelve members, although the jury may consist of less than nineteen at the time, p. 71.

Cited and approved in *People v. Gray*, 61 Cal. 165; *People v. Simmons*, 119 Cal. 3, 4, to same effect; *State v. Hartley*, 22 Nev. 353, to

same effect; *State v. Brainerd*, 56 Vt. 536, 48 Am. Rep. 820, to same effect.

**Validity of Indictment** on account of absence of one of the grand jury cannot be presented in the trial court by motion to set it aside, p. 65.

Cited in *Bruner v. Superior Court*, 92 Cal. 253; also, S. C. in concurring opinion of Garoutte, J., pp. 267, 268, holding that an error of the judge in the impanelment of the grand jury could only be reached by prohibition. Distinguished in *Territory v. Staples*, 2 Idaho, 781, as not applicable to that case.

#### 54 Cal. 72-74. SAN FRANCISCO v. ELLIS.

**Action to Quiet Title.**—The plaintiff must show title in himself or he cannot recover, p. 74.

Cited to same effect in *Heney v. Pesoli*, 109 Cal. 58; *Schroder v. Aden etc. Co.*, 144 Cal. 630, sustaining judgment for defendant under facts stated; *Wolverton v. Nichols*, 5 Mont. 91, holding as to mining claims plaintiff must show that the ground claimed is in conflict with that claimed by defendant. Distinguished in *Goldberg v. Bruschi*, 146 Cal. 711, holding in action to quiet title to mining claim plaintiff makes *prima facie* case by showing citizenship, discovery of mineral on land, location in conformity to law and that land is public land.

#### 54 Cal. 74-75. PEOPLE v. RICH.

**Street Railroad** ordinance which permits two railroad corporations to occupy the same street or track for more than five blocks is void, p. 75.

Cited in *Omnibus R. R. Co. v. Baldwin*, 57 Cal. 169, to same effect; note to 25 Am. St. Rep. 478, on right of one street railway company to use the tracks of another.

#### 54 Cal. 75-80. EX PARTE DUNCAN.

**Bail, Amount of.**—Before the appellate court can interfere, the bail must be shown to be "per se" unreasonably great and clearly disproportionate, p. 78.

Cited in *In re Williams*, 82 Cal. 183, holding that the court's discretion would only be interfered with under the circumstances mentioned in the principal case; *In re Scott*, 38 Neb. 508, 509, approving the ruling of the principal case.

**Presumption of Guilt** attaches on application for reduction of bail, p. 80.

Distinguished in *In re Scott*, 38 Neb. 507, holding the court was not concluded by the finding of the grand jury, but might itself take evidence as to the truthfulness of the charge.

**54 Cal. 81-83. McCACKEN v. HARRIS.**

Homestead cannot be sold under a judgment obtained after declaration is filed, except in cases provided by sections 1240, 1241, of the Civil Code, p. 83.

Approved in *Sullivan v. Hendrickson*, 54 Cal. 259. Cited in *Wilson v. Madison*, 58 Cal. 2, applying the rule when judgment rendered before, but no abstract recorded until after filing the declaration; *Barrett v. Sims*, 59 Cal. 619, holding that the levy on a homestead creates no lien except for the purpose of instituting proceedings to have an appraisement and sale under section 1245 of the Civil Code; *Fitzell v. Leaky*, 72 Cal. 484, to same effect as principal case; *Beaton v. Reid*, 111 Cal. 486, to same effect, and holding that there is no distinction as to the effect upon the homestead between an execution lien and the lien of an attachment; note to 87 Am. Dec. 279, on effect of attachment levied on homestead; note to 34 Am. St. Rep. 499, on homestead not subject to judgment lien.

Undertaking is necessary before preliminary injunction can be granted, p. 83.

Approved in *Neumann v. Moretti*, 146 Cal. 32, undertaking is required for ex parte restraining order, granted to plaintiff before defendant's appearance, until further order of court.

**54 Cal. 87-88. BANDY v. RANSOM.**

Insolvency.—Order of Stay does not deprive other courts of their ordinary jurisdiction so as to authorize the issue of a writ of prohibition to restrain their proceedings, p. 88.

Cited in *Wiggin v. Superior Court*, 68 Cal. 402, holding that writ of prohibition could only issue to arrest proceedings without or in excess of jurisdiction. Distinguished and not followed in *Hayne v. Justice's Court*, 82 Cal. 285. 16 Am. St. Rep. 115, holding that the law of the principal case has been changed by the new insolvency act. Cited in *State v. District Court*, 18 Nev. 289, holding that if after a stay another court proceeded in exercise of its jurisdiction in disregard of the stay its action would have amounted to no more than error.

**54 Cal. 89-91. PEOPLE v. AH YUTE.**

Evidence.—Statements of third persons made in the presence of an accused can only be admitted as preliminary, and to show his conduct and statements in response thereto, p. 91.

Approved in *State v. Snowden*, 23 Utah, 331, admitting divorce complaint of wife and voluntary appearance and consent to default thereon by defendant, in prosecution for adultery. Distinguished in *People v. Mallon*, 103 Cal. 515, holding they were admissible primarily to show acquiescence of accused.

**54 Cal. 92-93. PEOPLE v. SPRAGUE.**

Order for Execution cannot be pronounced without defendant is present, p. 93.

Cited in People v. Sing Lum, 61 Cal. 539, to same effect, but presence will be presumed when the record does not show the contrary.

Order Fixing Date of Execution is an order made after judgment and is appealable, p. 93.

Cited in People v. McNulty, 95 Cal. 595; People v. Ebanks, 117 Cal. 666; People v. Durrant, 119 Cal. 209, all to same effect.

**54 Cal. 94-97. EX PARTE FRAZER.**

Board of Medical Examiners.—The statute of April 3, 1876, as amended in 1878, as to the issuing of certificates, is constitutional, p. 97.

Cited and followed in Ex parte Johnson, 62 Cal. 263; In re Guerrero, 69 Cal. 99, holding constitutional a city ordinance imposing a license on liquor dealers; Ex parte Fiske, 72 Cal. 128, holding constitutional a city ordinance defining the fire limits in San Francisco; Ex parte McNulty, 77 Cal. 165, 11 Am. St. Rep. 258, to same point and effect as the principal case; Gardner v. Tatum, 81 Cal. 373, holding that a contract to render medical services with one who has not obtained a certificate to practice is void; Ex parte Gerino, 143 Cal. 415, holding act (Stats. 1901, p. 56) valid, despite certain provisions; State v. Webster, 150 Ind. 616, sustaining and construing local statute on the subject.

Constitutionality of Portions of Statute upheld if they are wholly independent, and can be carried into effect without reference to other portions which are unconstitutional, p. 97.

Cited in Ex parte Gerino, 143 Cal. 420, construing act (Stats. 1901, p. 56); People v. McFadden, 81 Cal. 496, 15 Am. St. Rep. 71, to same effect as to the act of 1889 to create Orange county; McGowan v. McDonald, 111 Cal. 65, 52 Am. St. Rep. 153, holding that if an independent provision in a statute not in its nature and connections essential to the law be unconstitutional, it may be treated as a nullity, leaving the rest of the enactment to stand.

General Citations.—Scholle v. State, 90 Md. 744.

**54 Cal. 98-100. FORBES v. McDONALD.**

Contracts.—Consideration in whole or part that a trustee resign his trust is illegal, and a contract based thereon is void, p. 100.

Cited, and the principle applied, in Mill and Lumber Co. v. Hayes, 76 Cal. 393, 9 Am. St. Rep. 215, case of contract in restraint of trade, and being indivisible, was held to be invalid in its entirety; Mulvane v. O'Brien, 58 Kan. 473, in approval, as to trust relation of officers of corporation; Ellicott v. Chamberlin, 38 N. J. Eq. 611, 48 Am. Rep. 331, applied, case of agreement for a consideration to renounce an executor-

ship; Brooks v. Cooper, 50 N. J. Eq. 770, 35 Am. St. Rep. 801, holding that a contract is not enforceable which contravenes the policy of a statute; Gage v. Fisher, 5 N. Dak. 311, applied to a contract by a stockholder to permit another to control the voting of his stock, in consideration that he secure such stockholder an office in the corporation; Union Trust Co. v. Railroad Co., 10 Saw. 132, 20 Fed. Rep. 86, case of purchase of railroad bonds, and the rights of the holder held to be unaffected by a subsequent fraudulent issue of bonds.

**54 Cal. 101-103. EX PARTE FENNESSY.**

**Dismissal of Indictment.**—Application for based on section 1382, Penal Code, must first be made to trial court, p. 101.

Cited in People v. Hawkins, 127 Cal. 374, holding objection waived if first made after swearing of jury at trial.

**54 Cal. 103-107. CHAMBERLAIN v. PACIFIC WOOL-GROWING COMPANY.**

**Promissory Note** signed by one describing himself as "president" of a corporation is an individual note, and not that of the corporation, p. 106.

Cited in Guthrie v. Imbrie, 12 Oreg. 187, 53 Am. Rep. 334, in approval of the rule; McCormick v. Stockton etc. Co., 130 Cal. 103, noted under Jones v. Clark, 42 Cal. 180; Shackleton v. Church, 25 Mont. 426, noted under Richardson v. Scot R. etc. Co., 22 Cal. 150; Persons v. McDonald, 60 Neb. 453, holding contract to be binding on agent alone and not on principal; Yates v. Spofford, 7 Idaho, 742, suit on note payable to A. agent, and by him sold, indorsed and delivered before maturity and for a valuable consideration, can be maintained by the holder; 73 Am. Dec. 530, note.

**Corporation.**—Resolution of board of trustees, carried by casting vote of president, ratifying his unauthorized act, is void, p. 106.

Approved in Graves v. Mining Co., 81 Cal. 320, case of resolutions passed by vote of interested directors, making allowances in their own favor; so in Wickersham v. Crittenden, 93 Cal. 32. Referred to in Union Trust Co. v. Railroad Co., 10 Saw. 132, 20 Fed. Rep. 86; and Park Hotel Co. v. Fourth Nat. Bank, 86 Fed. Rep. 745, in approval of the principle. Cited in 17 Am. St. Rep. 300, extended note, discussing subject of transactions between director and corporation; so in 45 Am. St. Rep. 833, extended note on subject.

Trustee cannot take part in any transaction concerning trust in which he has interest adverse to beneficiary, p. 106.

Approved in Pacific Vinegar & Pickle Works, 145 Cal. 366, where president of corporation purchases its notes and causes corporation by himself as president, to become indorser to himself individually, guaranteeing payment of notes without approval of corporation, he cannot sue on indorsement.

**54 Cal. 107-110. SACKETT v. JOHNSON.**

**Negotiable Instrument.**—Pre-existing indebtedness of indorser to indorsee constitutes a valuable consideration for indorsement and transfer of, p. 109.

**Affirmed in Russ etc. Co. v. Muscupiabe etc. Co.,** 120 Cal. 532, 65 Am. St. Rep. 196, but holding, further, that when such indorsee takes with notice of a defense to the instrument against the payee, he stands in the shoes of the latter, and such defense is available against him. Cited in notes to 68 Am. Dec. 321; and 14 Am. St. Rep. 583.

**54 Cal. 111-118. WEILL v. KENFIELD.**

**Construction.**—A word having a technical, as well as a popular, meaning is presumed to be used in its latter sense, unless there is something in the instrument which shows the contrary, p. 113.

Approved in Towle v. Matheus, 130 Cal. 577, construing "willful" shooting; Matter of Maguire, 57 Cal. 605, 40 Am. Rep. 127, construing word "disqualified" as used in section 18, article 20, of the state constitution; Oakland Paving Co. v. Hilton, 69 Cal. 491, construing the words "shall be entered in their journals," as such words are used in section 1 of article 18 of the state constitution; Miller v. Dunn, 72 Cal. 465, 1 Am. St. Rep. 69, construing the word "law," as used in section 32, article 4, of the state constitution; Farrell v. Board of Trustees, 85 Cal. 414, construing constitutional provision (subdivision 28 of section 25 of article 4) relative to enactment of special laws; Attorney General v. Toggart, 66 N. H. 364, construing constitutional provision relative to "vacancy" in office of governor. Cited in 8 Am. St. Rep. 414, extended note, bearing on construction of constitutional provisions.

**Constitutional Law.**—Bills must be read at length for three separate days, unless two-thirds of the house where the bill is pending vote to the contrary, p. 115.

Approved in People v. Thompson, 67 Cal. 632, but held inapplicable to amendments. Cited in 85 Am. Dec. 359, extended note, where the cases are collected and collated.

Where it appears from the journal of the assembly that this constitutional provision has not been complied with, the act will be void, pp. 113-118.

Referred to in People v. Dunn, 80 Cal. 213, 13 Am. St. Rep. 120, but holding that it is not essential to the validity of a statute that it should affirmatively appear from the journals of the legislature that every act required by the constitution to be done in the enactment of a law has been done, nor will it be presumed, in the absence of such a showing, that such acts were not done. Cited in Railroad Tax Case, 8 Saw. 294, as sustaining the rule that if it appears from the journals of the legislature that a bill did not pass by the constitutional majority it will not be regarded as a law. So, to same effect, in Bank v. Commissioners,

119 N. C. 224; also cited in 47 Am. St. Rep. 818, extended note, discussing subject of "proof of enactment of statutes." Disapproved in *Ex parte Wren*, 63 Miss. 530, 56 Am. Rep. 828, holding that the journals of the legislature are not admissible in evidence to show that a statute does not contain amendments which were adopted. Distinguished in *Yolo Co. v. Colgan*, 132 Cal. 269-271, noted under *Sherman v. Story*, 30 Cal. 253; *State v. Swan*, 7 Wyo. 177, 75 Am. St. Rep. 895, on point that court may examine legislative records to inquire into due passage of statute; *Cohn v. Kingsley*, 5 Idaho, 462, 463, holding void act of March 12, 1897, regulating fees and compensation of county and precinct officers.

Court is not at liberty to determine that any constitutional prerequisite to the validity of a law is of no practical service, p. 117.

Approved in *People v. Gunn*, 85 Cal. 247, holding that the provisions of the constitution of the state relating to the organization of municipal corporations are mandatory and prohibitory, and the mode of procedure required thereby is the measure of power, and the acts required by it to be performed are conditions precedent and necessary to the validity of the legislation which it authorizes.

**General Citation.**—*Smith v. Furbish*, 68 N. H. 128.

#### 54 Cal. 118-119. **DUBRUTZ v. JESSUP.**

**New Trial.**—Where verdict is objected to on ground that damages are assessed in too great or too small a sum, it is sufficient specification to say that the verdict is not sustained by the evidence, p. 119.

Ruling approved in *Bennett v. Hobro*, 72 Cal. 179; *Wise v. Burton*, 73 Cal. 167, specifications held sufficient, although the particulars in which the evidence was claimed to be insufficient were not stated. So, to same effect, in *Townsend v. Briggs*, 88 Cal. 232. Referred to in *De Molera v. Martin*, 120 Cal. 546, setting forth form and requisites of specification, and the purpose of the statute (Code Civ. Proc., sec. 659) in requiring them; *McCloskey v. Pulitzer etc. Co.*, 163 Mo. 31, holding question of excessive damages properly raised on motion for new trial.

Action of court in granting or refusing will be sustained, where the evidence is conflicting, p. 119.

Cited as authority to same effect in *United States v. Eldredge*, 5 Utah, 171; *Coffin v. Bradbury*, 3 Idaho, 792, applying rule in action to recover value of goods sold.

#### 54 Cal. 120-121. **BANCROFT v. HERINGHI.**

**Fraud.**—In an action to recover goods, the sale of which is alleged to have been procured by fraud, evidence of distinct contemporaneous frauds is admissible, p. 121.

Cited to ruling stated in 90 Am. Dec. 299, extended note, discussing subject of "pleading and evidence in creditors' suits."

**54 Cal. 121-123. PAGE v. TUCKER.**

**Estate of Decedent.**—During administration, and until distribution, executor or administrator is entitled to possession of property left by deceased, and may recover the same from an heir or devisee, p. 122.

Approved as applicable under Nebraska statute in *Dundas v. Carson*, 27 Neb. 639; *Carson v. Dundas*, 39 Neb. 510. Cited to same effect in *Thorpe v. Sampson*, 84 Fed. Rep. 66, denying right of heir or devisee to maintain an action against executor or administrator to quiet title to real estate of decedent. Referred to as not in point in *Jordan v. Fay*, 98 Cal. 286, holding that a purchaser of land from the devisee of a decedent, who receives a conveyance of the title of such devisee before settlement or distribution of the estate, may maintain an action to quiet title to the devised premises, as against any one except the executor or administrator.

**Verdict may be directed by the court when there is no conflict in the evidence, pp. 122, 123.**

Affirmed in *Martin v. Ward*, 69 Cal. 132, an action of ejectment.

**54 Cal. 123-124. PAULSON v. NUNAN.**

**Findings must dispose of all the material issues, p. 124.**

Affirmed, s. c. again, 64 Cal. 291, reasserting the doctrine that a conclusion of law cannot be regarded as a finding of fact.

**54 Cal. 124-127. UPSTONE v. WEIR.**

**Damages.**—Measure of, for partial breach of buyer's contract to purchase, is recompense to the seller at contract price for the part performed, and indemnity for his loss in respect to the part unexecuted, p. 126.

Approved and applied in *Winans v. Sierra Lumber Co.*, 66 Cal. 67; referred to as bearing on rule as to measure of damages, 43 Am. Dec. 672, note.

**General Citation.**—As authority, *Crocker v. Crocker Co.*, 93 Cal. 535, holding that a contract for the sale of goods, and a bond given to secure its performance, are both deemed to have been made with reference to the law governing sales of goods.

**54 Cal. 127-131. RIDER v. EDGAR.**

**Instructions.**—Exceptions to oral charge of court below must be specific, p. 130.

Cited to same effect in *Cockrill v. Hall*, 76 Cal. 195, holding that an exception "to each and every part, and to the whole," of the instructions, is too general; so in *Sukeforth v. Lord*, 87 Cal. 407, to same effect; so in *Cavallaro v. Texas etc. Ry. Co.*, 110 Cal. 358, 52 Am. St. Rep. 101,

but holding that the rule has no application to special instructions asked by the parties, and given or refused by the court.

**Trover** lies in favor of mortgagee in chattel mortgage for unlawful attachment, although the property is not moved, p. 131.

Affirmed in Irwin v. McDowell, 91 Cal. 122. Distinguished in Wunsch v. Railway Co., 62 Fed. Rep. 881, in which case there was held to be no unlawful interference with plaintiff's property or exercise of dominion over it.

**Chattel Mortgage** upon growing crop is valid against an attaching creditor after severance and removal from the land, p. 131.

Cited in Close v. Hodges, 44 Minn. 206; Keel v. Levy, 19 Oreg. 455, in approval of the ruling; 18 Am. St. Rep. 770, note, as so holding.

#### 54 Cal. 135-136. **GLEASON v. GLEASON.**

**Supplemental Complaint** cannot be filed after final judgment, or to set up a new cause of action, p. 136.

Cited in Brown v. Valley etc. Co., 127 Cal. 633, 634, and Swedish etc. Bank v. Dickinson Co., 6 N. Dak. 226, 227, holding supplemental complaints improperly allowed; Jacob v. Lorenz, 98 Cal. 337, as authority that permission to file a supplemental complaint is in the discretion of the court; Gordon v. San Diego, 108 Cal. 272, that it is not allowable to substitute a new and independent cause of action by way of supplemental complaint.

#### 54 Cal. 136-140. **ROUSSET v. GREEN.**

**Homestead**.—Prior to act of March 9, 1868, could not be selected from an undivided interest in land, p. 140.

Cited in 63 Am. Dec. 124, extended note, in discussion of the subject.

#### 54 Cal. 140-143. **SALTER v. BAKER.**

**Mortgage**.—Equity of mortgagee who makes a loan without notice of a resulting trust is superior to that of the beneficiary, p. 143.

Cited as authority in Schultz v. McLean, 93 Cal. 357, applying the rule that a grantor cannot question his own conveyance, upon the ground that a third party practiced a fraud upon him, not known to or participated in by the grantee, to a case where fraud is practiced by the agent of the grantor; Whittle v. Vanderbilt etc. Milling Co., 83 Fed. Rep. 55, in approval of the doctrine.

#### 54 Cal. 143-145. **McDONALD v. McCONKEY.**

Appearance of new attorney in notice of appeal is waived by failure to object, p. 144.

Cited in Meredith v. Mining Assn., 60 Cal. 620, as to waiver of con-

stitutional or statutory rights by sureties in undertaking on appeal; Buell v. Buell, 92 Cal. 396, as authority for employment of new attorney to conduct motion to recall an execution; Shirley v. Burch, 16 Oreg. 8, signing of notice of appeal by new attorneys held sufficient; Belle City Mfg. Co. v. Kemp, 27 Wash. 115, one who has permitted appearance of new attorneys in cause without raising objection that they were not attorneys of record is estopped to urge that objection when subsequently served with notice of appeal by such attorneys.

#### 54 Cal. 146-147. BOIGNERES v. BOULON.

**Marriage.**—Promise by man to marry his mistress, in consideration of her continuing the unlawful relation, is void, p. 147.

Approved in Saxon v. Wood, 4 Ind. App. 245, in which case the consideration of the promise to marry was that the woman should have sexual intercourse with the promisor, and should thereby become pregnant. Cited in extended notes to 44 Am. Dec. 178; 63 Am. Dec. 536; and 40 Am. St. Rep. 173, discussing subjects of seduction, and breach of promise to marry.

#### 54 Cal. 147-148. PICKETT v. WALLACE.

**Rules of Court.**—Court has power to suspend its own rules, or to except a particular case from their operation, when purposes of justice require it, p. 148.

Cited in Sullivan v. Wallace, 73 Cal. 310, as authority for suspension of rule requiring a copy of all ex parte orders to be served on the attorney of the adverse party; People v. Demasters, 105 Cal. 673, applied to rule requiring party to present instructions before argument; Cronkhite v. Bothwell, 3 Wyo. 742, examined, and power to suspend the rule relative to filing briefs within a certain time denied in the particular case; 41 Am. St. Rep. 643, extended note, discussing subject of "rules of court."

Cited in People v. Silva, 121 Cal. 670, holding refusal to entertain requested instruction reversible error, although request not made conformably to rule of court; Gage v. Gunther, 136 Cal. 347, applying rule to regulations of Interior Department.

#### 54 Cal. 149-150. STEWART v. MAHONEY MINING COMPANY.

**Jurisdiction.**—Courts are always open to hear special proceedings of a civil nature, p. 150.

Cited to same effect in In re Gannon, 69 Cal. 545, and holding that neither an end of the session of the court nor a final adjournment for the year would have the legal effect of dissolving the grand jury; Whittlebeck v. Railway Cos., 21 Mont. 105, quoting In re Gannon, 69 Cal. 541.

**Stock and Stockholders.**—Stock must stand in name of party voting it, p. 150.

Approved in *Smith v. San Francisco etc. Ry. Co.*, 115 Cal. 594, 56 Am. St. Rep. 126, and holding that holders of stock standing in their names, who are only dummies for the real owners, are not bona fide stockholders, and can neither vote the stock nor give a lawful proxy therefor. Distinguished in *State v. Leete*, 16 Nev. 252, holding that the statutes of Nevada recognize a person who "holds" shares of stock, issued in his name, as a stockholder, as well as one who "owns" them.

**54 Cal. 151-154. PEOPLE v. WONG AH NGOW. S. C. 35 Am. Rep. 69.**

**Evidence.**—Flight on part of person accused of crime is a circumstance for the consideration of the jury, p. 153.

Cited in *People v. Mitchell*, 55 Cal. 238, and applied to the possession of stolen goods, recently after the larceny was committed; *People v. Messersmith*, 61 Cal. 249, holding it error for a court to assume the existence of a fact which is not in evidence or which is to be determined by the jury on evidence; *People v. Welsh*, 63 Cal. 168, applied to circumstances of escape, recapture, and conduct of defendant immediately after his arrest; *Smith v. State*, 106 Ga. 680, 71 Am. St. Rep. 289, holding instruction on subject erroneous; 72 Am. Dec. 544, note.

Erroneous instructions are not cured by a correct statement of the law in another part of the charge, p. 154.

Approved in *People v. Westlake*, 124 Cal. 457, holding erroneous instruction not cured. *People v. Messersmith*, 57 Cal. 576, contradictory charge to jury; so in *People v. Bush*, 65 Cal. 134; *Haight v. Vallet*, 89 Cal. 249; 23 Am. St. Rep. 468; *People v. Thomson*, 92 Cal. 512; and *McClaine v. Territory*, 1 Wash. 353.

**54 Cal. 156-161. HELBING v. SVEA INSURANCE COMPANY. S. C. 35 Am. Rep. 72.**

**Fire Insurance.**—Warranty in policy against overvaluation is broken only in case of an intentional overvaluation, pp. 158, 159.

Cited in approval of the ruling in 76 Cal. 422; 9 Am. St. Rep. 220; *Commercial Ins. Co. v. Friedlander*, 156 Ill. 599; so in *National Bank v. Union Ins. Co.*, 88 Cal. 505; 22 Am. St. Rep. 327, applying the principle of the decision.

**Same.**—Instruction that existence of discrepancy between statement of assured as to his loss, and the actual loss, would give rise to a *prima facie* presumption of fraud, held erroneous, p. 159.

Cited in *Wise v. Wakefield*, 118 Cal. 112, holding an instruction to have been properly refused, because declaring to the jury a mere presumption of fact.

**54 Cal. 161-164. HERMAN v. HAFFENEGGER.**

**Contract.**—Party rescinding must return, or offer to return, whatever of value he has received under the contract, p. 164.

Notes Cal. Rep.—172.

Affirmed in Hill v. Den, 121 Cal. 46, denying right to sue on contract treated as void without surrender of property received thereunder; Westerfeld v. N. Y. etc. Co., 129 Cal. 84, noted under Morrison v. Lods, 39 Cal. 381; Bailey v. Fox, 78 Cal. 397, 398, holding that if the party complaining has parted with the thing received, he cannot rescind, but must resort to his action for damages; Loaiza v. Superior Court, 85 Cal. 31, 20 Am. St. Rep. 208, as to right of rescission on offer of restoration; Hammond v. Wallace, 85 Cal. 532, 20 Am. St. Rep. 244, as to necessity of prompt offer of restoration; Kelley v. Owens, 120 Cal. 509, as to necessity of averring in complaint notice of rescission and offer to restore before suit brought. Examined in Maloy v. Berkin, 11 Mont. 146, and held inapplicable in an action for the cancellation of a deed upon the ground of inadequacy of consideration and fraud and deceit in its procurement. Cited, treating at length of subject of rescission, in 74 Am. Dec. 661.

#### 54 Cal. 164-166. SMITH v. EAST BRANCH MINING COMPANY.

**Evidence.**—Offer of proof not directed to some specific material fact should be denied, p. 165.

Affirmed in Schroeder v. Schmidt, 74 Cal. 460. Approved in Palmer v. McMaster, 10 Mont. 396, excluding on offer of evidence to prove that certain property in controversy "was not the property of the plaintiff, and that she did not own and was not in the possession of the same."

#### 54 Cal. 166-167. McCREEERY v. EVERDING.

**Ejectment.**—Party moving to restrain sheriff from executing writ of possession against him must show that he did not enter under or in collusion with defendant in ejectment, p. 167.

Cited in 39 Am. Dec. 313; 15 Am. St. Rep. 60, extended notes, as authority that it will be *prima facie* presumed that all persons entering upon lands, after commencement of action of ejectment, are in subordination to defendant.

#### 54 Cal. 168-169. McCREEERY v. EVERDING.

**Misanomer.**—When a party is sued and answers by a wrong name, and judgment is entered against him accordingly, no advantage can be taken of the misnomer, p. 169.

Cited in Hammond v. Starr, 79 Cal. 558, as authority that when a person, natural or artificial, is sued by a wrong name, and appears by and in his, or its, true name in the action without objection, the error is waived.

In action of ejectment against tenant, if landlord assumes the defense, he is bound by the judgment, p. 169.

Cited in Loftis v. Marshall, 134 Cal. 397, 86 Am. St. Rep. 288, noted under Valentine v. Mahoney, 37 Cal. 389; 85 Am. Dec. 210, note.

**54 Cal. 169-175. SHAY v. McNAMARA.**

Tax Title cannot be acquired by one charged with duty of paying the taxes, p. 174.

Cited in note to Cone v. Wood, 75 Am. St. Rep. 232, on general subject.

Judgment is an estoppel only as to parties and privies, and the latter are only those whose interests in the subject-matter of the suit originated subsequently to its commencement, p. 175.

Cited in Brady v. Burke, 90 Cal. 6, holding that a prior lienholder who has not been made a party to an action of foreclosure by subsequent lienholders is not in privity with the defendant in such action, within the rule stated. So in Keokuk etc. R. R. Co. v. Missouri, 152 U. S. 314, holding that a mortgagee is not bound by judgments against mortgagor in suits begun by third parties subsequent to the mortgage, unless he or his representative is a party to the litigation.

Doctrine of Relation is a fiction of law adopted solely for purposes of justice, p. 175.

Cited in Hawkins v. Harlan, 68 Cal. 238, referring the rule that an after-acquired title by the mortgagor ordinarily inures to the benefit of the mortgagee to the doctrine of relation.

General Citation.—Ermeling v. Bargh, 121 Mich. 406.

**54 Cal. 176-177. SPIERS v. DUANE.**

Appeal.—If case is tried upon theory that the issues are properly joined in the trial court, and no exception is taken there, it is too late to raise the objection upon appeal, p. 177.

Ruling affirmed in Pacific Bridge Co. v. Kirkham, 54 Cal. 561; Kirsch v. Kirsch, 83 Cal. 635.

**54 Cal. 178-179. BUTLER v. BABER.**

Married Woman.—Under section 167 of the Civil Code, as originally enacted, a married woman could not make a valid contract for the payment of money, p. 178.

Approved in Brickell v. Batchelder, 62 Cal. 639, but noting that said section was changed by the legislature of 1873-74, so that a married woman could make such contract, and bind herself by note and mortgage.

**54 Cal. 179-180. MATTER OF FIFTEENTH AVENUE EXTENSION.**

Time for appeal dates from actual entry of judgment, although judgment is entered nunc pro tunc as of a prior date, p. 180.

Affirmed in Coon v. United Order of Honor, 76 Cal. 354.

Appellate court will not hear affidavits to contradict the transcript, p. 180.

Referred to as authority in Washoe etc. Co. v. Hickey, 23 Mont. 322, noted under Bonds v. Hickman, 29 Cal. 461; Ward v. Springfield Fire etc. Ins. Co., 12 Wash. 632, holding that the transcript on appeal cannot be corrected in the appellate court by affidavits or other extrinsic evidence.

#### 54 Cal. 180-182. BRADY v. FEISIL.

Appeal does not lie from new trial order after judgment directed by supreme court on appeal, p. 181.

Cited but not discussed in Tuffree v. Stearns etc. Co., 124 Cal. 310, sustaining right to appeal from judgment thus entered, under facts stated.

#### 54 Cal. 182-184. ROOT v. BRYANT.

**Stay of Proceedings.**—Undertaking for costs and damages (Code Civ. Proc., sec. 941), stays proceedings on an appeal in all cases, except those specified in sections 942 and 945 of the Code of Civil Procedure, p. 184.

Cited in Los Angeles v. Pomeroy, 132 Cal. 341, as to final order of condemnation in eminent domain proceedings; McMillan v. Hayward, 84 Cal. 87, as to undertaking required of defendant in foreclosure who is residing on the mortgaged premises, but who holds in subordination to another.

#### 54 Cal. 187-188. O'NEIL v. O'NEIL.

**Venue.**—Each defendant in real action is entitled as matter of right to have the action tried where the land is situated, and all of them need not join in claiming such right, p. 188.

Cited in Warner v. Warner, 100 Cal. 16; Territory v. District Court, 5 Dak. Ter. 277, as authority that the right is one which may be waived. Distinguished in Pieper v. Centinela Land Co., 56 Cal. 175, as not belonging to the same class of cases; and so in McKenzie v. Barling, 101 Cal. 461, which was an action to recover a money judgment; McDonald v. Bank, 106 Iowa, 523, but holding right waived by defendant's default; 74 Am. Dec. 243, note.

#### 54 Cal. 189-192. MARSTON v. SIMPSON.

**Contracts.**—Party desiring to rescind contract for fraud must act promptly, upon discovery of the facts entitling him to rescind, pp. 190, 191.

Cited to same effect in Hart v. Kimball, 72 Cal. 286, holding that six months was a reasonable time within which to ascertain the facts; Loaiza v. Superior Court, 85 Cal. 31, 20 Am. St. Rep. 208, as to securing

the results and fruits of rescission; *Delano v. Jacoby*, 96 Cal. 282, 31 Am. St. Rep. 207, as to waiver of right to rescind; *Scott v. Walton*, 32 Or. 464, holding right to rescind lost under facts stated.

**54 Cal. 192-198. KELLY v. MCKIBBEN.**

**Replevin.**—Reference in judgment to findings, and in findings to complaint, for a description of the property, is inexcusably circuitous, but not uncertain, p. 193.

Cited in *Stewart v. Taylor*, 63 Cal. 7, in which case it is held that an insufficient verdict could not be corrected by reference to a note of the phonographic reporter; *Ronnow v. Delmoe*, 23 Nev. 32, in approval.

Interest on the value of the property is allowable, by way of damages for detention, from date of wrongful taking, p. 194.

Affirmed in *Schmidt v. Nunan*, 63 Cal. 374; and cited as the law of California in *Webb v. Phillips*, 80 Fed. Rep. 961. Cited in *Hickey v. Coschina*, 133 Cal. 85, sustaining award of damages for detention; *Black v. Vermont M. Co.*, 137 Cal. 685, allowing interest in action for restitution on reversal of judgment.

But money expended in pursuit of the property is not recoverable, p. 194.

Cited in *Redington v. Nunan*, 60 Cal. 639, in approval. Examined and distinguished in *Arzaga v. Villalba*, 85 Cal. 193, and holding that the plaintiff may recover compensation for pursuit of the property, provided his complaint be framed for that purpose; *Harris v. Smith*, 132 Cal. 319, holding attorney's fees not recoverable in action for claim and delivery; *Pacific etc. Co. v. Bank*, 109 Fed. 378, holding attorney's fees not allowable under facts stated.

**Pleading.**—Amended complaint supersedes the original, p. 193.

Cited in *Pfister v. Wade*, 69 Cal. 138, in affirmance; so in *Collins v. Scott*, 100 Cal. 454, and holding that the original thenceforth fills no office as a pleading, except as evidence of the date at which suit is brought and for a few other purposes; so in *Kentfield v. Hayes*, 57 Cal. 411, and applied to amended answer.

**Replevin.**—Nature of action and difference from trover discussed, p. 195.

Cited in *Richards v. Morey*, 133 Cal. 439, holding former action not maintainable when property not in defendant's possession at commencement of action; *Hunt v. Hammel*, 142 Cal. 458, sustaining complaint as being one in trover.

**54 Cal. 196-198. RICHARDSON v. MUSSER.**

**Stipulation.**—Court may relieve party from effects of stipulation which admits as a fact that which is not true, p. 198.

Cited in *Ward v. Clay*, 82 Cal. 510, as authority sustaining the power

of the court to relieve from the effect of a mistake in law; *Welsh v. Noyes*, 10 Colo. 145, in approval of ruling stated.

#### 54 Cal. 201-204. EX PARTE TINKUM.

**Parties.**—In action against public officer, upon going out of office, his successor does not become a party to the suit, and is not affected by the proceedings, until made a party in due form, p. 203.

Cited in 50 Am. St. Rep. 741, extended note, discussing at length subject of "new parties."

#### 54 Cal. 204-207. EX PARTE ELLIS.

**Criminal Law.**—Judgment may direct imprisonment for nonpayment of fine until paid, at a certain rate per day, p. 205.

Followed in *Ex parte Chin Yan*, 60 Cal. 80. Cited in *Ex parte Harrison*, 63 Cal. 300, as authority that any judgment for a fine only substantially conforming to the provisions of the statute would be valid and sufficient; *Ex parte Henshaw*, 73 Cal. 496, in approval. So, to same effect, in *Ex parte Miller*, 82 Cal. 455. Distinguished in *Ex parte Baldwin*, 60 Cal. 435, which case was decided on a section of the statute (Pen. Code, sec. 1446) different in its language.

#### 54 Cal. 207-210. NOE v. SPLIVALO.

**Estoppel.**—If a will disposes of property of a third person, who accepts a bequest or devise under it, he is estopped by election, p. 209.

Cited and applied in *In re Stewart*, 74 Cal. 104; *Cunha v. Hughes*, 122 Cal. 113, 68 Am. St. Rep. 29, holding widow estopped by decree of distribution, as to share in community property; *In re Gilmore*, 81 Cal. 243, cases where the widow was put to an election between the provisions of the will of her deceased husband disposing of the entire community property as his own, and his right as his surviving wife to one-half of such property.

#### 54 Cal. 211-212. WELSH v. ALLEN.

**Appeal.**—Order substituting party plaintiff is not a final judgment as between the contesting parties, nor is it an appealable order, p. 212.

Cited in *Nolan v. Smith*, 137 Cal. 361, noted under *Peck v. Vandenberg*, 30 Cal. 22; *Gilman v. Bootz*, 80 Cal. 565, as to the necessity of a bill of exceptions for review of a non-appealable order; *Grant v. Los Angeles etc. Ry. Co.*, 116 Cal. 72, in affirmance; 60 Am. Dec. 436, extended note, discussing subject of final and interlocutory judgments and decrees.

#### 54 Cal. 212-215. WILKE v. COHN.

**Attachment.**—Affidavit for, in the alternative, held insufficient, p. 214.

Followed in Merced Bank v. Morton, 58 Cal. 361; Harvey v. Foster, 64 Cal. 297, 298. Approved in Scrivener v. Dietz, 68 Cal. 3, holding, also, that the regularity of an affidavit for attachment cannot be attacked collaterally by a stranger to the suit; Winters v. Pearson, 72 Cal. 554, in affirmance. Referred to in Simpson v. McCarty, 78 Cal. 178, 12 Am. St. Rep. 39, and holding that an affidavit for attachment, averring an indebtedness to plaintiff "upon an account stated, or contract for the direct payment of money," is not fatally defective in not averring whether the contract was express or implied.

#### 54 Cal. 215-218. ESTATE OF COTTER.

Surviving spouse, though incompetent to serve because of nonresidence, is entitled to nominate a suitable person for administrator, p. 217.

Ruling affirmed in In re Stevenson, 72 Cal. 166; In re Dorris, 93 Cal. 612. Approved and applied in Estate of Dow, 132 Cal. 310, sustaining such right even in case of widow's remarriage; McLean v. Roller, 33 Wash. 170, husband who is convicted of felony and disqualified to act may designate person entitled to appointment to administration on deceased wife's estate; In re Stewart's Estate, 18 Mont. 598, the surviving wife being disqualified by reason of minority. Distinguished in Hyde v. Cutler, 64 Cal. 228, denying letters of administration to nominee of nonresident heir; In re Allen, 78 Cal. 585, holding that the surviving wife, upon remarrying loses the right of nomination.

#### 54 Cal. 218-223. HOOPER v. FLOOD.

To maintain claim for mechanic's lien a substantial observance of the provisions of the law is required, p. 221.

Approved in White v. Mullins, 2 Idaho, 1167, omission to state name of owner; and so in Malter v. Falcon Min. Co., 18 Nev. 215; so in Lavin v. Bradley, 1 N. Dak. 297, and applied to such lien; Minor v. Marshall, 6 N. Mex. 197, insufficient notice of claim; Liberty etc. Loan Co. v. Furbush, 80 Fed. Rep. 637, noncompliance with requirement as to time of filing claim; Morrison v. Willard, 17 Utah, 309, 310, 70 Am. St. Rep. 786, 787, holding notice insufficient. Distinguished in Blackmen v. Marsicano, 61 Cal. 640, where the claim of lien, in stating the terms, time given, and conditions of the contract, used the words "cash upon demand, in Gold coin of the United States," and it was held sufficient; so in Kelly v. Plover, 103 Cal. 36, 37, where the words used were "cash on completion of contract"; so in Cohn v. Wright, 89 Cal. 89, where the notice of lien stated that it was agreed that the price of all materials furnished by the materialman should be due on the delivery of the same.

**54 Cal. 223-228. ESTATE OF BURNS.**

Homestead.—Order setting apart, to widow of deceased, is appealable, p. 228.

Affirmed in Gruwell v. Seybolt, 82 Cal. 10.

Homestead may be set apart to surviving wife without notice to heirs, pp. 227, 228.

Cited in Kearney v. Kearney, 72 Cal. 597, in approval.

Such homestead must not exceed five thousand dollars in value, p. 228.

Examined in In re Walkerly, 81 Cal. 580, 581, and denied to be law.

Appeal in such case must be taken within sixty days after the entry of the order, p. 228.

Affirmed in Estate of Harland, 64 Cal. 379. Cited in 75 Cal. 524, and applied to appeal from decree of partial distribution; In re Backus, 95 Cal. 672, applied to appeal from order refusing probate of will.

**54 Cal. 228-232. WOLF v. MARSH.**

Contract.—One who voluntarily disables himself from performing as agreed, breaks his contract, and is immediately liable to suit therefor without demand, p. 232.

Cited in Long v. Saufley, 79 Cal. 262, as within the principle stated, the defendant having voluntarily put it out of his power to perform by compromising a claim; Griffith v. Happensberger, 86 Cal. 614, voluntarily dismissal of employes by defendant, rendering performance impossible; Poirer v. Gravel, 88 Cal. 83, promise to pay from products of certain land, broken by a sale and conveyance of the land. So, to same effect, in Crane v. McCormick, 92 Cal. 182; San Francisco Bridge Co. v. Improvement Co., 119 Cal. 283, performance on part of plaintiff rendered impossible by failure of defendant to make monthly payments as agreed; Bagley v. Cohen, 121 Cal. 606, as to sale of business out of whose profits payments were to be made; Carter v. Rhodes, 135 Cal. 48, 49, holding party liable on voluntary loss of power to perform; Stanford v. McGill, 6 N. Dak. 565, but holding executory contract of sale not violated by mere making of another such contract; Reed v. Union etc. Co., 21 Utah, 307, 312, holding agent not deprived of right to commissions by principal's sale of the property from which fund to pay them was to be derived; Hood v. Hampton etc. Co., 106 Fed. 411, noted under Williston v. Perkins, 51 Cal. 554; Macgregor v. Union Life Ins. Co., 121 Fed. 496, life insurance company which abandons business by transferring it, and thus disables itself from carrying out contract of employment is liable for damages where employment was to continue for certain term; Seaman v. Paddock, 55 Mo. App. 301, applied to recognizance given

on temporary stay of execution, the principal therein having suffered the property seized to be subsequently sold under an execution enforcing a prior lien; *Branson v. Railway Co.*, 10 Oreg. 283, in which case the defendant put itself beyond its power to perform as agreed by the voluntary sale and disposal of its railroad.

**General Citations.**—*Barnum v. Green*, 13 Colo. App. 260; *Smith v. Barber*, 153 Ind. 329; *Johnson v. Clements*, 23 Tex. Civ. App. 118; *Stark v. Duvall*, 7 Okla. 216.

#### 54 Cal. 233-235. **HOFF v. FUNKENSTEIN.**

**Statute of Limitations.**—Period of suspension of right of action by bankruptcy proceedings must be deducted from the time prescribed by the statute to bar the action, p. 235.

Followed in *Goldtree v. Funkenstein*, 54 Cal. 594.

**Statute of Limitations.**—Creditor has full statutory period on any day of which he may of own volition bring suit, p. 235.

Cited in *Barclay v. Blackinton*, 127 Cal. 193, holding action on rejected probate claim barred; *Union etc. Co. v. Soule*, 141 Cal. 100, holding running of statute interrupted by insolvency proceedings, though these were afterward dismissed.

#### 54 Cal. 236-237. **PEOPLE v. CENTER.**

**Appeal.**—After appeal is complete, court below has no longer any power or control over the action, p. 237.

Cited in *Mill Co. v. Johnston*, 5 Utah, 150, in approval.

For all purposes connected with its appellate jurisdiction, the appellate court has the same power over the clerk of the court below as it has over its own clerk, p. 237.

Cited to same effect in *Winder v. Hendrick*, 54 Cal. 277; *Duncan v. Times-Mirror Co.*, 109 Cal. 606, relative to certification of transcript by clerk of court below.

#### 54 Cal. 245-248. **McDONALD v. PATTERSON.**

**Constitutional Law.**—Act of April 1, 1872, relative to levy of street assessments in San Francisco, was superseded by section 19, article 11, of the new constitution of 1879, p. 248.

Cited in *Staude v. Election Commissioners*, 61 Cal. 324, and applied as to effect of constitution of 1879 in controlling elections and terms of office throughout the state; *Donahue v. Graham*, 61 Cal. 277; *Thomason v. Ruggles*, 69 Cal. 469, 473; *Oakland Paving Co. v. Hilton*, 69 Cal. 482, 483, 485, in affirmance; *Thomason v. Ashworth*, 73 Cal. 75, in approval, but holding that said section of the new constitution was repealed by the constitutional amendment proposed by the legislature in 1883, and adopted by the people at the general election in

1894. Distinguished in *Ede v. Knight*, 93 Cal. 161, holding that said section is applicable only to contracts made after the taking effect of the constitution; so in *Ex parte Chin Yan*, 60 Cal. 81, involving question of constitutionality of an ordinance providing for the punishment of misdemeanor by fine or imprisonment; *Huntington v. City of Nevada*, 75 Fed. 61, holding that the California legislature is not restrained by the provisions of the new constitution from exercising control, by general laws, over municipal corporations, created prior to its adoption, but only from passing special laws affecting such corporations.

Said section (Const. 1879, art. 11, sec. 19) is self-executing, not requiring any legislation to enforce it, p. 248.

Cited in *Hyatt v. Allen*, 54 Cal. 360, and applied to section 1 of article 13 of the constitution, relative to taxation; so in *Matter of Maguire*, 57 Cal. 608, 40 Am. Rep. 129, and applied to constitutional provision (Const. art. 20, sec. 18) imposing a restraint on every law-making power in the state. Distinguished in *Ewing v. Oroville Min. Co.*, 56 Cal. 654, holding that the constitutional provision (Const. art. 12, sec. 11) for the increase of the capital stock of corporations, is not self-executing. Referred to in *Russell v. Ayer*, 120 N. C. 196, dissenting opinion of Clark, J., as recognizing self-executing constitutional provisions.

#### 54 Cal 248-251. PEOPLE v. SAN FRANCISCO GAS-LIGHT COMPANY.

**Wharfage.**—When corporation lessee of harbor commissioners is to be at the expense of dredging at its dock, it is entitled to all dockage fees from vessels doing business with it by contract, p. 251.

Cited in *People v. Pacific Rolling Mills Co.*, 60 Cal. 326, holding that harbor commissioners have no authority to collect wharfage for merchandise landed at a wharf constituting no portion of a street.

#### 54 Cal. 254-258. REYNOLDS v. BRUMAGIN.

Decree of probate court settling accounts of administrator, is conclusive, p. 257.

Cited to same effect in *Tobelman v. Hilderbrandt*, 72 Cal. 315; *Washington v. Black*, 83 Cal. 294; *Estate of Marshall*, 118 Cal. 381; *Estate of Grant*, 131 Cal. 429, noted under *Estate of Stott*, 52 Cal. 403; 48 Am. Dec. 746, note; 5 Am. St. Rep. 469, note, discussing the subject. Distinguished in *Wheeler v. Bolton*, 54 Cal. 305, the complaint in which presented an entirely different case.

**Findings** are not required, where plaintiff is nonsuited, p. 258.

Affirmed in *Harney v. McLeran*, 66 Cal. 36; *Toulouse v. Pare*, 103 Cal. 252. Cited in *Reever v. White*, 8 Utah, 191, noted under *Plant v. Fleming*, 20 Cal. 93.

**Same.**—Waiver of will be presumed, unless the fact of nonwaiver appears from the record, p. 258.

Cited in *Weeks v. Gold Min. Co.*, 73 Cal. 602; *Campbell v. Coburn*, 77 Cal. 37; *Gordon v. Donahue*, 79 Cal. 503; *In re Arguello*, 85 Cal. 153; and *Chandler v. Kennedy*, 8 S. Dak. 59, all in approval of the ruling.

**54 Cal. 258-259. SULLIVAN v. HENDRICKSON.**

**Homestead.**—Judgment obtained after filing declaration of cannot be enforced against the homestead, p. 259.

Cited to same effect in *Wilson v. Madison*, 58 Cal. 2; *Fitzell v. Leaky*, 72 Cal. 484; *Beaton v. Reid*, 111 Cal. 486, holding that an attachment lien is defeated by the intervention of a homestead right subsequently acquired, the case last cited also applying the rule to an execution lien; extended notes to 76 Am. Dec. 518; 87 Am. Dec. 279; 93 Am. Dec. 351; 34 Am. St. Rep. 499, where the authorities are collected and the subject discussed at length.

**54 Cal. 262-265. HASKELL v. HASKELL.**

Adultery or habitual intemperance do not, in a legal sense, constitute extreme cruelty as ground of divorce, p. 263.

Cited in *Waldron v. Waldron*, 85 Cal. 264, in approval; *Delatour v. Mackay*, 139 Cal. 622, but holding extreme cruelty shown by habitual intemperance; note to 65 Am. St. Rep. 32; 73 Am. Dec. 628, extended note, treating of cruelty as ground of divorce.

**Pleading.**—Matters constituting the gravamen of one cause of action cannot be pleaded by reference to another, p. 265.

Cited in *Coulthurst v. Coulthurst*, 58 Cal. 240, and applied to cross-complaint; *Jerrett v. Mahan*, 20 Nev. 100, but held inapplicable in the particular case.

Defects in one count of complaint cannot be supplied from statements in another, unless expressly referred to in it, p. 265.

Approved and applied in *Baldwin v. Ellis*, 68 Cal. 496, action to recover money illegally exacted as taxes; *Bidwell v. Babcock*, 87 Cal. 33, complaint containing several counts upon several debts of a corporation; *Green v. Clifford*, 94 Cal. 52, case of consolidation of several actions to enforce mechanic's liens; *Reading v. Reading*, 96 Cal. 6, action for divorce; *Treweek v. Howard*, 105 Cal. 442, action against sureties upon bond of executor, sustaining complaint as sufficient; *Hopkins v. Contra Costa County*, 106 Cal. 570, affirming the rule; *Aulbach v. Dahler*, 4 Idaho, 658, applying the rule in action on certificates of deposit; *Gardner v. McWilliams*, 42 Or. 17, where in action for pasturing stock defendant answered as first defense that he rented premises to plaintiff under agreement to permit stock to roam on

premises without charge, and then for further defense, answer incorporated first defense by reference and further alleged facts of waste, answer was bad as not separately stating defenses.

General Citation.—*Ramsey v. Johnson*, 8 Wyo. 481.

**54 Cal. 266-273. BLACK v. SPRAGUE.**

Boundary.—Map referred to in deed is often entitled to as much, if not more, weight, than the courses and distances, p. 271.

Cited in *Chapman v. Polack*, 70 Cal. 495; *Wise v. Burton*, 73 Cal. 171, in approval of the ruling.

**54 Cal. 273-275. TRENOUTH v. FARRINGTON.**

Statute of Limitations does not begin to run against action on judgment until the entry thereof, p. 275.

Affirmed in *Crim v. Kessing*, 89 Cal. 491, 23 Am. St. Rep. 499; *Rowe v. Blake*, 99 Cal. 171, 37 Am. St. Rep. 48, action to enforce judgment for foreclosure of mortgage; *Edwards v. Hellings*, 103 Cal. 207, holding further that if defendant desires to set the statute running he may himself cause the judgment to be entered at any time after its rendition; *Herrlich v. McDonald*, 104 Cal. 553. Referred to in *Durant v. Comegys*, 2 Idaho, 811, 35 Am. St. Rep. 268, as authority that a judgment is rendered when ordered by the court, but is not entered until actually written in the judgment book, and holding that an appeal from a judgment cannot be taken until it is entered. Denied in *Feeney v. Hinckley*, 134 Cal. 469, 86 Am. St. Rep. 293, holding time to run only from expiration of term for appeal or from final determination if appeal is taken. Cited in *Haupt v. Burton*, 21 Mont. 577, 69 Am. St. Rep. 703, on point that bar is avoided by filing of complaint even if summons is not served within statutory period.

**54 Cal. 275-277. WINDER v. HENDRICK.**

Appeal.—Clerk's certificate to transcript stating that an undertaking on appeal was properly filed, omitting the words in "due form," held insufficient, and appeal dismissed, p. 277.

Cited as authority in *Duncan v. Times-Mirror Co.*, 109 Cal. 606, holding that a certificate to the effect that an "undertaking on appeal in due form has been properly filed," was not conclusive on the supreme court.

**54 Cal. 278-280. WATSON v. DAMON.**

Verdict may be directed by the court when the evidence is not conflicting, p. 279.

Cited as authority to the ruling stated in *Martin v. Ward*, 69 Cal. 132.

**Same.**—For recovery of money must be certain as to the amount, p. 280.

Cited in *Fiore v. Ladd*, 29 Oreg. 533, as authority that the verdict in regard to the amount recovered cannot be amended by the court by changing the amount after the jury has been discharged.

**54 Cal. 280-281. SCHIRMER v. HOYT.**

**Street Assessment.**—Demand for aggregate sum due on two lots is insufficient, and should be on each lot, for the amount assessed thereon, p. 281.

Cited to same effect in *Donnelly v. Howard*, 60 Cal. 292, in which case there was a charge for work done which was not authorized; *Gillis v. Cleveland*, 87 Cal. 218, in affirmance; *Ryan v. Altschul*, 103 Cal. 176, holding that where a street assessment is illegal in part the whole assessment is void.

**54 Cal. 282-283. DONELLY v. CURRAN.**

Introduction of irrelevant evidence by one side does not entitle the other to go into such evidence in reply thereto, p. 283.

Ruling affirmed in *People v. Mitchell*, 62 Cal. 412; *People v. Dye*, 75 Cal. 112; *San Diego Land etc. Co. v. Neale*, 78 Cal. 76. Cited in *Oyler v. Dantoff*, 36 Or. 363, but ruling aliter where evidence held not to be entirely irrelevant.

**54 Cal. 283-284. CONNIEF v. KAHN.**

**Appeal.**—Consent order, overruling demurrer, is not reviewable upon appeal, p. 284.

Cited to same effect in *Jackson v. Brown*, 82 Cal. 278, holding that a consent to a judgment is a waiver of errors by the party consenting, and, on appeal, the judgment must be affirmed; *Rader v. Barr*, 22 Oreg. 496, holding that no appeal lies from a judgment by consent; and so in *Omaha Fire Ins. Co. v. Maxwell*, 38 Neb. 360.

**54 Cal. 285-289. BATEMAN v. SUPERIOR COURT.**

District court had no power to appoint receiver in action of ejectment, p. 289.

Cited in *Scott v. Sierra Lumber Co.*, 67 Cal. 78, in approval; and so, to same effect, in *State v. District Court*, 13 Mont. 416, 422; *State v. District Court*, 14 Mont. 595, 598; *San Jose etc. Bank v. Bank*, 121 Cal. 545, ruling similarly in action by assignee of certificate of redemption to compel issuance of sheriff's deed and to quiet title to land involved.

**General Citation.**—*Smith v. White*, 62 Neb. 60.

**54 Cal. 289-294. TALCOTT v. BLANDING.**

**Public Officers.**—Words giving joint authority to three or more public officers will be construed as giving it to the majority, unless otherwise expressed, p. 293.

Cited in *People v. Hecht*, 105 Cal. 628, 45 Am. St. Rep. 102, quo warranto to determine authority of board of freeholders to act as such, or as individuals.

**54 Cal. 295-297. GOODWIN v. BUCKLEY.**

**Statutes.**—Last expression of legislative will must prevail, p. 296.

Cited as authority in *San Luis Obispo Co. v. Phelps*, 104 Cal. 66, construing provisions of the Political Code relative to taxation. Distinguished in *Yolo Co. v. Colgan*, 132 Cal. 276, discussing successive county government acts; but cf. *Mariposa Co. v. Madera Co.*, 112 Cal. 55, holding code sections controlled by subsequent act.

**54 Cal. 298-301. GRANT v. BURR.**

**Deed of Trust** of land, authorizing trustee to sell and convey the land upon default in payment of debt, is not a mortgage requiring foreclosure, but a conveyance of the legal title, p. 300.

Affirmed in *Bateman v. Burr*, 57 Cal. 483, followed, *Durkin v. Burr*, 60 Cal. 361. Cited to same effect in *Savings etc. Soc. v. Deering*, 66 Cal. 286; *Partridge v. Shepard*, 71 Cal. 478; *Spect v. Spect*, 88 Cal. 443, 22 Am. St. Rep. 318, discussing remedy of mortgagor against mortgagee; *Savings etc. Soc. v. Burnett*, 106 Cal. 528, in affirmance; *Bell Min. Co. v. Butte Bank*, 156 U. S. 477, in approval of the doctrine; so, *First Nat. Bank v. Min. Co.*, 8 Mont. 45. Cited in *Camp v. Land*, 122 Cal. 170, holding such deeds not void as in restraint of alienation; *Banta v. Wise*, 135 Cal. 279, and *Kraft Co. v. Bryan*, 140 Cal. 80, noted under *Koch v. Briggs*, 14 Cal. 256; *Etna Coal etc. Co. v. Marting Iron etc. Co.*, 127 Fed. 36, upholding provisions of deed of trust that in case of default instrument might be foreclosed without resort to judicial proceedings, and that trustees after advertisement might sell property without appraisement; *Farmers' Loan etc. Co. v. Denver etc. R. Co.*, 126 Fed. 51, one who has paramount lien on legal title is not guilty of laches which will prevent him from asserting equities therein in defense of equity suit to deprive him of lien, by fact that he did not institute any suit to foreclose; 94 Am. Dec. 742, note, and 19 Am. St. Rep. 274, 275, extended note, discussing the subject. Distinguished in *Merrill v. Hurley*, 6 S. Dak. 603; 55 Am. St. Rep. 867; *Brown v. Bryan*, 6 Idaho, 16, 17, trust deed to secure given debt payable at specified time is a mortgage and cannot be foreclosed by notice and sale under power of sale in such trust deed.

**Statute of Limitations.**—Expiration of statute time for bringing an

action to recover a debt, or to enforce any personal obligation, does not operate as an extinguishment or payment, p. 301.

Cited in Alhambra etc. Water Co. v. Richardson, 72 Cal. 600, in approval; Feeney v. Howard, 79 Cal. 536, 12 Am. St. Rep. 171, to same effect; so in Spect v. Spect, 88 Cal. 444, 22 Am. St. Rep. 319; Zellerbach v. Allenberg, 99 Cal. 69; Woodward v. Faris, 109 Cal. 18; Boyce v. Fisk, 110 Cal. 113; Currier v. Studley, 159 Mass. 25; Capehart v. Detrick, 91 N. C. 351; Goldfrank v. Young, 64 Tex. 438; Leavitt v. Mining Co., 3 Utah, 275; Gage v. Riverside Trust Co., 86 Fed. Rep. 998; Wells Co. v. McHenry, 7 N. Dak. 266, on point that lien may be foreclosed although personal action on the debt is barred by limitation; Gisborn v. Insurance Co., 142 U. S. 338 (distinguishing between deed of trust and mortgage as to running of statute of limitations); 39 Am. St. Rep. 739, extended note, treating of moral obligation as consideration for express promise.

**General Citation.**—Southern Building etc. Assn. v. McCants, 120 Ala. 622.

54 Cal. 302-306. **WHEELER v. BOLTON.** S. C. 66 Cal. 83; 92 Cal. 159.

**Estate of Decedent.**—Probate court loses jurisdiction, after final decree of distribution, p. 305.

Cited in Buckley v. Superior Court, 102 Cal. 10; 41 Am. St. Rep. 138, in approval, holding that ordinarily after decree of distribution courts of equity alone can afford relief; O'Donnell v. Slack, 123 Cal. 288, noted under Ex parte Smith, 53 Cal. 204; Morflew v. San Francisco etc. R. R. Co., 107 Cal. 594, to same effect; so in Prefontaine v. McMicken, 16 Wash. 21; 41 Am. St. Rep. 141, extended note, discussing the subject.

Distributee may sue executor who acted without joining nonresident executor who did not act, p. 306.

Examined and disapproved in Conolly v. Wells, 33 Fed. Rep. 215.

Limitation begins to run against action by distributee from date of decree, p. 306.

Cited in Dennis v. Bint, 122 Cal. 47, 68, Am. St. Rep. 24, on point that heir is bound where executor is barred; Wheeler v. Bolton, 66 Cal. 86, in approval, as to decree constituting basis of plaintiff's right to recover.

**General Citations.**—In Melone v. Davis, 67 Cal. 281; In re Clary, 112 Cal. 294; and McLaughlin v. Barnes, 12 Wash. 375, as authority that a decree of distribution can be enforced by proceedings for contempt. Referred to in Wheeler v. Bolton, 92 Cal. 167, as the same case on first appeal; Ehrngren v. Gronlund, 19 Utah, 417.

54 Cal. 306-311. **WHITING v. QUACKENBUSH.**

**Street Assessment.**—Course of streets may be described in assessment by point of a scroll upon the diagram, p. 310.

Approved in *Williams v. McDonald*, 58 Cal. 529, as to sufficiency of diagram; so in *Brady v. Page*, 59 Cal. 55; *Labs v. Cooper*, 107 Cal. 657. Referred to in *Gillis v. Cleveland*, 87 Cal. 220, and omission of name of mayor from record of warrant of assessment held not to render the recording ineffectual.

Street Assessment may be apportioned in proportion to frontage of the land assessed on the improvement, p. 310.

Cited in *Jennings v. Le Breton*, 30 Cal. 16; *Raleigh v. Peace*, 110 N. C. 43, in approval of the ruling; *Tripp v. City of Yankton*, 10 S. Dak. 525, sustaining charter provisions under local statutes.

Judicial Notice will be taken of the streets of San Francisco as designated on map of city, p. 310.

Cited in *People v. McGregor*, 88 Cal. 144, as authority bearing on matter of proof of venue in criminal case; *Diggins v. Hartshorne*, 108 Cal. 157, holding that courts take judicial notice of streets established by acts of legislature, but not of the existence and location of streets established by dedication; 89 Am. Dec. 669, 680, extended note, discussing subject of "judicial notice."

#### 54 Cal. 311-315. HILL v. FINNIGAN.

Time.—Fraction of day will not be regarded on motion to dismiss an appeal, p. 313.

Cited in *Hoyt v. San Francisco etc. R. R. Co.*, 87 Cal. 611, but held not to furnish a rule for a case in which it is not denied that the notice of motion to dismiss was given before the filing of the transcript on appeal.

Appeal is not rendered ineffectual by failure of sureties on undertaking to justify, p. 314.

Cited to same effect in *Hill v. Finnigan*, 54 Cal. 494; affirmed in *Wittram v. Crommelin*, 72 Cal. 90; *Tompkins v. Montgomery*, 116 Cal. 123; *De Jarnatt v. Marquez*, 127 Cal. 560, 78 Am. St. Rep. 91, denying dismissal; *State v. District Court*, 22 Mont. 456, 74 Am. St. Rep. 622, noted under *Schacht v. Odell*, 52 Cal. 477. Distinguished, and held inapplicable, in *Gross v. Kelleher*, 73 Cal. 640, in which case an order staying proceedings pending an appeal from a judgment in action of unlawful detainer, was set aside by the trial court, on account of the failure of the sureties on the stay bond to justify.

Same.—While an appeal is pending upon one notice and undertaking, a second appeal is unauthorized, and will be dismissed, p. 315.

Cited as authority to ruling stated in *Brown v. Plummer*, 70 Cal. 338, 339. So, to same effect, in *Tompkins v. Montgomery*, 116 Cal. 122. Denied as authority in *Reichenbach v. Lewis*, 5 Wash. 578, holding that a second notice of appeal cannot be filed by an appellant pending the consideration of a motion to dismiss his first appeal.

**.54 Cal. 315-318. CALIFORNIA FURNITURE COMPANY v. HALSEY.**

**Insolvency.**—Insolvent act prior to 1880 made no provision for relief of insolvent partnership; and the right of firm creditors to pursue the partnership assets was not affected by insolvency proceedings in the case of one of the partners, p. 317.

Explained in Hawley v. Campbell, 62 Cal. 446, as not in conflict with the rule, that the discharge of an individual member of a firm from all his debts, operates as a discharge from all his individual liability for the debts of the firm. Cited in Whelan v. Shain, 115 Cal. 329, as to preference of creditors of partnership over creditors of individual partners; so in 54 Am. Dec. 338, extended note on subject.

**.54 Cal. 319-329. LAMB v. SCHOTTLE.**

Object of writ of certiorari is to annul, and not to restrain, and does not lie so long as proceedings remain in fieri, p. 321.

Cited to same effect in Gauld v. Board, 122 Cal. 19, noted under Wilson v. Board, 3 Cal. 386; Sayers v. Superior Court, 84 Cal. 945, denying application for writ of review, made upon information and belief of petitioner, that an order had been made adjudging him guilty of contempt.

**Statutea.**—Repeal obliterates a statute and all proceedings under it, unless a vested right would thereby be destroyed, pp. 322, 323.

Cited in Los Angeles v. Teed, 112 Cal. 332, applied to repeal of act providing for issue of municipal bonds; Connecticut etc. Co. v. Spratley, 99 Tenn. 335, construing local statutes, but held inapplicable. Principle of decision approved and applied in 76 Fed. Rep. 545.

**Eminent Domain.**—Right to compensation does not accrue until the property is taken, p. 327.

Cited to same effect in Lewis v. Seattle, 5 Wash. 750; so in Manion v. Railroad Co., 90 Ky. 495.

Government is under no obligation to take the property, if the terms, when ascertained, are not satisfactory, p. 327.

Cited in 86 Am. Dec. 205, extended note, discussing subject of "eminent domain."

**.54 Cal. 329-332. SHARP v. MILLER. S. C. 57 Cal. 431.**

**Malicious Prosecution.**—Attachment bond does not affect limitation for malicious prosecution, p. 332.

Cited in Taylor v. Bidwell, 65 Cal. 491; McCusker v. Walker, 77 Cal. 212, holding to same effect. Referred to in S. C. 66 Cal. 99, as to effect of reversal of the judgment and order denying motion for new trial.

Notes Cal. Rep.—173.

**54 Cal. 333-338. DINGLEY v. GREENE.**

**Mechanic's Liens.**—Liens of employees of original contractor are enforceable only to the extent of the money due on his contract, and in subordination to its terms, p. 338.

Followed in Dingley v. Greene, 54 Cal. 597. Affirmed in Rosenkranz v. Wagner, 62 Cal. 154; Wilson v. Barnard, 67 Cal. 423, 425; Roylance v. San Luis Hotel Co., 74 Cal. 277; Walsh v. McMenamy, 74 Cal. 359; Frost v. Falgetter, 52 Neb. 696, noted under Bowen v. Aubrey, 22 Cal. 566; Hunnicutt etc. Co. v. Hoose, 111 Ga. 527; 43 Am. St. Rep. 900, 904, note.

**54 Cal. 339-344. PAYNE v. ELLIOTT. 35 Am. Rep. 80.**

**Trover** lies for conversion of "shares of stock," or any species of personal property, pp. 340, 341.

Cited in People v. Williams, 60 Cal. 2, holding that shares of stock constitute property, and may be the subject of embezzlement; Ralston v. Bank of California, 112 Cal. 213, holding that refusal by a bank to transfer stock upon its books may be treated as a conversion of the shares of stock; London, Paris and American Bank v. Aronstein, 117 Fed. 605, refusal of corporation without lawful excuse to transfer shares of stock on its books to one who is entitled to such transfer may be treated as conversion of stock, and its value may be recovered at law; Lacaff v. Dutch Miller Min. etc. Co., 31 Wash. 571, complaint by assignee of stock which had been subscribed for by assignor to compel corporation to issue it to him must allege transfer of stock on books of company; so in Keller v. Manufacturing Co., 43 Mo. App. 88; Daggett v. Davis, 53 Mich. 37, 51 Am. Rep. 92, holding that conversion of an unindorsed certificate of stock is not a conversion of the stock itself, and justifies only nominal damages; Craig v. Mason, 64 Mo. App. 350; Withers v. Bank, 67 Mo. App. 120; Budd v. Multnomah etc. Ry. Co., 12 Oreg. 275, 53 Am. Rep. 359, all in approval of the ruling stated; notes to 52 Am. Dec. 73; 79 Am. Dec. 506; 24 Am. St. Rep. 818, treating of the subject. Distinguished in Crosby v. Stratton, 17 Colo. App. 217, 218, complaint in action by one stockholder against another alleging that corporation had stock which each stockholder could purchase in proportion to holdings, and that defendant caused to be sold to himself stock in excess of his proportion, is insufficient to allege wrongful conversion.

**Fraud.**—To justify judgment of imprisonment on ground of the facts upon which the charge of fraud is based must be specifically alleged in complaint, pp. 342, 343.

Cited in Portland etc. Co. v. Murphy, 130 Cal. 651, on point that money judgment may be awarded when charges of fraud are not sustained; Plummer v. Brown, 70 Cal. 546, complaint alleging fraud in

general terms held insufficient; *People v. McKenna*, 81 Cal. 159, supplying the rule both in civil and in criminal cases; *Cosgrove v. Fisk*, 90 Cal. 77, in approval of the ruling.

**54 Cal. 346-352. VIGOUREUX v. MURPHY.**

**Sheriff's Sale.**—Sale of separate parcels of real estate en masse is voidable, and on timely application will ordinarily be set aside, p. 351.

Cited in *Gregory v. Bovier*, 77 Cal. 123, holding that it is not available, in a collateral action to quiet title, to attack the defendant's title, acquired under an execution sale, on the ground that the lots of land were sold en masse, the period of redemption having passed; *Marston v. White*, 91 Cal. 40, held applicable to sales under decree of foreclosure, when the decree is silent as to the manner or order in which the separate parcels shall be sold; *Power v. Larabee*, 3 N. Dak. 510, 44 Am. St. Rep. 582, in approval, holding that an execution sale in the lump of several parcels of real estate is not void; *Thompson v. Browne*, 10 S. Dak. 347, holding equitable action to vacate such sale not maintainable under facts stated; *Nevada etc. Syn. v. National etc. Co.*, 103 Fed. 401, holding irregularities in judicial sale waived under facts stated.

**54 Cal. 353-374. HYATT v. ALLEN.**

Mere change of phraseology in revision of statute is presumed not to intend a change of law, p. 356.

Principle approved and applied in *Estate of Healy*, 122 Cal. 164, construing code provisions; *In re Baker*, 55 Cal. 304, construing Insolvency Act of 1852, in connection with the Involuntary Insolvency Act of 1878. Referred to in 52 Am. Dec. 303, note, as bearing on subject of construction.

Construction of Statute should be such as to include every word used therein, p. 357.

Cited in *State v. District Court*, 24 Mont. 559, construing local constitution.

**Mandamus.**—Taxpayer is a proper party to apply for issuance of writ of, to compel assessor to assess property, p. 360.

Cited in *Gibson v. Board of Supervisors*, 80 Cal. 366, holding that a taxpayer is a proper party plaintiff to restrain any illegal action which would increase the burden of taxation; *Eby v. School Trustees*, 87 Cal. 175, holding that a taxpayer of a school district may apply for writ of mandate to compel board of school trustees to comply with the instructions of the electors as to the location of the schoolhouse site; so in *State v. Grace*, 20 Oreg. 156, matter of location of county seat; *Frederick v. City of San Luis Obispo*, 118 Cal. 393, holding it sufficient in a complaint for mandamus to aver that the complainant is a property

owner and taxpayer; *State v. Carey*, 2 N. Dak. 41; *State v. Lien*, 9 S. Dak. 299; *Kimberly v. Morris*, 10 Tex. Civ. App. 601, 87 Tex. 639, all in approval of ruling stated. Cited in 89 Am. Dec. 741, extended note on subject of mandamus.

**Mandamus** will lie to compel assessor to assess property, p. 360.

Cited as authority to ruling stated in *State v. Buchanan*, 24 W. Va. 385; *Metz v. Schweitzer*, 8 Utah, 188, noted under *People v. Bell*, 4 Cal. 177.

**Constitutional Law.**—Provisions of state constitution not requiring subsequent legislation to enforce them are self-executing, p. 360.

Cited in *Railroad and Telephone Cos. v. Board of Equalizers*, 85 Fed. Rep. 306, holding that the provision of the Tennessee constitution (art. 2, sec. 28), relative to uniformity of taxation, is peremptory and self-executing.

#### 54 Cal. 375-378. **PEOPLE v. BOARD OF EDUCATION OF OAKLAND.**

Writ of certiorari lies only to review the action of an inferior tribunal, board, or officer, exercising "judicial" functions, pp. 376, 377.

Approved in *People v. Board of Supervisors*, 122 Cal. 424, noted under *Chard v. Harrison*, 7 Cal. 113; *In re Stevens*, 83 Cal. 332, 17 Am. St. Rep. 260, as to distinction between judicial and legislative acts, and holding that the matter of the adoption of children is legislative and not judicial; so in *Wulzen v. Board of Supervisors*, 101 Cal. 18, 40 Am. St. Rep. 21, holding that proceedings of board of supervisors, in passing a resolution of intention to open and extend Market Street, San Francisco, to the Pacific Ocean, were legislative in character, and certiorari would not lie to review them; *Quinchard v. Board of Trustees*, 113 Cal. 669, 670, in approval of distinction between judicial and legislative acts; *Esmeralda County v. District Court*, 18 Nev. 440, holding that acts required by statute to be performed by the district judge, in the event of the board of county commissioners failing to agree, are not judicial in character. So, to same effect, in *State v. Washoe Co. Comm'r's.*, 23 Nev. 248, 250. Cited in extended notes to 18 Am. Dec. 238, 40 Am. St. Rep. 43, discussing subject of certiorari.

**Distinction Between Judicial and Legislative Acts** stated, p. 376.

Approved in *Tanner v. Nelson*, 25 Utah, 233, acts of school book convention provided for by Revised Statutes, sections 1854, 1855, 1859, are not judicial, and person injured by its act may restrain execution thereof.

#### 54 Cal. 379-385. **OLNEY v. SAWYER.**

Tenants in common, in possession as such, cannot assail the common title, or call its validity in question, pp. 381, 385.

Cited in approval in *Tully v. Tully*, 71 Cal. 341, 344, dissenting opinion

of McKinstry, J.; Newman v. Bank of California, 80 Cal. 373; 13 Am. St. Rep. 172; Millis v. Roof, 121 Ind. 364; McPheeters v. Wright, 124 Ind. 572, also in approval of the doctrine; Cedar Canyon etc. Min. Co. v. Yarwood, 27 Wash. 282, where purchase of mine was made by co-tenant of adjoining claim for benefit of latter, cotenant not deprived of right to participate in purchase for failure to participate in cost thereof, where no demand made for contribution, but he was willing to contribute; 49 Am. Dec. 389; 47 Am. St. Rep. 78, extended notes on subject.

**General Citation.**—Referred to in Gwinn v. Hamilton, 75 Cal. 266, as sustaining the doctrine that a decision upon a point which arose in a case, and was decided, is not a *dictum*, although it was not necessary to the disposition of the appeal.

#### 54 Cal. 386-390. **WALKER v. FELT.**

**Parties to Action.**—Plaintiff who has transferred interest pendente lite cannot thereafter control the case, p. 387.

Cited in Crescent etc. Co. v. Montgomery, 124 Cal. 142, denying right of defendants after such transfer to bind transferee by stipulation with plaintiff for judgment; Tuffree v. Stearns etc. Co., 124 Cal. 307, sustaining right of transferee to continue action in name of original party after his death without substitution; Rodgers v. Pitt, 96 Fed. 672, 673, construing similar Nevada statute.

#### 54 Cal. 390-393. **WILLIAMS v. HILL.**

**Findings.**—Facts substantially found or evinced by necessary inference from the findings will be considered as found, p. 393.

Examined and distinguished in Bard v. Kleeb, 1 Wash. 372, holding that a recital in a judgment that "the court finds the matters and things set forth in the complaint are true," is not a sufficient finding of facts under Washington Code.

#### 54 Cal. 398-404. **PEOPLE v. AH CHUNG.**

**Jurors.**—Action of court in overruling challenge to panel, upon the grounds set forth, approved, pp. 400, 401.

Cited in Levy v. Wilson, 69 Cal. 111, sustaining validity of drawing of grand jury in the particular case; Mabry v. State, 50 Ark. 497, holding that no cause for challenge can be assigned as error which does not deny the party complaining the exercise of a natural or constitutional right.

**Same.**—Juror who states that he would not convict, in a capital case, on circumstantial evidence, is incompetent, p. 402.

Cited in State v. Pritchard, 16 Nev. 108, and Cluverius v. Commonwealth. 81 Va. 795, in approval of the ruling.

**Evidence.**—Facts from which inference of guilt is drawn must be proved beyond a reasonable doubt, p. 404.

Cited in *Gill v. State*, 59 Ark. 427, in approval of the rule; *48 Am. St. Rep.* 569, extended note on subject of "reasonable doubt."

#### 54 Cal. 404-407. **PEOPLE v. ELECTION COMMISSIONERS.**

Writ of prohibition will not lie to restrain the calling of a special election by election commissioners, p. 406.

Cited as authority in *Hull v. Superior Court*, 63 Cal. 179, holding that prohibition does not lie to prevent a court from recognizing and taking judicial notice of the acts of a ministerial officer either de facto or de jure, nor to set aside judicial acts already done; *Hobart v. Tillson*, 66 Cal. 212, holding that a tax collector cannot be restrained by prohibition from performing the duties of his office; *City of Coronado v. San Diego*, 97 Cal. 442, holding that prohibition will not lie to restrain the levy of a tax; *State v. Hogan*, 24 Mont. 382, noted under *Maurer v. Mitchell*, 53 Cal. 289; 18 Am. Dec. 236, extended note.

#### 54 Cal. 407. **ESTRADA v. ORENA.**

**Venue.**—Demand in writing is essential to validity of order changing place of trial, where defendant is sued in wrong county, p. 407.

Cited in approval of the practice in *Byrne v. Byrne*, 57 Cal. 348; *Pennie v. Visher*, 94 Cal. 326; *Warner v. Warner*, 10 Cal. 17, dissenting opinion of Beatty, C. J.; *Elam v. Griffin*, 19 Nev. 443; *74 Am. Dec.* 243, extended note, change of venue as matter of right, where action is not brought in proper county.

#### 54 Cal. 408-412. **SAN FRANCISCO v. RANDALL.**

**Complaint Against Officer of Corporation** for embezzlement, alleging that defendant did willfully, unlawfully and feloniously embezzle and convert securities to own use, contrary to execution of his trust, is sufficient, p. 409.

Approved in *Grin v. Shine*, 187 U. S. 189, omission of word "fraudulently" from complaint in extradition proceedings charging embezzlement is immaterial where it is alleged that accused "wrongfully, unlawfully and feloniously" took property.

**Criminal Law—Name.**—"Jr." is no part of name proper, p. 410.

Cited in *People v. Oliveria*, 127 Cal. 379, noted under *People v. Boggs*, 20 Cal. 433.

**Bail Bond.**—Order that prisoner be released, followed by his release, renders the bond obligatory, p. 411.

Cited to same effect in *Dilley v. State*, 2 Idaho, 1014.

**General Citation.**—In *People v. De Pelancoli*, 63 Cal. 410, as authority

that an action on a forfeited bail bond may be brought in name, either of the people or of the county, and the district attorney may bring the action.

**54 Cal. 412-416. EX PARTE CLARKE.**

Examination and dismissal of bill by grand jury is not a bar to another prosecution, p. 415.

Cited as authority to same effect in *Kalloch v. Superior Court*, 56 Cal. 236; *Ex parte Moan*, 65 Cal. 219; *Dulin's case*, 91 Va. 722; *Patterson v. Conlan*, 123 Cal. 455, denying prohibition of subsequent proceedings; *In re Bergerow*, 136 Cal. 297, applying rule to dismissal for delay in speedy trial.

**54 Cal. 416-418. HAFFENEGGER v. BRUCE.**

**Findings.**—Refusal to find after exception taken is error, p. 418.

Approved in *Estate of Burton*, 63 Cal. 37.

**54 Cal. 418-421. SIEMERS v. EISEN.**

**Negligence.**—Failure to perform a duty imposed by statute or other legal authority is negligence per se, p. 420.

Cited in *Higgins v. Deeney*, 78 Cal. 580, injury resulting from a team being driven at an unlawful rate of speed under a city ordinance; *Over-acre v. Blake*, 82 Cal. 83, holding that negligence is a question of law when the facts are clearly settled, the case being one of alleged negligence on part of notary public in certifying acknowledgment of mortgage; *Driscoll v. Street Ry. Co.*, 97 Cal. 565, 33 Am. St. Rep. 206, failure to ring bell at street crossing as required by ordinance; *McKune v. Santa Clara etc. Lumber Co.*, 110 Cal. 486, unauthorized obstruction of highway to another's injury; *Fath v. Railway Co.*, 105 Mo. 548, violation of ordinance as to care required of street railways at crossings; *Sullivan v. Railway Co.*, 117 Mo. 242, to same effect; *Rose v. King*, 49 Ohio St. 225, failure to provide exit from tenement house as required by statute; *Bott v. Pratt*, 33 Minn. 327, 53 Am. Rep. 50, leaving team unguarded in street in violation of city ordinance; *Denver etc. R. R. Co. v. Ryan*, 17 Colo. 101, as to duty of person to observe care in avoiding injury at railway crossing; *Atchison etc. R. R. Co. v. Reesman*, 60 Fed. Rep. 374, failure to fence track of railway as required by statute. So, to same effect, in *Hayes v. Railroad Co.*, 111 U. S. 240; *Jackson v. Kansas City etc. R. Co.*, 157 Mo. 643; notes to 42 Am. Rep. 393; 53 Am. Rep. 54; and 36 Am. St. Rep. 818, discussing the subject. Distinguished in *Nelson v. Railway Co.*, 30 Minn. 78, injury to animal in the particular case held too remote.

**54 Cal. 422-427. FISHBECK v. PHENIX INSURANCE COMPANY.**

**Insurance.**—Authorized agent of insurance company may waive condition in policy against additional insurance, p. 427.

Cited in Grubbs v. Insurance Co., 106 N. C. 474, 23 Am. St. Rep. 63, in approval of the ruling. So, to same effect, in Dibrell v. Georgia Home Ins. Co., 110 N. C. 209, 28 Am. St. Rep. 684; Follette v. Mut. Acc. Assn., 110 N. C. 380; 28 Am. St. Rep. 695 (knowledge of agent imputed to insurer). So, to like effect, in Insurance Co. v. Malevinsky, 6 Tex. Civ. App 86; Fireman's Fund Ins. Co. v. Norwood, 69 Fed. Rep. 78; 59 Am. Dec. 146, note; 64 Am. Dec. 221, note.

Company is estopped when agent joins in apportionment of loss, and promises to pay its part, whereby the insured is induced to settle with and release other companies, p. 427.

Cited in Grubbs v. Insurance Co., 106 N. C. 478, 23 Am. St. Rep. 66, in approval of ruling.

If company retains earned premium paid on the policy, it cannot avoid the policy on the ground of deception, p. 427.

Cited as authority to like effect in Schrieber v. German American Ins. Co., 43 Minn. 370. So in Grabenheimer v. Blum, 63 Tex. 376; Georgia etc. Co. v. Rosenfield, 95 Fed. 361, but holding right to avoid policy for over-insurance not waived under facts stated.

#### 54 Cal. 430-435. SCOTT v. DYER.

Alcalde Grant barred right of city of San Francisco to open streets through the land granted, except upon compensation paid or secured, p. 435.

Affirmed as to validity and effect of alcalde grants in Weisenberg v. Truman, 58 Cal. 69; Spaulding v. Bradley, 79 Cal. 459; Spaulding v. Wesson, 115 Cal. 443.

#### 54 Cal. 435-438. LANGLEY v. VOLL.

Writ of Assistance.—Grantee of purchaser is not entitled to writ against defendant who claims a new right of possession acquired from purchaser, pp. 437, 438.

Cited in Stanley v. Sullivan, 71 Wis. 587, 5 Am. St. Rep. 247, holding that writ of assistance to put execution purchaser in possession will only issue when the rights of the parties affected have been fully determined by the judgment; 51 Am. Dec. 153, note; 81 Am. Dec. 148, note.

Same.—Whether stranger to the record is entitled to the writ, questioned, p. 438.

Examined in Gibson v. Marshall, 64 Miss. 76, and holding that the chancery court may put grantee of purchaser into possession, though not a party to the record, if he be entitled to possession as against him who has the possession.

General Citation.—Referred to in approval in Niles v. Edwards, 95 Cal. 46, as an instance in which, after a judgment had been rendered in Department, the court in Bank modified the opinion that had been rendered

by the Department, and maintaining such power of the supreme court in Bank.

**54 Cal. 439-441. QUACKENBUSH v. SAWYER.**

**Partnership.**—Mere joint ownership in personal property does not constitute the owners partners, p. 440.

Cited in *Noonan v. Nunan*, 76 Cal. 48, holding that the mere purchase of the interest of the estate of a deceased partner in the partnership property does not create a new partnership between the purchaser and the surviving partner of the old firm; *State Bank v. Kelley*, 47 Neb. 682, applied to a case where two persons purchased, owned, and operated a threshing machine; *Vietti v. Nesbitt*, 22 Nev. 395, holding that under the agreement in the particular case to operate a mine, the parties were simply tenants in common of the ore and its proceeds, and that no partnership existed between them; *Shrum v. Simpson*, 155 Ind. 164; *Wormser v. Lindauer*, 9 N. M. 29; *Pierce v. Strickler*, 9 N. M. 473.

**54 Cal. 442-452. WILLIAMS v. HARTFORD INSURANCE COMPANY.**  
35 Am. Rep. 77.

**Insurance.**—Agreement for appraisement and inventory, when no number of appraisers or mode of selection is fixed, if not void for uncertainty, at least has no application in a case where total loss of building is claimed, pp. 445, 446.

Cited in *Case v. Insurance Co.*, 82 Cal. 270, as sustaining the rule that no right of arbitration exists under a fire insurance policy when the stipulation for arbitration does not definitely fix the number of arbitrators nor provide a mode of selection.

Insufficiency of preliminary proofs of loss may be waived by the conduct of the insurance company, inducing a belief that they are sufficient, p. 448.

Cited in *Continental Ins. Co. v. Wilson*, 45 Kan. 253, 23 Am. St. Rep. 721, in approval. So, to same effect, in *Daniher v. Grand Lodge A. O. U. W.*, 10 Utah, 124 (waiver of proof of death); 42 Am. Rep. 624, note.

Insurance upon building in an insurance upon the building as such, and not upon the materials of which it is composed, p. 450.

Cited to same effect in *Monteleona v. Insurance Co.*, 47 La. Ann. 1569; *Havens v. Germania Fire Ins. Co.*, 123 Mo. 423; 45 Am. St. Rep. 577; *O'Keefe v. Insurance Co.*, 1140 Mo. 565; *Insurance Co. v. Bachler*, 44 Neb. 562; *Corbett v. Insurance Co.*, 155 N. Y. 394; *Hamburg-Bremen Fire Ins. Co. v. Garlington*, 66 Tex. 106; 59 Am. Rep. 614, all in approval of the ruling that a "total loss" does not mean an absolute extinction of the building in all its parts; *Trustees v. Northwestern etc. Co.*, 98 Wis. 266, 67 Am. St. Rep. 809, construing "wholly destroyed" and "total loss." So, in 45 Am. St. Rep. 578, note. Commented on and disapproved in *Royal Ins. Co. v. McIntyre*, 90 Tex. 174, 177, 178; 59 Am. St. Rep. 800, 802.

**Evidence.**—It is the duty of objecting party to ask an instruction limiting the evidence to the purpose for which it is competent, and if he fails to do so he cannot afterward complain, p. 449.

Cited in *People v. McLean*, 84 Cal. 483; *County of San Luis Obispo v. White*, 91 Cal. 438, in affirmance of the ruling.

**General Citation.**—*Pennsylvania Fire Ins. Co. v. Drackett*, 63 Ohio St. 56.

**54 Cal. 452-463. LE ROY v. DUNKERLY.**

**Execution.**—In California, all beneficial estates, whether legal or equitable, are liable to be taken on execution, p. 460.

Cited as authority to same effect in *Janes v. Throckmorton*, 57 Cal. 384; *Fish v. Fowlie*, 58 Cal. 375; 97 Am. Dec. 314, extended note, discussing the subject.

**General Citation.**—*Muller v. Florin*, 13 S. D. 611.

**54 Cal. 463-470. HARRIS v. HILLEGASS.**

**Partnership.**—Agreement held to constitute, p. 465.

Cited in *Prince v. Lamb*, 128 Cal. 128, but holding no partnership created under facts stated.

**Partnership.**—Right of action for accounting cannot exist until the partnership has been dissolved, p. 469.

Cited in 2 Am. St. Rep. 796, extended note, delay or laches as bar to specific performance in case of partnership agreement; 40 Am. St. Rep. 575, extended note, as to running of statute of limitations in suits for accounting; note 69 Am. St. Rep. 422, on general subject. Distinguished in *Emery v. Mason*, 75 Cal. 223, as to the facts.

**Pleading.**—Ultimate Facts, not evidentiary, should be pleaded, p. 470.

Cited in *Simons v. Bedell*, 122 Cal. 346, 68 Am. St. Rep. 39, but sustaining complaint.

**54 Cal. 471-476. ESTATE OF BROOKS.**

**Wills.**—Fact that beneficiary was a partner of testator does not raise a presumption of undue influence, p. 474.

Cited in *Goodbar v. Lidikey*, 136 Ind. 6, 43 Am. St. Rep. 300; and ruling approved; so in *Penn. Mut. L. Ins. Co. v. Union Trust Co.*, 83 Fed. Rep. 897, applied to case of advice given by physician to patient; 21 Am. St. Rep. 97, extended note, as authority, discussing subject of "presumption of undue influence."

**Same.**—Evidence of declarations of testator to devisee that he wished him to pay certain sums does not show undue influence, but will prove a trust if agreed to, p. 475.

Referred to in Curdy v. Berton, 79 Cal. 427, 12 Am. St. Rep. 161, 162 (case of bequest on undisclosed parol trust), as not directly in point, but as in harmony with the principles set forth in the latter case.

.54 Cal. 476-480. **CRANE v. WEYMOUTH.**

**Appeal.**—Final affirmance upon appeal to United States supreme court fixes liability of sureties on undertaking, pp. 479, 480.

Cited in Clark v. Smith, 66 Cal. 646, as sustaining the rule that liability upon undertaking on appeal accrues upon affirmance of the judgment to which the undertaking relates. So, as authority to same effect, in 38 Am. St. Rep. 707, extended note, discussing the subject. Examined and distinguished in Nofsinger v. Hartnett, 84 Mo. 557, where it is said that the language of the decision must be construed with reference to its own peculiar and controlling circumstances.

**Same.**—Action upon undertaking on appeal in ejectment suit, given to secure the value of the use and occupation of the land, is an action upon contract, and may be brought before the plaintiff regains possession, p. 480.

Approved in Clark v. Smith, 66 Cal. 649, dissenting opinion of Thornton, J.; so in Tarpey v. Sharp, 12 Utah, 391.

.54 Cal. 486-488. **BURKE v. TURNERY.**

**Street Assessment.**—Contract entered into by superintendent of streets with bidder for work before the time when, by statute, he has authority to do so, is without authority and void, and cannot form the basis of a valid assessment, p. 487.

Affirmed in Manning v. Denn, 90 Cal. 614; California Imp. Co. v. Quinchard, 119 Cal. 87. Cited in Capron v. Hitchcock, 98 Cal. 430, and applied to contract for street work entered into by a municipal corporation with one of its officers, contrary to statute.

A void contract in such case does not become valid by failure to appeal to board of supervisors, p. 487.

Cited to same effect, and the principle applied, in Brock v. Luning, 89 Cal. 321; Manning v. Den, 90 Cal. 616; Girvin v. Simon, 116 Cal. 610; De Haven v. Berendes, 135 Cal. 182, noted under Hewes v. Reis, 40 Cal. 263.

.54 Cal. 491-493. **McCOOL v. MAHONEY.**

**Joint Tort.**—In an action for a wrong in which two defendants joined, the damages cannot be severed, p. 493.

Explained and distinguished in Nichols v. Dunphy, 58 Cal. 607, in which case one of the defendants appealed and the judgment as to him was reversed, and the plaintiff was held entitled to execution against the other defendant.

**54 Cal. 493-495. HILL v. FINNIGAN.**

**Appeal.**—Stay bond may be filed at any time after appeal is taken, but not a second bond, after failure of sureties to justify, pp. 494, 495.

Harmonized in Swift v. Shepard, 64 Cal. 424, 425, in which case it is held that the appellate court will not suspend the operation of a judgment granting a perpetual injunction, pending an appeal; so in Lee Chuck v. Quan Wo Chong Co., 81 Cal. 229, 15 Am. St. Rep. 55, holding that the fact that a stay bond on appeal is insufficient because the sureties are not good, and that a new bond is given upon exception to the sureties upon the first bond, does not affect the stay of proceedings, which takes place upon the filing of the required bond without regard to the sufficiency or insufficiency of the sureties; so in Brown v. Rouse, 115 Cal. 620 (giving of new bond on second notice). Cited in McCracken v. Superior Court, 86 Cal. 78, distinguishing between an undertaking to perfect an appeal from one to stay proceedings, and holding that greater liberty is and should be allowed as to the giving of the latter; so in McDonald v. Paris, 9 S. Dak. 314.

**Supersedeas.**—After failure of sureties to justify, the appellate court may make an order to operate as a supersedeas upon proper terms, p. 495.

Ruling approved in Williams v. Borgwardt, 115 Cal. 618. So, to same effect, in Brown v. Rouse, 115 Cal. 620; Lake v. Lake, 17 Nev. 241 (appeal from part of judgment). Cited in Owen v. Pomona etc. Co., 124 Cal. 333, sustaining right of appellate court to quash execution sale made pending such stay; Cluness v. Bowen, 135 Cal. 662, denying power in summary proceedings; Nonpareil Mfg. Co. v. McCartney, 143 Cal. 3, grant supersedeas, pending execution of a new stay bond, although prior bonds were insufficient; Forrester v. Boston etc. Co., 22 Mont. 434, as to similar order taking property from receiver and transferring to owners; State v. Board, 19 Wash. 11, 67 Am. St. Rep. 709 (note, pages 715, 716), sustaining right to issue supersedeas under local statutes.

**54 Cal. 496-501. GAGLIARDO v. DUMONT.**

**Homestead.**—Under act of 1862, alienation of homestead could only be by the personal acts of the husband and wife, and a deed for that purpose could not be executed by attorney, p. 500.

Cited in Hart v. Church, 126 Cal. 476, 77 Am. St. Rep. 200, noted under Poole v. Gerrard, 6 Cal. 71. Distinguished in Burkett v. Burkett, 78 Cal. 312, 12 Am. St. Rep. 59, as relating to conveyances to third persons, and holding that a husband may convey the homestead to his wife without her joining in the deed. Approved in Merced Bank v. Rosenthal, 99 Cal. 49, as to necessity of acknowledgment by husband and wife of deed of homestead intended as mortgage; Powell v. Patison, 100 Cal. 238, mortgage of homestead by husband alone declared to be inoperative and void in its inception; Wallace v. Travelers' Ins. Co., 54

Kan. 446, 45 Am. St. Rep. 290, alienation or encumbrance of homestead by husband, under power of attorney given by wife, declared to be void; California Fruit Transp. Co. v. Anderson, 79 Fed. Rep. 406, holding that under California law, mortgage of homestead by wife to secure antecedent debt of husband does not bind her. Referred to in Security Loan etc. Co. v. Kauffman, 108 Cal. 221, a case involving question of estoppel to deny validity of mortgage of homestead. Explained and distinguished in Oregon Mort. Co. v. Hersner, 14 Wash. 517, and holding that under the Washington code (Gen. Stats., sec 1446) a husband having a general power of attorney from his wife authorizing him to mortgage all their real estate, can make a valid mortgage of their homestead, which is community property, without her joining in it.

Upon death of either spouse, the homestead vests in the survivor, p. 501.

Affirmed in In re Ackerman, 80 Cal. 210, 13 Am. St. Rep. 117; Sanders v. Russell, 86 Cal. 120; 21 Am. St. Rep. 27; and Collins v. Scott, 100 Cal. 451, cases of homestead declared upon community property.

#### 54 Cal. 502-508. HARDING v. MINEAR.

**Pleading.**—Motion to file supplemental answer is addressed to the sound legal discretion of the court, pp. 505, 506.

Commented on in Seehorn v. Big Meadows etc. Road Co., 60 Cal. 249, 253. Affirmed in Greenwood v. Adams, 80 Cal. 77. So, in Jacob v. Lorenz, 98 Cal. 337, ruling held applicable to leave to file supplemental complaint; Bank v. Heron, 122 Cal. 109, noted under Cooke v. Spears, 2 Cal. 409; Brown v. Valley etc. Co., 127 Cal. 634, noted under Gleason v. Gleason, 54 Cal. 135.

#### 54 Cal. 509-518. ESTATE OF TOOMES. 35 Am. Rep. 83.

**Evidence.**—Opinion of Catholic priest as to sanity of testator held to be admissible as that of an expert, p. 513.

Cited as authority in Sowden v. Idaho etc. Min. Co., 55 Cal. 451, admitting in evidence the opinion of a practical miner as to the safety of blasting powder; 66 Am. Dec. 239, extended note, discussing subject of expert testimony.

Proof of insanity of testator at a time prior or subsequent to the time of executing the will is admissible, p. 516.

Cited in Estate of Dalrymple, 67 Cal. 446, in approval. So, to same effect, in Scott v. Wood, 81 Cal. 407; People v. Manoogian, 141 Cal. 594, applying rule to evidence of insanity of defendant in homicide case; People v. Zeigler, 142 Cal. 338, holding evidence of insanity at time of trial admissible in like case.

Exclusion of proper testimony is ground for reversal, pp. 516, 517.

Cited as authority in In re Carpenter, 79 Cal. 386, but intimating that it is not always ground for reversal.

Will.—Failure of one who signs name of testatrix to write his own name as a witness to her signature, does not invalidate, p. 518.

Cited in *In re Langan*, 74 Cal. 355, in approval, to same effect.

#### 54 Cal. 519-520. **McLAUGHLIN v. DOHERTY.**

Taken before the entry, though after the rendition of judgment, will be dismissed, p. 520.

Cited, and followed as authority, in *Thomas v. Anderson*, 55 Cal. 46. So in *People v. Center*, 66 Cal. 567, 570; *Kimple v. Conway*, 69 Cal. 72 (but holding that an appeal from an order refusing a new trial may be taken before the judgment is entered); *Tyrrell v. Baldwin*, 72 Cal. 192; *In re Rose*, 72 Cal. 578; S. C., 80 Cal. 168, 169 (appeal from order settling account of administrator taken before entry of order in minute-book); *Onderdonk v. San Francisco*, 75 Cal. 535; *Home of Inebriates v. Kaplan*, 84 Cal. 488; and *Wells v. Kreyenhagen*, 117 Cal. 331. Approved in *Durant v. Comegys*, 2 Idaho, 811; 35 Am. St. Rep. 267. Cited in *Schroder v. Schmidt*, 71 Cal. 400, dismissing such appeal; *Wood v. Etiwanda etc. Co.*, 122 Cal. 156, and *Bell v. Staacke*, 137 Cal. 308 (but cf. p. 309), noted under *Lorenz v. Jacobs*, 53 Cal. 24; *Estate of More*, 143 Cal. 500, dismissing appeal from decree of distribution whose entry was after service of notice of appeal; *Elko etc. Co. v. Wines*, 24 Nev. 306, dismissing appeal taken before rendition, under local statutes; *Needham v. Salt Lake*, 7 Utah, 321, but holding certain matters reviewable on appeal from new trial order. Distinguished in *Parrott v. Kane*, 14 Mont. 28, the state of facts being different.

Judgment is rendered when ordered by the court, and entered when actually entered in the judgment-book, p. 520.

Cited in *In re Cook*, 77 Cal. 225, 11 Am. St. Rep. 271, in approval. So in *Schurtz v. Romer*, 81 Cal. 247; *Durant v. Comegys*, 2 Idaho, 811; 35 Am. St. Rep. 267; and *State v. Biesman*, 12 Mont. 16.

#### 54 Cal. 521. **SPINETTI v. BRIGNARDELLO.**

Dismissal of Appeal for failure to file requisite papers is bar to another appeal, p. 521.

Approved in *Fahey v. Belcher*, 3 Idaho, 644, applying rule when transcript not filed.

#### 54 Cal. 522-525. **GRIMM v. O'CONNELL.**

Taxes.—Assessment to some person named, "and all owners or claimants known or unknown," is void, p. 523.

Cited to same effect in *Brady v. Dowden*, 59 Cal. 51, asserting the rule that the recital in a tax deed as to whom the property was assessed, is conclusive; *Wilson v. Atkinson*, 77 Cal. 487, 11 Am. St. Rep. 301, in affirmance. So in *Daly v. Ah Goon*, 64 Cal. 512; *Pearson v. Creed*, 78 Cal. 147; *Greenwood v. Adams*, 80 Cal. 76; and *Jatunn v.*

O'Brien, 89 Cal. 61. Approved in *State v. Ernst*, 26 Nev. 127, where assessor returned assessment of E.'s property, and board of equalization ordered assessor to add to such assessment name of M. L. & I. Co., and to add certain property to assessment, and E. did not own property, and was only a shareholder in company, board's action was void; *Lewis v. Blackburn*, 42 Or. 116, assessment to "unknown owners, and to all owners and claimants known and unknown," is void.

Where form of tax deed is prescribed by statute, the form becomes substance, and must be strictly pursued, or the deed will be void, p. 523.

Affirmed in *Hubbell v. Campbell*, 56 Cal. 532, 533 (defect in statement that deed was made subject to redemption, and failure to state the true consideration); *Anderson v. Hancock*, 64 Cal. 456 (omission of recital in certificate of sale as to the time at which the purchaser would be entitled to a deed); *City of San Luis Obispo v. Pettit*, 87 Cal. 502 (money paid into court assessed to plaintiff in suit, instead of to the county treasurer, as required by statute); *Hughes v. Cannedy*, 92 Cal. 386, 387 (insufficient recitals in deed, and defective notice by purchaser at tax sale, of an application for a deed); *California etc. Co. v. Moran*, 128 Cal. 378, noted under *Donnelly v. Tillman*, 47 Cal. 40; *Salmer v. Lathrop*, 10 S. Dak. 225, holding deed void under local statutes; *Rector etc. Co. v. Maloney*, 15 S. Dak. 279, under Session Laws of 1891, chapter 14, section 121, published notice of expiration of time for tax redemption addressed "to whom it may concern," and not containing name of nonresident in whose name property was taxed, is void; *Shipman v. Forbes*, 97 Cal. 574 (street assessment, insufficient compliance with statute relative to date of warrant); *Simmons v. McCarthy*, 118 Cal. 624, 625 (failure to state the year of the assessment, and definitely to state the amount paid for the land). Approved in *Burroughs v. Goff*, 64 Mich. 468 (failure to recite loss or destruction of former deed, as required by statute); *Gilfillan v. Hobart*, 35 Minn. 186 (omission of date of sale from tax certificate); *Hopkins v. Scott*, 86 Mo. 144 (generally, as to omission of recitals required by statute).

Same.—Void tax deed cannot be made valid by proof of a valid assessment, p. 524.

Affirmed in *Hearst v. Egglestone*, 55 Cal. 367, in which case the certificate and tax deed both recited that the property was assessed to the "Blue Ridge Mining Company, and to all owners and claimants known and unknown"; *Hollister v. Sherman*, 63 Cal. 39, in which case the tax deed showed a void assessment; *Wilson v. Atkinson*, 68 Cal. 591, holding that the tax deed being void, the assessment could not be relied on as translative of title; *Pearson v. Creed*, 78 Cal. 147, in affirmance. So, to same effect, in *Greenwood v. Adams*, 80 Cal. 77; *Jatunn v. O'Brien*, 89 Cal. 61; and *Russ v. Crichton*, 117 Cal. 703. Ruling disapproved in *Pearson v. Creed*, 78 Cal. 148, dissenting opinion of Works, J.

**54 Cal. 525-527. DIGGINS v. REAY.**

**Street Assessment.**—In action to enforce, all owners of the property assessed must be made parties defendant, p. 526.

Cited to same effect in Harney v. Applegate, 57 Cal. 207; Driscoll v. Howard, 63 Cal. 440; Robinson v. Merrill, 87 Cal. 13, 15; Schultz v. McLean, 76 Cal. 609, applying the principle in an action to enforce a trust in certain lands. Distinguished in Parker v. Altschul, 60 Cal. 381, in which case the decree recited that the action was dismissed as to some of the defendants, and it was presumed that the other defendants consented to the dismissal, the record showing nothing to the contrary.

**54 Cal. 527-532. PEOPLE v. LEE FAT.**

Reporter's notes of testimony is inadmissible if evidence was taken through an interpreter, p. 531.

Affirmed in People v. Ah Yute, 56 Cal. 121. So in People v. Lee Ah Yute, 60 Cal. 96. Referred to in Reid v. Reid, 73 Cal. 207, holding that the stenographer's transcript of the testimony, in a civil case, given by a party in a prior action, although certified to by the stenographer as correct, is not admissible in a subsequent action as evidence of what he said on the former trial. Cited in People v. Lem Deo, 132 Cal. 202, on point that interpreter is a "witness" within section 925, Penal Code; People v. John, 137 Cal. 22, holding notes inadmissible for purposes of impeachment; but cf. People v. Lewandowski, 143 Cal. 578, admitting deposition of witness so taken on preliminary examination. Distinguished in People v. Sierp, 116 Cal. 250, holding that the deposition of a witness taken at a preliminary examination is not rendered inadmissible because taken through an interpreter, where the examination was conducted in the English language, and the interpreter is present at the trial, and testifies to the correctness of the deposition. Cited in People v. Thiede, 11 Utah, 279, as authority that an interpreter is a witness; also in 28 Am. Dec. 29, note on trial in absence of accused, but the citation is apparently irrelevant.

**54 Cal. 532-533. PAYNE v. MCKINLEY.**

Complaint in action to enjoin public nuisance must show special damage to plaintiff, p. 533.

Affirmed in Siskiyou etc. Co. v. Rostel, 121 Cal. 513, noted under Lewiston etc. Co. v. Shasta etc. Co., 41 Cal. 562; Crowley v. Davis, 63 Cal. 462, obstruction of street by railroad; so in Martini v. Graham, 67 Cal. 133, obstruction of sidewalk; Hogan v. Central Pac. R. R. Co., 71 Cal. 87, obstruction of street; Bowen v. Wendt, 103 Cal. 238, pollution of waters of stream. Cited in notes to 28 Am. Dec. 306; and 31 Am. Dec. 132, 133, discussing the subject.

**Injunction.**—Order dissolving preliminary injunction should not be disturbed, unless it appear that there has been an abuse of discretion, p. 533.

Approved in *White v. Nunan*, 60 Cal. 408, applied to matter of continuance of dissolution of injunction to prevent a sale of property, pending an action between the parties to determine the right to the property. Cited in *Washington etc. Ry. Co. v. Navigation Co.*, 2 Idaho, 407, and ruling approved and applied.

**54 Cal. 534-535. PARROTT v. FLOYD.**

Dissolution or continuing in force of preliminary injunction rests largely in discretion of court below, p. 535.

Followed in *Jewell v. McKinley*, 54 Cal. 600. Approved in *White v. Nunan*, 60 Cal. 408; *Hiller v. Collins*, 63 Cal. 238; *Blum v. Sunol*, 63 Cal. 343 (applying the principle to the action of the trial court in granting a new trial, where a finding has been made upon a conflict of evidence, or contrary to evidence, or without evidence); so in *Reay v. Butler*, 95 Cal. 215, to same effect; *Marks v. Weinstock etc. Co.*, 121 Cal. 55, noted under *Patterson v. Board*, 50 Cal. 344; *Grannis v. Lorden*, 103 Cal. 473; and *Washington etc. Ry. Co. v. Navigation Co.*, 2 Idaho, 407, in approval of the doctrine.

**54 Cal. 542-547. THOMPSON v. PATTERSON.**

**Appeal.**—On appeal from order denying new trial, errors appearing on judgment roll cannot be considered, p. 546.

Affirmed *In re Westerfield*, 96 Cal. 115; and ruling approved in *Simpson v. Ogg*, 18 Nev. 34. Referred to in *Saint Croix Lumber Co. v. Pennington*, 2 Dak. Ter. 477, as authority that a statement on motion for new trial cannot be used on appeal from the judgment. Distinguished in *Sharon v. Sharon*, 79 Cal. 640, in which case certain exhibits were referred to in the body of the statement on motion for new trial, and it was held that the certificate of the judge that "the foregoing statement on motion for a new trial has been settled and allowed by me" included and authenticated such exhibits as a part of such statement, although the certificate was attached to the body of the statement and preceded the exhibits.

**Reference.**—Findings and report of referee appointed to try and determine a case are the equivalent of the findings and decision of the court itself, p. 546.

Explained in *Faulkner v. Hendy*, 103 Cal. 20, and holding that it is only the finding of a referee upon the whole issue that must stand as the finding of the court, and form part of the judgment roll.

**General Citation.**—*Boutner v. French*, 8 N. D. 327.

Notes Cal. Rep.—174.

**54 Cal. 547-555. THOMPSON v. FELTON.**

**Adverse Possession** must be open, notorious, and exclusive, with notice or means of knowledge to owner, p. 553.

Cited to same effect in Churchill v. Louie, 135 Cal. 611, holding prescription insufficiently pleaded; Altschul v. O'Neil, 35 Or. 218, noted under Thompson v. Pioche, 44 Cal. 508; Pulliam v. Bennett, 55 Cal. 373, and possession in the particular case held not to be adverse; Furlong v. Cooney, 72 Cal. 327, holding that owner must have knowledge or means of knowledge; so in Neilson v. Grignon, 85 Wis. 553; so, generally, in approval of the ruling, in Archbishop v. Shipman, 79 Cal. 294; De Frieze v. Quint, 94 Cal. 663; 28 Am. St. Rep. 156; Town-end v. Edwards, 25 Fla. 588; Cowley v. Monson, 10 Biss. 187, note; McDonald v. Fox, 20 Nev. 368.

**New Trial.**—Order granting, may be affirmed without regard to the reasons which the court below may have assigned therefor, p. 554.

Cited, and principle of decision applied in People v. Crowley, 56 Cal. 39, order denying defendant's motion to set aside indictment; so in Wakeham v. Barker, 82 Cal. 50, order sustaining demurrer; so in In re Crozier, 74 Cal. 181, in affirmance, order granting new trial.

**General Citation.**—In 50 Am. Dec. 791, note, as authority that a tenant threatened with eviction by a paramount title may attorn to the holder of such title.

**54 Cal. 556-558. ESTATE OF CUNNINGHAM.**

**Probate.**—Contest by Attorney appointed by court does not bar right to subsequent contest by parties, p. 557.

Cited in Estate of Lux, 134 Cal. 9, discussing right of such attorney to compensation under Code of Civil Procedure, section 1718.

**54 Cal. 558-562. PACIFIC BRIDGE CO. v. KIRKHAM.**

Objection to sufficiency of pleading cannot be made for the first time on appeal, p. 561.

Affirmed in Alhambra etc. Water Co. v. Richardson, 72 Cal. 600, where the objection was that the averments of the answer were insufficient to raise the affirmative defense of a prescriptive right acquired under the statute of limitations.

**Dedication.**—President and members of corporations individually cannot dedicate corporate property by permitting its use, p. 561.

Cited in S. P. Co. v. City, 144 Cal. 349, but sustaining dedication by agent where ostensible authority appeared.

**54 Cal. 562-565. PAGE v. WILLIAMS.**

**Amendments.**—After case has been long at issue upon plea of pay-

ment, amendment at trial to plead want of consideration may be refused, p. 563.

Approved in *Harney v. Corcoran*, 60 Cal. 316, denying permission to set up defense denying ownership, after having admitted ownership in the original answer; *Bank v. Heron*, 122 Cal. 110, noted under *Cooke v. Spears*, 2 Cal. 409.

#### 54 Cal. 565-571. MAHONEY v. BRAVERMAN.

**Street Assessment** is void, if the work was not completed within the time specified in the contract, and is not made valid by appeal to board of supervisors, p. 570.

Cited to same effect in *Dougherty v. Coffin*, 69 Cal. 456; affirmed in *Williams v. Bergin*, 108 Cal. 173, as to effect of appeal in such case; *Girvin v. Simon*, 127 Cal. 495, noted under *People v. O'Neil*, 51 Cal. 91.

**Street Assessment**.—Resolution may embrace several streets, p. 570.

Cited in *Bates v. Twist*, 138 Cal. 54, noted under *Emery v. Gas Co.*, 28 Cal. 346.

#### 54 Cal. 571-575. SAN FRANCISCO v. SPRING VALLEY WATER WORKS.

**Taxation**.—Assessment upon "the capital" of a corporation, eo nomine, sustained as valid, p. 574.

Followed in *San Francisco v. Spring Valley Water Works*, 54 Cal. 603; and cited to same effect in *San Francisco v. Spring Valley Water Works*, 63 Cal. 528, 533.

#### 54 Cal. 575-578. PEOPLE v. MORINE.

**Deposition** taken by committing magistrate must be taken and certified as required by statute (Pen. Code, sec. 869), p. 577.

Cited to same effect in *People v. Mitchell*, 64 Cal. 87, holding that a proper certificate of the officer taking the deposition is essential; so in *People v. Ward*, 105 Cal. 657, certificate held insufficient; *Ryan v. People*, 21 Colo. 123, holding that the provisions of the statute must be followed in all substantial particulars. Distinguished in *People v. Riley*, 75 Cal. 101, as a case in which there was no certificate at all, and holding that a certificate of the stenographer was a sufficient certification under the statute.

**Preliminary Examination**.—**Deposition** is inadmissible unless properly certified, p. 577.

Cited in *People v. Buckley*, 143 Cal. 382, but holding no error in admission of deposition shown by the record; *People v. Lewandowski*, 143 Cal. 578, but admitting deposition taken through interpreter.

**54 Cal. 578-579. THOMAS v. ROCK ISLAND G. & S. MINING COMPANY.**

**Assignment.**—Action cannot be maintained by assignee of part of entire demand without assent of debtor, p. 579.

Cited as authority to same effect in *Clancy v. Plover*, 107 Cal. 275; 2 Am. St. Rep. 473, note.

**Judgment.**—If satisfaction is entered without notice to judgment creditor, he has his remedy by motion to set aside the satisfaction, p. 579.

Cited in approval of the practice, in *Cramer v. Tittle*, 79 Cal. 334.

**54 Cal. 583-584. FREDERICK v. TIERNEY.**

**Appeal.**—Upon motion to dismiss, for failure to file transcript, clerk's certificate must show service of the appeal, p. 584.

Affirmed in *Carpentier v. Bartlett*, 62 Cal. 562.

**54 Cal. 584-585. PHILLIPS v. LOWREY.**

**New Trial.**—Statement on motion for must particularly specify where-in evidence is insufficient, p. 585.

Cited in approval in *Preston v. Hearst*, 54 Cal. 596.

**54 Cal. 588. ALVARADO v. DE CELIS.**

Nonsuit is improperly granted, if there is evidence tending to prove the material allegations of the complaint, p. 588.

Cited in *Franklin v. Motor Road Co.*, 85 Cal. 69, as authority to the ruling stated; *Goldstone v. Merchants' etc. Co.*, 123 Cal. 627, noted under *De Ro v. Cordes*, 4 Cal. 118.

**54 Cal. 588. DOUGLAS v. FULDA.**

**Appeal.**—Objectionable transcript, judgment affirmed, p. 588.

Cited in S. C., 54 Cal. 589, dismissing appeal; 59 Cal. 285, denial of motion to recall remittitur.

**54 Cal. 590. MILLER v. SHARPE.**

**Appeal.**—Interlocutory decree in partition not appealable before entry, p. 590.

Cited to same effect in *In re Rose*, 80 Cal. 168, appeal from order settling account of administrator.

**54 Cal. 590. BRADY v. KELLY.**

Decision on first appeal becomes the law of the case, p. 590.

Cited as authority sustaining the doctrine in *Palmer v. Murray*, 8 Mont. 183; 27 Am. Dec. 634, extended note, discussing subject of "stare decisis."

**54 Cal. 591. HARDENBERG v. HARDENBERG.**

General Finding that material allegations of pleading are true is insufficient, p. 592.

Cited as authority to ruling stated in Abrahamson v. Lamberson, 68 Minn. 456; Musselman v. Musselman, 140 Cal. 197, noted under Ladd v. Tully, 51 Cal. 277.

**54 Cal. 593-595. PEOPLE v. BADLAM.** See Bacon v. Board of State Tax Comrs., 126 Mich. 32.**54 Cal. 595-597. PRESTON v. HEARST.**

Appeal taken before judgment is entered of record is premature, and cannot be entertained, p. 597.

Cited in Home of Inebriates v. Kaplan, 84 Cal. 488, as authority to the ruling stated.

General Citation.—Baumer v. French, 8 N. D. 327.

**54 Cal. 597. DINGLEY v. GREENE.** Following Same v. Same, 54 Cal. 333.

Mechanics' Liens.—Right of materialman to lien, as against owner, p. 597.

Referred to as authority on the subject in Wiggins v. Bridge, 70 Cal. 439.

**54 Cal. 598-599. HIBERNIA SAVINGS AND LOAN SOCIETY v. FELLA.**

Relief cannot be given to defendant unless his answer is served on other defendants affected, pp. 598, 599.

Cited as authority to same effect in Hibernia etc. Soc. v. Clarke, 110 Cal. 33; Houghton v. Tibbets, 126 Cal. 60, reversing judgment as to defendant not served with cross-complaint; Hibernia etc. Soc. v. London etc. Co., 138 Cal. 280, holding pleading a cross-complaint where so served; Culmer v. Caine, 22 Utah, 229, but sustaining refusal to dismiss for laches in such service, under facts stated.

**54 Cal. 600-601. CARR v. CRONAN.**

Findings, if not filed, are waived unless nonwaiver is incorporated in statement or bill of exceptions, p. 601.

Cited in Weeks v. Gold Min. Co., 73 Cal. 602, presumption of waiver of findings; so in Gordon v. Donahue, 79 Cal. 503; and Chandler v. Kennedy, 8 S. Dak. 59, as authority to same effect.

**54 Cal. 603. SAN FRANCISCO v. SPRING VALLEY WATER WORKS.**

Taxation.—Assessment upon "the capital" of a corporation, *ex nomine*, is valid, p. 603, following Same v. Same, 54 Cal. 571.

Referred to in *San Francisco v. Spring Valley Water Works*, 63 Cal. 533, as practically disregarding the decision in *People v. National Gold Bank*, 51 Cal. 509.

**54 Cal. 605-610. COX v. McLAUGHLIN.** S. C. 76 Cal. 62, 9 Am. St. Rep. 164, where history of case is given.

**Contract.**—Upon breach of entire contract, the party not in fault may treat the contract as rescinded, and sue for work and labor, pp. 605, 606.

Cited in *Cox v. McLaughlin*, 76 Cal. 62, 9 Am. St. Rep. 164, in which case the complaint had been amended, and the action was before the court upon quantum meruit, and was sustained; *Porter v. Arrowhead Reservoir Co.*, 100 Cal. 502, 503, in approval of the ruling. So, to same effect, in *Tucker v. Billing*, 3 Utah, 90, 92.

**General Citations.**—In *Cox v. McLaughlin*, 63 Cal. 205, as to law of the case; and p. 206, as to what constitutes prevention of performance; *Beatty v. Howe Lumber Co.*, 77 Minn. 278.

#### **54 Cal. 613-615. OULD v. STODDARD.**

There can be but one action for the recovery of any debt secured by mortgage, pp. 614, 615.

Cited in *Campan v. Molle*, 124 Cal. 417, and *Bank v. Reed*, 131 Cal. 603, noted under *Mascarel v. Rafavour*, 51 Cal. 242; *Lavenson v. Standard Soap Co.*, 80 Cal. 248, 13 Am. St. Rep. 149, in which case the security was impaired by the removal of fixtures from the realty, and it was held that before the mortgagee could resort to other property of the mortgagor it was incumbent upon him to exhaust his mortgage security; *Hall v. Arnot*, 80 Cal. 354, holding that where the same debt is secured by distinct mortgages, and the plaintiff forecloses but one of the mortgages, he waives and nullifies the lien of the other; *Commercial Bank v. Kershner*, 120 Cal. 499; *First Nat. Bank v. Williams*, 2 Idaho, 626; *Bacon v. Raybould*, 4 Utah, 360; and *Winters v. Hub Min. Co.*, 57 Fed. Rep. 291, approving and applying the principle of the decision. Explained and distinguished in *Barbieri v. Ramelli*, 84 Cal. 157; and *Felton v. West*, 102 Cal. 270, 271, construing section 726 of the Code of Civil Procedure; so in *Largey v. Chapman*, 18 Mont. 566, to same effect.

#### **54 Cal. 616-620. ASHLEY v. OLSTEAD.**

**Homestead.**—Declaration of homestead must contain an estimate of the actual cash value of the land, pp. 619, 620.

Cited in *Reid v. Engelhart etc. Co.*, 126 Cal. 529, 77 Am. St. Rep. 208, applying principle to failure to state that applicant is head of a family, and *Yerrick v. Higgins*, 22 Mont. 510, to failure to claim only the area allowed by statute; *Ames v. Eldred*, 55 Cal. 138, in approval, and statement that the actual cash value was five thousand

dollars and over, held insufficient; so in *Schuyler v. Broughton*, 76 Cal. 525, holding sufficient a statement as follows: "We do place the value of said land at a sum not to exceed sixteen hundred dollars."

**54 Cal. 620-625. REMINGTON v. HIGGINS.**

**Equitable Mortgage.**—Agreement to give mortgage, treated in equity as mortgage, p. 623.

Principle of decision approved and applied in *Peers v. McLaughlin*, 88 Cal. 297, 22 Am. St. Rep. 308. Cited in 4 Am. St. Rep. 700, extended note, treating of subject of equitable mortgages.

**Mistake.**—Parties may be relieved from mistake of law as well as of fact, p. 624.

Cited as authority in *Lee v. Percival*, 85 Iowa, 642, reformation of promissory note. So to same effect in *Benson v. Markoe*, 37 Minn. 34, 5 Am. St. Rep. 818.

**Vendor's Lien.**—Acceptance of distinct and separate security for purchase money is *prima facie* a waiver of such lien, p. 625.

Cited, in approval of the ruling, in *Tripp v. Duane*, 74 Cal. 92.

**54 Cal. 626-628. GREEN v. CHANDLER.**

**Finding not within the issues does not warrant a judgment**, p. 628.

Cited in *Willamette S. M. Co. v. Kremer*, 94 Cal. 211, holding that the amount of land which may be made subject to a lien for work done or materials furnished for a building constructed thereon is an issuable fact; *Gamache v. School Dist.*, 133 Cal. 148, holding finding outside the issues; *Schirmer v. Drexler*, 134 Cal. 139, noted under *Morenhout v. Barron*, 42 Cal. 605; *Reid v. Gregory*, 78 Miss. 249, holding default judgment not sustained by allegations occurring merely in prayer of complaint; *Ford v. Springer Ld. Assn.*, 8 N. N. Mex. 60, but distinguished holding pleadings sufficient as to amount of land subjected to mechanic's lien; *Male v. Schaut*, 41 Or. 429, applying rule in action on note; so in *Sachse v. Auburn*, 95 Cal. 651, construing the principal case; *Harris v. Lloyd*, 11 Mont. 405, 28 Am. St. Rep. 485, in approval of the ruling stated.

**54 Cal. 628-630. McFADDEN v. MITCHELL.**

**Fraud.**—Question of fraudulent intent is one of fact, and not of law, p. 629.

Cited to same effect in *Bull v. Bray*, 89 Cal. 301, action to set aside certain deeds of gift; so in *Threlkel v. Scott*, 89 Cal. 353, and holding that a voluntary conveyance by an insolvent debtor is not necessarily fraudulent and void as to creditors; so in *Daugherty v. Daugherty*, 101 Cal. 223, in affirmation of ruling stated; and so in *Hutchinson v. First Nat. Bank*, 133 Ind. 283, 36 Am. St. Rep. 547, to same effect.

**54 Cal. 630-634. POLLARD v. PUTNAM.**

**State Lands.**—Applicant who first performs the required conditions is entitled to purchase, p. 634.

Explained in Urton v. Wilson, 65 Cal. 14, setting forth effect on application to purchase of provisions of new constitution, section 3, article 17.

**Appeal.**—Judgment reversed, and cause remanded for a new trial, p. 634.

Referred to as authority in Schroeder v. Schweizer etc., 60 Cal. 471, and holding that extreme caution should be exercised in refusing new trials where judgments are reversed; so in Niles v. Edwards, 95 Cal. 46, as to power of court in bank to modify judgment rendered in a department.

**54 Cal. 635-637. CONNER v. BLUDWORTH.**

**Replevin.**—Complaint held sufficient, p. 636.

Cited in Summerville v. Stockton etc. Co., 142 Cal. 547, sustaining complaint in claim and delivery.

**54 Cal. 637-638. LIVERMORE v. HODGKINS.**

Judgment having been obtained by plaintiff, he is entitled to enforce it, unless it be set aside or modified in due course of law, p. 638.

Cited in approval in Vermont M. Co. v. Superior Court, 99 Cal. 582; so in 49 Am. Dec. 516, extended note, treating of "power of court to stay execution."

**54 Cal. 640-645. GOSS v. STRELITZ.**

**Mechanic's Lien.**—Claim of lien as filed, determines the right, and cannot be reformed in equity, pp. 643, 644.

Cited to same effect in Fernandez v. Burleson, 110 Cal. 167, 52 Am. St. Rep. 77, misdescription of property in lien claim; so in Madera Flume etc. Co. v. Kendall, 120 Cal. 183, 65 Am. St. Rep. 178, insufficient notice of claim; Bell v. Bosche, 41 Neb. 855, to same effect as ruling stated; so in Lonkey v. Wells, 16 Nev. 274; and Lavin v. Bradley, 1 N. Dak. 297, and applied to seed lien; Morrison v. Willard, 17 Utah, 309, 70 Am. St. Rep. 786, noted under Hooper v. Flood, 54 Cal. 222. Distinguished in Henderson Lumber Co. v. Gottschalk, 81 Cal. 647, in which case there was held to be no variance between the claim filed and the one attempted to be enforced, while in the principal case the attempt was made to recover for material not included in the claim of lien.

**General Citation.**—Referred to in Reed v. Norton, 99 Cal. 619, action to enforce mechanic's lien, as to consequence of variance between averments in pleading and the proof.

**54 Cal. 645-654. FONTAINE v. SOUTHERN PACIFIC RAILROAD COMPANY.**

Railroad Company having leased its road to another company, nevertheless remains liable for cattle killed by the trains of the lessee, on unfenced portions of the lessor's railroad. pp. 651, 652.

Cited, and principle of decision approved, in *Dolan v. Newburgh etc. R. R. Co.*, 120 N. Y. 580; so, in notes to 71 Am. Dec. 295, 296; 89 Am. Dec. 312; and 58 Am. St. Rep. 148, as authority that railroad companies are liable for the torts of their lessees; *Arrowsmith v. Railroad Co.*, 57 Fed. Rep. 173, in denial of the doctrine.

**Findinga**—If issue presented in answer is such that a finding upon it in favor of defendant would not defeat plaintiff's right of action, failure to make such finding is immaterial, p. 654.

Cited as authority in *Brison v. Brison*, 90 Cal. 329, that if the findings which are made are of such a character as to dispose of issues which are sufficient to uphold the judgment, it is not a mistrial or against law to fail or omit to make findings upon other issues which, if made, would not invalidate the judgment.

**General Citation.**—*Snyder v. Emerson*, 19 Utah, 324.



## VOLUME LV.

By C. H. SQUIRE.

Revised to include citations to Volume 147, by CHARLES L. THOMPSON.

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### 55 Cal. 1-4. ROWLAND v. COYNE.

**Venue.**—Affidavit of merits filed by one defendant suffices for codefendants, p. 4.

Cited to same effect in People v. Larue, 66 Cal. 236; also, in Palmer & Rey v. Barclay, 92 Cal. 202, holding further, as to amended affidavit sworn to by defendant other than one swearing to original; McSherry v. Pennsylvania C. G. M. Co., 97 Cal. 642.

**Appearance.**—Filing demurrer is appearance, p. 3.

Approved in Thompson v. Michigan Mut. Assn., 52 Mich. 525, and general demurrer waives objections to jurisdiction; also, dissenting opinion of Miner, J., in Blyth & Fargo Co. v. Swenson, 15 Utah, 363.

### 55 Cal. 5-9. WILSON v. MADISON.

**Action to Quiet Title** may be maintained to land the title of which is in the government, p. 7.

Cited to this effect in Orr v. Stewart, 67 Cal. 277. Cited in Kitts v. Austin, 83 Cal. 171, holding further, as to plaintiff's right to set up rights of third party.

**Sheriff's Deed.**—Title of purchaser at sheriff's sale does not depend on sheriff's return to writ, p. 8.

Cited with approval in Hibberd v. Smith, 67 Cal. 564; also in Brusie v. Gates, 80 Cal. 460, where rule is applied to attaching creditor. Cited in Brusie v. Gates, 96 Cal. 268, as to what evidence of title is given by sheriff's deed.

**Cross-complaint** alleging title, in action to quiet title, should be stricken out, p. 8.

Cited to same effect in Miller v. Luco, 80 Cal. 261. Cited in Islais etc. Co. v. Allen, 132 Cal. 434, 435, but denying right to strike out affirmative matter seeking to quiet defendant's title as against plaintiff; Mining Co. v. Mining Co., 83 Cal. 599, as to cross-complaint presenting immaterial issues. Modified in Winter v. McMillan, 87 Cal. 264, 22 Am.

St. Rep. 247, holding cross-complaint is proper when defendant sets up equitable title. Approved in Mills v. Fletcher, 100 Cal. 149. Cited with apparent disapproval in Chalmers v. Trent, 11 Utah, 99. Although the cases differ in form of action and facts.

Title.—Judgment for defendant in action to quiet title protects his interests as well as a decree in his favor, p. 8.

Cited with approval in Irrigation Co. v. Little, in 14 Utah, 46, where affirmative relief was granted without prayer for through counter-claim or cross-complaint.

#### 55 Cal. 15-20. ALEXANDER v. BOUTON.

Contracts.—Married Woman may make any contract in relation to her separate property, p. 19.

Cited with approval in Brickell v. Batchelder, 62 Cal. 639, holding a note and mortgage binding; also, in Goad v. Moulton, 67 Cal. 540; Burkle v. Levy, 70 Cal. 252, holding, she may bind her property in any manner to secure her husband's debts; Bogart v. Woodruff, 96 Cal. 611; Cartan v. David, 18 Nev. 328, holding a note and mortgage given by her as security for her husband's debts is enforceable against her separate estate; to same effect in Mortgage Co. v. Stevens, 3 N Dak. 268; McDonald v. Randall, 139 Cal. 253, noted under Spear v. Ward, 20 Cal. 659; First Nat. Bank v. Leonard, 36 Or. 394, quoting Goad v. Moulton, 67 Cal. 536; Valensin v. Valensin, 12 Saw. 99, 28 Fed. Rep. 602, where wife entered into contract with husband. See note in Caldwell v. Walters, 55 Am. Dec. 608, 609.

#### 55 Cal. 21-24. DE LA GUERRA v. NEWHALL.

Pleading.—Common Counts may be used, p. 22.

Cited in Monroe v. Cannon, 24 Mont. 320, noted under Fratt v. Clark, 12 Cal. 89. Note on "how far allowable under code system," Allen v. Patterson, 57 Am. Dec. 545. Cited, but not in point, in Rosina v. Trowbridge, 20 Nev. 118.

#### 55 Cal. 26-28. SMITH v. DAVIS.

Statement on Motion for New Trial and amendments, as allowed, must be engrossed into one and authenticated by judge, in order to be considered on appeal, p. 27.

Cited to same effect in Sawyer v. Sargent, 65 Cal. 260. Approved in Hattabaugh v. Vollmer, 5 Idaho, 27, when amendments are offered and allowed to proposed statement on motion for new trial, statement as amended must be engrossed before court will consider it.

#### 55 Cal. 28-31. BUTLER v. BEECH.

Evidence—Preliminary Proof.—Sufficiency of to be determined by trial judge, p. 29.

Cited to same effect in Bryce v. Joynt, 63 Cal. 378, and his determination will not be disturbed unless abuse of discretion is shown; also in Webster v. San Pedro Lumber Co., 101 Cal. 329.

**Findings.**—Conclusions of law, how stated, p. 31.

Cited on this point in Blish v. McCormick, 15 Utah, 197.

#### .55 Cal. 31-38. TOMPKINS v. SPROUT.

**Equity.**—Property of debtor cannot, by means of fraud, be diverted from payment of his debts, p. 37.

Cited in Hilton v. Young, 73 Cal. 199, holding further as to power of court of equity to require performance of conditions before it renders assistance; Smith v. Selz, 114 Ind. 234, holding further constructive fraudulent conveyance will not be set aside when conveyance is on such terms as not to divert property from payment of grantor's debts; Daisy etc. Mills v. Ward, 6 N. Dak. 324, discussing powers of court in avoiding such transfers.

**Pleading.**—Necessary allegations in answer when defendant sets up adverse claim to title, p. 36.

Cited in Pennie v. Hildreth, 81 Cal. 131, 132.

**Equity—Constructive Fraudulent Conveyance.**—Court will protect both purchaser and creditor when possible, p. 37.

Cited in Fowler v. Maus, 141 Ind. 52, holding further as to right of grantee to be subrogated to rights of lienholders whom he has paid; Crockett v. Phinney, 33 Minn. 160.

#### .55 Cal. 38-42. HAYNES v. WHITE.

**Sales.**—An agreement to execute a good deed requires the conveyance of title to the land, p. 40.

Cited to same effect in Yates v. McLean, 70 Cal. 45, of an agreement to execute a good conveyance. Approved in Linton v. Allen, 147 Mass. 237.

**Contract—Rescission.**—Vendee of land cannot maintain action to rescind contract and recover purchase money without surrendering or offering to surrender land to vendor, p. 42.

Cited to same effect in Rhorer v. Bila, 83 Cal. 55; also in Maddock v. Russell, 109 Cal. 426, and a mere offer in the answer to reconvey is not sufficient; Hill v. Den, 121 Cal. 48, noted under Herman v. Haffnegger, 54 Cal. 161. Note to Mecklem v. Blake, 99 Am. Dec. 76.

#### .55 Cal. 42, 43. DANIELWITZ v. TEMPLE.

**State Lands—Contest.**—Courts acquire jurisdiction of such cases only under section 3415 of the Political Code, p. 43.

Cited to this effect in Byrd v. Reichert, 74 Cal. 582, also in McFaul v. Pfankuch, 98 Cal. 402.

**55 Cal. 43-46. THOMAS v. ANDERSON.**

Appeal taken before entry of judgment is premature and will be dismissed, p. 46.

Cited to same effect in People v. Center, 66 Cal. 567, 570, where notice of appeal was given before judgment was entered; also in Kimple v. Conway, 69 Cal. 72, further, no appeal lies from judgment of nonsuit; Schroder v. Schmidt, 71 Cal. 400; Tyrell v. Baldwin, 72 Cal. 192, holding, if notice is filed on day judgment is entered, notwithstanding it was served earlier, the appeal is not premature; In re Rose, 72 Cal. 578, as to appeal from order settling account of administrator; In re Rose, 80 Cal. 168, where act which determines the date of the "entry of judgment," in probate proceedings, is decided; Wood v. Etiwanda etc. Co., 122 Cal. 156, noted under Lorenz v. Jacobs, 53 Cal. 24; concurring opinion, Estate of More, 143 Cal. 500, dismissing premature appeal from decree of distribution; Hodgins v. Harris, 4 Idaho, 518, an order for a judgment is not a final judgment from which appeal lies. Approved in Home of Inebriates v. Kaplan, 84 Cal. 488, also in Durant v. Comegys, 2 Idaho, 811, 35 Am. St. Rep. 268, holding a judgment is not entered until written in the judgment-book; Parrott v. Kane, 14 Mont. 28, although case goes off on another point. Cited in State v. Biesman, 12 Mont. 16, as to when a judgment is "rendered."

**55 Cal. 46-49. CHESTER v. BOWER.**

**Exclusion of Witnesses.**—A party in interest, though not of record, should be excepted from order excluding witnesses, p. 48.

Cited with approval in Garman v. State, 66 Miss. 199, criminal case; also in Gregory Dry Goods Co. v. McMahan, 61 Mo. App. 505, holding any person pecuniarily interested in a cause has a constitutional right to be present at the trial; Schneider v. Haas, 14 Oreg. 177; 58 Am. Rep. 299.

**Sales.**—What is sufficient change of possession to sustain, p. 48.

Note to Clafin v. Rosenberg, 97 Am. Dec. 342.

**Evidence.**—Motion to strike out should be denied if any part is admissible, p. 48.

Approved in Hawley v. Dawson, 16 Oreg. 347.

**General Citation.**—Bailey v. Master Plumbers, 103 Tenn. 102.

**55 Cal. 49-52. KERN VALLEY BANK v. CHESTER.**

**Judgment.**—Reversal of may be conditional, p. 52.

Cited to this effect in Eames v. Haver, 111 Cal. 405; Fox. v. Hale etc. Co., 122 Cal. 222, noted under De Costa v. Mining Co., 17 Cal. 613.

**Continuance.**—When sought on ground of absence of witness, affidavit must show materiality of evidence, p. 51.

Approved in *Peachy v. Witter*, 131 Cal. 319, on point that matter is within court's discretion, and holding it not abused under facts stated; *Stone v. Chicago, M. & St. P. Ry. Co.*, 3 S. Dak. 335, holding further as to facts which must be shown. See note to *Stevenson v. Sherwood*, 74 Am. Dec. 145.

**55 Cal. 52-59. LEONIS v. LAZZAROVICH.**

**Reformation of Deed.**—Court of equity cannot reform the deed of a married woman, p. 59.

Denied in *Gardner v. Moore*, 75 Ala. 400, 51 Am. Rep. 458. Cited in *Holland v. Moon*, 39 Ark. 124, to the effect that "courts are not in the habit of reforming the deeds of married women." Unqualifiedly approved in *Bowden v. Bland*, 53 Ark. 55, 22 Am. St. Rep. 180. Distinguished in *Savings and Loan Society v. Meeks*, 66 Cal. 373, holding as to when court may correct clerical mistakes in mortgage of married woman. Apparently overruled in *Stevens v. Holman*, 112 Cal. 351. S. C. 53 Am. St. Rep. 218, holding the deed of a married woman properly executed is subject to reformation in like manner as the contract of any other person. The dissenting opinion of Temple, J., in *Stevens v. Holman*, *supra*, approves the rule. Approved in *Montana Bank v. Schmidt*, 6 Mont. 610, where there was an erroneous description in premises mortgaged. Note to *Gardner v. Moore*, 51 Am. Rep. 458; also, to *Snell v. Snell*, 5 Am. St. Rep. 531; note to *Williams v. Hamilton*, 65 Am. St. Rep. 512, on reformation.

**Deed—Married Woman.**—Certificate of acknowledgment is absolutely essential to deed of married woman, p. 58.

Not approved in *Wedel v. Herman*, 59 Cal. 514, holding certificate not essential—is merely record proof of acknowledgment—court of equity may amend; also in *Banbury v. Arnold*, 91 Cal. 610, holding certificate is no essential part of the execution of instrument.

**Acknowledgment is essential to execution of married woman's deed**, p. 57.

Approved in *Joseph v. Dougherty*, 60 Cal. 380, holding, "allegation that mortgage was 'executed' imports acknowledgment"; dissenting opinion of McKee, J., in *Hand v. Hand*, 68 Cal. 140, holding the acknowledgment must be in mode provided by law; *Tolman v. Smith*, 74 Cal. 350, as to acknowledgment of mortgage; *Bollinger v. Manning*, 79 Cal. 11; *Danglarde v. Elias*, 80 Cal. 67, statute must be strictly followed; *Mathews v. Davis*, 102 Cal. 207. See notes on general subject in *Mason v. Brock*, 52 Am. Dec. 493; *Morrison v. Wilson*, 73 Am. Dec. 599; *Maclay v. Love*, 85 Am. Dec. 144. Approved in *American Loan Assn. v. Burghardt*, 19 Mont. 326; 61 Am. St. Rep. 508.

**Evidence.**—When insufficient to support judgment, p. 54.

Cited in *Ward v. Waterman*, 85 Cal. 503, holding further as to what evidence is necessary to prove fraud or mistake.

**55 Cal. 60-86. LANTERMAN v. WILLIAMS.**

Parol Partition of Land, p. 60.

Note on subject in *Tomlin v. Hilyard*, 92 Am. Dec. 122-128.

**55 Cal. 67-72. TRACY v. COLEBY.**

Fiduciaries cannot make a valid purchase of any part of the estate, in respect to which they have any duties to perform, p. 71.

Cited with approval in *Golson v. Dunlap*, 73 Cal. 159, holding further as to exceptions; also in *Tracy v. Craig*, 55 Cal. 92, 94. Cited in *Graves v. Mining Co.*, 81 Cal. 320, where the power of director of corporation to act when he has interest adverse to corporation is discussed.

**55 Cal. 72-78. PEOPLE v. HODGDON.** 36 Am. Rep. 30.

Criminal Law.—Dying Declaration must be shown to have been made under sense of impending death, p. 76.

Approved in *Johnson v. State*, 102 Ala. 14, further, as to declaration not made under sense of impending death, but reaffirmed when declarant had given up all hopes of recovery; *People v. Taylor*, 59 Cal. 646, 649, but the declarations need not state that they are so made; *People v. Gray*, 61 Cal. 175; *People v. Ramirez*, 73 Cal. 404. Cited in *People v. Fuhrig*, 127 Cal. 414, holding declaration inadmissible under facts stated; *State v. Jeswell*, 22 R. I. 140, but holding statement admissible when supplemented by statement by coroner as to circumstances. Note to 42 Am. St. Rep. 333.

Construction of Statute.—Where statute is ambiguous it will be so construed as not to deprive party of substantial right, p. 75.

Approved in *People v. Eichelroth*, 78 Cal. 144.

New Trial—Practice.—Motion for new trial may be heard by successor of judge who tried the case, p. 73.

Cited to same effect in *Territory v. Bryson*, 9 Mont. 42.

**55 Cal. 79-81. PEOPLE v. BRITE.**

Office—Vacancy.—A local office becomes vacant, ipso facto, upon the incumbent ceasing to be an inhabitant of the district, p. 80.

Cited in *People v. Perkins*, 85 Cal. 511, where it is held that an office becomes forfeited on failure to take oath and file bond within time required by statute; *People v. Fleming*, 100 Cal. 541, 38 Am. St. Rep. 313, holding further as to what acts effect a vacancy in an office.

**55 Cal. 81-87. ALDRICH v. WILLIS.**

Executor cannot act until appointment and qualification, p. 85.

Distinguished in *Farnsworth v. Sutro*, 136 Cal. 243, holding qualification of assignee alleged by allegation of assignment to him.

Supreme Court in bank has power to correct or modify a judgment rendered in department, p. 86.

Cited to this point in *Niles v. Edwards*, 95 Cal. 46.

**Judgments Against Infants**, p. 81.

Note to *Joyce v. McAvoy*, 89 Am. Dec. 185.

Satisfaction of mortgage by mortgagor does not protect a subsequent mortgagee, p. 86.

Cited in *Jennings v. Jennings*, 104 Cal. 154, holding further, as to satisfaction of mortgage by guardian when he is mortgagor and his ward mortgagee.

**Mortgage**.—Satisfaction by general guardian of infant mortgagee is invalid, p. 87.

Cited in *Martin v. De Ornelas*, 139 Cal. 46, as to satisfaction not authorized by probate court.

#### 55 Cal. 87-90. **ESTATE OF BARTON**.

**Estate of Deceased Persons**.—Administrator's fees shall be ascertained and paid only upon final accounting, p. 90.

Cited with approval in *Dewar's Estate*, 10 Mont. 439; also in *In re Levinson*, 108 Cal. 456, where administrators changed before estate was settled.

#### 55 Cal. 91-94. **TRACY v. CRAIG**.

Findings must not deviate from admitted allegations, p. 93.

Cited to this effect in *Silvey v. Neary*, 59 Cal. 99, where judgment was held erroneous because findings negatived an admitted allegation; also in *White v. Douglass*, 71 Cal. 119; *Ortega v. Cordero*, 88 Cal. 226, holding findings outside the pleadings will be disregarded on appeal—exceptions.

#### 55 Cal. 94-98. **MANLY v. HOWLETT**.

**Statute of Limitations—Patent**.—Where title to land is based on a patent, the statute cannot be considered to have commenced to run prior to the issuance of patent, p. 98.

Cited to same effect in *O'Connor v. Fogle*, 63 Cal. 11, statute could not run against United States; *Easton v. O'Reilly*, 63 Cal. 309. Distinguished in *Garabaldi v. Shattuck*, 70 Cal. 513, where statute had run, as to right to acquire patent, before patent was issued. Approved in *Dorn v. Baker*, 96 Cal. 210. Cited to this effect in *Directors F. T. District v. Abila*, 106 Cal. 383; *King v. Thomas*, 6 Mont. 415, where the rule is applied to mining claims; *Altschul v. O'Neil*, 35 Or. 216, noted Notes Cal. Rep.—175.

under *Page v. Fowler*, 28 Cal. 605. Distinguished in *Steele v. Boley*, 6 Utah, 313, holding time to run from payment by pre-emptioner and issuance of his certificate.

**Parol Gift of land, followed by use and occupation by donee, entitles to specific performance, p. 97.**

Cited in *Anson v. Townsend*, 73 Cal. 417, where performance necessary in order to remove case from operation of statute of frauds is discussed. Approved in *Burlingame v. Rowland*, 77 Cal. 317. Cited in *Baker v. Wiswell*, 17 Neb. 60, holding as to what performance is necessary to take an oral contract for sale of real estate out of statute of frauds. See notes to *Anderson v. Green*, 23 Am. Dec. 429, and *Christy v. Barnhart*, 53 Am. Dec. 543.

**Certificate of Purchase to public lands does not pass title, p. 97.**

Cited to this effect in *Sweatt v. Burton*, 14 Saw. 470, 42 Fed. Rep. 285, holding the action of ejectment cannot be maintained on the title given by such certificate.

**Findings contradictory on material issue is error, p. 96.**

Cited in *Walley v. Deseret National Bank*, 14 Utah, 323, to the point that special, control general findings on the same subject; *Gwin v. Gwin*, 5 Idaho, 277, applying rule in will contest; *Kountz v. Kountz*, 15 S. Dak. 69, applying rule in suit to quiet title where findings as to ownership are in conflict.

#### 55 Cal. 98-103. BAKERSFIELD TOWN HALL ASSOCIATION v. CHESTER.

**Gift of Real Estate by parol is effected, when donee takes possession and does acts to carry out the purpose of the gift, p. 102.**

Cited with approval in *Anson v. Townsend*, 73 Cal. 417, holding "parol gifts will be enforced under like circumstances as parol sales"; *Burlingame v. Rowland*, 77 Cal. 317. Note to *Anderson v. Green*, 23 Am. Dec. 429.

**Corporation.—A de facto corporation has all the rights of a de jure corporation until called in question by direct proceedings to arrest its usurpation of power, p. 101.**

Cited to same effect in *First Baptist Church v. Branham*, 90 Cal. 24. Note to *Hildreth v. McIntire*, 19 Am. Dec. 67, 68. Approved in *Los Angeles etc. Band v. Spires*, 126 Cal. 545, and *California etc. Assn. v. Stelling*, 141 Cal. 720, noted under *Rondell v. Fay*, 32 Cal. 361; *San Diego Gas Co. v. Frame*, 137 Cal. 443, noted under *Oroville etc. Co. v. Board*, 37 Cal. 354; *Scott v. Lewis*, 40 Or. 40, purchase money mortgagee who voluntarily releases mortgage and takes reconveyance, having means of knowing that mortgagor executed bond for title therefor, takes subject to equity so created; *Miller v. Perris Irrigation District*,

85 Fed. Rep. 698, holding, "validity of organization cannot be brought in question by private parties." Note to *People v. Montecito Water Co.*, 33 Am. St. Rep. 184.

#### 55 Cal. 103-105. **JOHNSON v. SQUIRES.**

**Constitutional Law—State Lands.**—Lands suitable for cultivation can be granted only to actual settlers, p. 105.

Approved in *Aurrecochea v. Sinclair*, 60 Cal. 547; *Urton v. Wilson*, 65 Cal. 13, holding, the rule applies where application to purchase was made before the adoption of the constitution, but no payments were made; *Dillon v. Saloude*, 68 Cal. 270; *Mosely v. Torrence*, 71 Cal. 321; *Manley v. Cunningham*, 72 Cal. 242, reaffirming that the act applies to applications made before its passage.

**State Lands.**—Curative Act of March 27, 1872, was retrospective in its operation, p. 104.

Approved in *Johnson v. Wright*, 55 Cal. 478; *Upham v. Hosking*, 62 Cal. 259, holding further, the act validated the sale of state tide lands not sold under authority of law.

#### 55 Cal. 106-109. **CURTIS v. PARKS.**

**Contracts.**—No one can be made a debtor for money paid, unless paid at his request, p. 108.

Approved in *McGlew v. McDade*, 146 Cal. 554, brother of deceased person, who made voluntary payment of debt due from decedent for doctor's services, without taking assignment of claim and without request to make such payment and without promise of repayment, cannot recover against estate; *Huddleston v. Washington*, 136 Cal. 519, noted under *Moulton v. Loux*, 52 Cal. 81; *Flournoy v. Flournoy*, 86 Cal. 294, 21 Am. St. Rep. 43, where husband paid debt of wife, against her separate property, without her knowledge.

#### 55 Cal. 109-114. **WAKEFIELD v. BOUTON.**

**Equity.**—Findings of jury are merely advisory and not binding, p. 114.

Cited with approval in *Evans v. Nealis*, 87 Ind. 268.

#### 55 Cal. 115-116. **BUSTAMENTE v. STEWART.**

**Injunction.**—Attorney's Fees recoverable is limited to amount paid counsel for procuring dissolution of injunction, p. 116.

Cited to same effect in *Black v. Hilliker*, 130 Cal. 194, denying attorney's fees to defendant in action of claim and delivery; *Porter v. Hopkins*, 63 Cal. 55, and fees for service after dissolution of injunction should not be allowed. Cited in *Mitchell v. Hawley*, 79 Cal. 303, where

subject, whether fees can be recovered for unsuccessful efforts to procure dissolution of injunction, is discussed but not decided. Approved in *Lambert v. Haskell*, 80 Cal. 624; *Curtiss v. Bachman*, 110 Cal. 438, 52 Am. St. Rep. 114, holding fees of counsel for services before injunction is rendered, cannot be recovered in an action on injunction bond; *Parker v. Bond*, 5 Mont. 14; *Olds v. Cary*, 13 Oreg. 388; *Donahue v. Johnson*, 9 Wash. 191, no fees are recoverable where injunction is allowed to stand until defeated by trial on merits; *State v. McHale*, 16 Mo. App. 483, where a like rule is said to apply in suits on attachment bonds; *Loehner v. Hill*, 17 Mo. App. 33; *Lamb v. Shaw*, 43 Minn. 509, and fees for abortive attempts to set injunction aside cannot be recovered. Cited in note to *Trapnell v. McAfee*, 77 Am. Dec. 159.

**Damagea.**—Judgment for defendant will not be reversed to grant plaintiff nominal damages, p. 118.

Cited in *Kelly v. Fahrney*, 97 Fed. 179, affirming judgment accordingly.

**General Citation.**—*State v. Fargo*, 151 Mo. 290.

**55 Cal. 117-119. HELLMAN v. LEVY & ARPIN.**

**Land—Notice.**—Open, notorious possession is constructive notice of claim of title, p. 118.

Approved in *Bank of Mendocino v. Baker*, 82 Cal. 118, holding, such possession is sufficient to put a purchaser on his inquiry.

**55 Cal. 123-125. GILMORE v. LYCOMING FIRE INSURANCE COMPANY.**

**Pleading.**—Complaint on contract, which shows affirmatively that all terms of contract are not set out, is insufficient, p. 124.

Distinguished as to facts in *Tischler v. C. F. M. F. I. Co.*, 66 Cal. 178, 179; *Sutliff v. Seidenberg*, 132 Cal. 66, holding complaint sufficient. Cited for purposes of explanation, in *Gilmore v. A. C. I. Co.*, 67 Cal. 366, 367, 388. Approved in *Schinck v. Hartford Ins. Co.*, 71 Cal. 28, holding further such defect may be cured by averments in answer.

**Insurance Contracts.**—When application for insurance is made a part of policy, it constitutes part of contract, and its terms must be alleged in suit on contract, p. 125.

Cited in *Berliner v. Travelers' Ins. Co.*, 121 Cal. 456, but distinguished where application contained no promissory warranty. Distinguished in *Tischler v. C. F. M. F. I. Co.*, 66 Cal. 178-79, where application was verbal. Disapproved in *Knights of Honor v. Wollschlager*, 22 Colo. 214; also in *Travelers' Ins. Co. v. Sheppard*, 85 Ga. 759, holding matters stated in application may be brought to notice of court defensively; *Connecticut Mut. Life Ins. Co. v. McWhirter*, 73 Fed. Rep. 447.

55 Cal. 126-129. **LUCAS v. PICO.** Cited in *Casserleigh v. Wood*, 14 Colo. App. 277.

Lawful Contracts, p. 126.

Note on subject to *Cobb v. Cowdery*, 94 Am. Dec. 377.

55 Cal. 136. **AMES v. ELDRED.**

Homestead.—Declaration must contain estimate of actual cash value, p. 136.

Cited to this effect in *Schuyler v. Broughton*, 76 Cal. 525, but holding a statement that the value did not exceed a certain amount is sufficient; *Tappendorff v. Moranda*, 134 Cal. 421, holding declaration insufficient for stating actual "cost" value; *Yerrick v. Higgins*, 22 Mont. 510, noted under *Ashley v. Olmstead*, 54 Cal. 616.

55 Cal. 137-142. **ESTATE OF CARDWELL.**

Guardian and Ward.—Guardian may invest ward's funds without order of court, but if he does so, it is generally at his risk, p. 141.

Cited in *Estate of Schandoney*, 133 Cal. 390, but holding guardian not liable where not negligent; *Scheib v. Thompson*, 23 Utah, 567, where guardian without authority of court purchased realty with ward's money, and realty had depreciated in value when ward attained majority, ward may recover amount invested with commercial rate of interest, compounded annually; *Estate of Carver*, 118 Cal. 74, holding under such circumstances, guardian is held to strict accountability; *De Greayer v. Superior Court*, 117 Cal. 645, 59 Am. St. Rep. 223, as to the general power of guardian. Note to *Nyce's Estate*, 40 Am. Dec. 508.

General Citation.—*Nagle v. Robins*, 9 Wyo. 231.

55 Cal. 143-148. **PHENIX MINING COMPANY v. LAWRENCE.**

Cited to note on "Abandonment" to *Wyman v. Hurlburt*, 40 Am. Dec. 465. Note on "Possessory Rights of Miner," to *McClintock v. Bryden*, 63 Am. Dec. 105.

55 Cal. 148-159. **PICO v. MARTINEZ.**

Replevin.—Damages awardable to one having special interest only should not exceed that interest, p. 151.

Cited in *Wilkerson v. Thorp*, 128 Cal. 226, noted under *Treadwell v. Davis*, 34 Cal. 606.

55 Cal. 159-164. **LOTHIAN v. WOOD.**

Mechanic's Lien for material furnished a lessee can only embrace such interest as lessee had in land at date of accruing of lien, p. 164.

Cited in *Stenberg v. Liennemann*, 20 Mont. 461, holding lien could

only attach to such buildings as lessee might remove at common law. Note on "What Structures are Subject to Mechanic's Lien," to *Cross R. R. Co. v. Vanderpool*, 78 Am. Dec. 694.

**55 Cal. 165-176. PORTER v. PICO.**

**Attachment.**—Irregularities in obtaining are waived by appearance and answer of defendant, p. 173.

Cited to this effect in *Harvey v. Foster*, 64 Cal. 298, holding further as to who may contest; also in *Scrivner v. Dietz*, 68 Cal. 4; *Hammond v. Starr*, 79 Cal. 558; *Brusie v. Gates*, 80 Cal. 468, "judgment cures all irregularities." Cited in *Murphy v. Montandon*, 2 Idaho, 1053, 35 Am. St. Rep. 283, holding the rule as to waiver applies only to defendants to original suit. Cited in *Leppel v. Beck*, 2 Colo. App. 395, holding sufficiency of affidavit cannot be attacked collaterally. Cited in dissenting opinion of Reed, J., in *Mentzer v. Ellison*, 7 Colo. App. 326. See extended note on "Attachment Lien," to *Franklin Bank v. Bachelder*, 39 Am. Dec. 607; *Bagley v. Ward*, 99 Am. Dec. 270.

To create a lien on real property the terms of the statute must be strictly complied with, p. 172.

Cited to same effect in *Schwartz v. Cowell*, 71 Cal. 306.

**Same—Relation.**—Judgment in attachment suit relates back to time of levy of attachment, p. 174.

Cited to this effect in *Anderson v. Goff*, 72 Cal. 71; 1 Am. St. Rep. 38; also in *Riley v. Nance*, 97 Cal. 204, 205, holding sheriff's deed of attached property takes effect from date of attachment; *Reiley v. Wright*, 117 Cal. 80; *Lehnhardt v. Jennings*, 119 Cal. 195; *Woodward v. Brown*, 119 Cal. 306, 63 Am. St. Rep. 120; *Holter etc. Co. v. Ontario etc. Co.*, 24 Mont. 193, noted under *Sharp v. Baird*, 43 Cal. 577.

What constitutes sufficient return by attaching officer discussed, p. 173.

Cited in *Anderson v. Goff*, 72 Cal. 74; 1 Am. St. Rep. 41, and *Davis v. Baker*, 72 Cal. 498, where returns made were approved on authority of *Porter v. Pico*; *Brusie v. Gates*, 80 Cal. 468, holding parol evidence may be introduced to supplement return; *Head v. Daniels*, 38 Kan. 10, 13, holding further as to presumption that sheriff did his duty; also in *Wilkins v. Tourtelott*, 42 Kan. 201; *Bank v. Richardson*, 34 Or. 532, 75 Am. St. Rep. 675, on point that due performance by sheriff will be presumed. Note to *Mudge v. Steinhart*, 12 Am. St. Rep. 22.

**Injunction—Cloud on Title.**—Court of equity will enjoin a sale by sheriff where its only effect would be to cast a cloud on petitioner's title, p. 176.

Cited to this effect in *Roth v. Insley*, 86 Cal. 140; *Einstein v. Bank*, 137 Cal. 49, 59, noted under *Shattuck v. Carson*, 2 Cal. 589; *Wilhoit v. Cunningham*, 87 Cal. 457, where there was an attempted execution sale of assigned property. Note to *Ramsdell v. Fuller*, 87 Am. Dec. 107.

55 Cal. 176-179. LOS ANGELES WATER CO. v. LOS ANGELES. See 177 U. S. 577.

55 Cal. 179-184. ERNST v. CUMMINGS.

**Findings Must be upon All Material Issues**, p. 183.

Approved in Wilson v. Wilson, 6 Idaho, 605, applying rule in foreclosure of mortgage.

**Contracts**.—Where contract contains mutual conditions party seeking to enforce must allege performance or excuse therefor, p. 184.

Cited to this effect in Marchant v. Hayes, 117 Cal. 672.

55 Cal. 185-191. PEOPLE v. SMALLMAN.

**Larceny**.—Obtaining money under fraudulent intent of converting to one's own use, and so converting, is larceny, p. 185.

Cited with approval in dissenting opinion of Thornton, J., in People v. Raschke, 73 Cal. 385; the majority opinion holds there must be a felonious intent to steal at time of change of possession. Cited with approval in People v. Shaughnessy, 110 Cal. 602, where possession was obtained by fraud, owner not intending to part with property. Approved in State v. Woodruff, 47 Kan. 154, 27 Am. St. Rep. 287, where property was obtained by fraud.

**Criminal Law—Supreme Court**.—A question of law is presented to supreme court, where verdict is complained of as being contrary to evidence, only where there is no evidence to sustain the charge, p. 191.

Cited with approval in People v. Kuches, 120 Cal. 569.

**Evidence**.—On redirect examination antecedent facts and circumstances may be shown to remove inferences left by cross-examination, p. 190.

Cited to this effect in State v. McGahey, 3 N. Dak. 299.

55 Cal. 193-197. EX PARTE COHN.

**Contempt**.—Disobedience of decree of distribution by executor or administrator is contempt, p. 196.

Cited in Ex parte Hollis, 59 Cal. 412, holding a court has no power to adjudge a party guilty of contempt for not turning over to receiver in insolvency money held by him adversely to insolvent debtor; In re Burrows, 33 Kan. 679, holding refusal by judgment debtor to satisfy judgment, when he has money on his person, not exempt, with which he may do so, is contempt. Light v. Canadian County Bank, 2 Oklahoma, 553; Ex parte Tinsley, 37 Tex. Cr. App. 531, 66 Am. St. Rep. 825, quoting Ex parte Hollis, 59 Cal. 405. Note to Eikenberry v. Edwards, 56 Am. Rep. 365; and Mullin v. People, 22 Am. St. Rep. 422, 423.

**Habeas Corpus** cannot be used to inquire into question of error, p. 197.

Cited to this effect in *Ex parte Lehmkuhl*, 72 Cal. 54; also, in *Ex parte Long*, 114 Cal. 161.

**General Citations.**—*In re Taber*, 13 S. D. 67; *State v. Judge of First Judicial Dist.*, 50 La. Ann. 556.

#### 55 Cal. 197-199. **FREEMAN v. CAMPBELL.**

**Partnership Note.**—Necessary allegations in suit on, p. 198.

Cited in *Harrison v. McCormick*, 69 Cal. 620, to effect that partners are jointly liable on note signed by their individual names, in absence of words showing different intention; *Cribb v. Morse*, 77 Wis. 327, a note signed by partners as individuals is *prima facie* evidence of individual indebtedness.

#### 55 Cal. 199-201. **CLARK v. SUPERIOR COURT.**

**Judgment of.**—Court having jurisdiction of matter and parties can only be reviewed on appeal, p. 200.

Cited to same effect in *Reagan v. Justice's Court*, 75 Cal. 256, where attempt was made to have erroneous default judgment reviewed on certiorari; *Powelson v. Lockwood*, 82 Cal. 615, holding a writ of prohibition will not issue to justice's court to prevent court from trying an accused on charge of vagrancy without jury. Distinguished in *Havemeyer v. Superior Court*, 84 Cal. 398, 18 Am. St. Rep. 239, holding further, as to when prohibition lies. Approved in *Woodward v. Superior Court*, 95 Cal. 276, further as to writ of prohibition. Distinguished in *Jones v. Justice's Court*, 97 Cal. 524, holding writ of review lies to justice's court to ascertain whether such court has jurisdiction. Cited in *People v. Spiers*, 4 Utah, 396, where prohibition issued for want of jurisdiction of justice's court.

#### 55 Cal. 204-207. **SARGENT v. LINDEN MINING COMPANY.**

**Instructions, p. 204.**

Note on subject to *State v. Whit*, 72 Am. Dec. 539.

#### 55 Cal. 210-211. **ESTATE OF MONTGOMERY.**

**Appeal.**—No appeal lies from order denying petition for revocation of letters of administration, p. 211.

Cited to same effect in *Estate of Winslow*, 128 Cal. 312, and applied to order refusing to revoke probate of will; *Estate of Keane*, 56 Cal. 408, and order denying new trial in such case is unappealable. Cited in *In re Ohm*, 82 Cal. 162, holding no appeal lies from order compelling administratrix to allow her name to be used by a creditor of estate, who seeks to have set aside a conveyance in defraud of creditors; *In re Hathaway*, 111 Cal. 272.

**55 Cal. 212-230. EX PARTE KEARNY.**

**Habeas Corpus.**—Trial and sentence, for an act which is not a crime, is absolutely void, and person under custody under such trial will be discharged on habeas corpus, p. 228.

Cited with approval in *Matter of Maguire*, 57 Cal. 609; also in *Ex parte Hollis*, 59 Cal. 407. Distinguished in *Ex parte Foley*, 62 Cal. 509, holding the facts stated an offense under the statute. Cited in *Gardner v. Jones*, 126 Cal. 618, applying rule to inmate of state hospital detained against his will, after his restoration to sanity; *In re Kowalsky*, 73 Cal. 122, holding further as to extent of inquiry under habeas corpus proceedings. Cited in dissenting opinion of Thornton, J., in *Ex parte Henshaw*, 73 Cal. 508, holding party cannot be imprisoned for refusing to obey a void judgment; *Ex parte Mirande*, 73 Cal. 371, but mere error will not be reviewed on habeas corpus. Approved in *Ex parte McNulty*, 77 Cal. 166, 167; 11 Am. St. Rep. 259. Distinguished in *Ex parte Ah Men*, 77 Cal. 201, 11 Am. St. Rep. 265, where complaint was inartificially drawn, though intimating facts necessary to constitute an offense; also, on same point, in *Ex parte Acock*, 84 Cal. 54, both cases holding such complaint sufficient to sustain a judgment. Distinguished in *Ex parte Noble*, 96 Cal. 364, holding issues of fact will not be retired under habeas corpus. Approved in *Ex parte Maier*, 103 Cal. 479, 42 Am. St. Rep. 130; also, in *Ex parte Prince*, 27 Fla. 199-201; 26 Am. St. Rep. 69, 70, further, writ does not lie to correct irregularity of procedure where there is jurisdiction. See extended note on subject of *Commonwealth v. Lecky*, 26 Am. Dec. 47; also, to *Morrill v. Morrill*, 23 Am. St. Rep. 110.

**Municipal By-laws** must harmonize with general laws of the state, p. 225.

Cited to same effect in *In re Ah You*, 88 Cal. 102, 22 Am. St. Rep. 282; also, in *South Pasadena v. Terminal Ry. Co.*, 109 Cal. 321, and can have no extra territorial force, unless by permission of sovereign power.

Court must have jurisdiction to pronounce valid sentence, p. 228.

Approved in *Ex parte Cox*, 3 Idaho, 534, where sentence exceeds limit prescribed by law, accused will be discharged on habeas corpus; *In re McVey*, 50 Neb. 483, holding sentence void where petitioner was informed against for one offense and convicted and sentenced for another; also, in *Ex parte Degener*, 30 Tex. App. 576, further as to essential elements to render a conviction valid.

**Judicial Notice.**—Courts take judicial notice of public statutes, p. 221.

**Note to Lanfear v. Mestier**, 89 Am. Dec. 665, 666.

**General Citation.**—Cited in *People v. Kelly*, 120 Cal. 273, to effect that a judgment need contain no recital of facts upon which it is based; *Buel v. State*, 104 Wis. 142; *Miskimmins v. Shaver*, 8 Wyo. 410, 415.

**55 Cal. 230-236. PEOPLE v. ALVISO.**

Murder.—Indictment set out held sufficient, p. 231.

Cited in People v. Hyndman, 99 Cal. 3, to effect that indictment need not state means employed to effect killing.

**Corpus Delicti.**—Generally this must be proven, p. 233.

Cited in People v. Simonsen, 107 Cal. 348, holding defendant's admissions cannot be admitted to establish necessary elements of commission of crime. Distinguished in People v. Lee Look, 137 Cal. 593, holding information insufficient when murder of human being was not charged.

**55 Cal. 236-238. PEOPLE v. MITCHELL.**

Instructions.—Court cannot instruct respecting matters of fact, p. 238.

Cited in State v. Sullivan, 9 Mont. 177, holding that an instruction that unexplained possession of stolen goods raises presumption of guilt is error; also, to same effect, in People v. Hart, 10 Utah, 209, where the offense charged was housebreaking. Note to State v. Whit, 72 Am. Dec. 544.

**55 Cal. 239-242. PARKS v. BARNEY.**

**Sale of Personal Property.**—Delivery and change of possession questions of fact, p. 242.

Cited to this effect in Dubois v. Spinks, 114 Cal. 294; Shauer v. Alterton, 151 U. S. 624; Rosenbaum v. Hayes, 10 N. Dak. 324, sustaining sale as against creditors. Cited as not being in point in Bassinger v. Spangler, 9 Colo. 190.

**55 Cal. 242-254. DESMOND v. DUNN.**

**Consolidation Act.**—Organization under shall remain in force until city and county of San Francisco shall adopt another charter as provided in the constitution, p. 253.

Cited in dissenting opinion of Sharpstein, J., Earle v. S. F. Board of Education, 55 Cal. 500. Cited in Earle v. S. F. Board of Education, 55 Cal. 495, where it is stated the regulation of schools in city and county of San Francisco does not remain unchangeable under "Consolidation Act." Cited in Wood v. Election Commissioners, 58 Cal. 567, holding constitution does not repeal special acts for regulating elections in San Francisco; and in opinion of Ross, J., same case, p. 589. Cited with approval in Donahue v. Graham, 61 Cal. 280, 281, dissenting opinion of McKinstry, J., holding a street law of San Francisco, being part of the charter, was not repealed by the adoption of the present constitution. Cited in Staude v. Election Commissioners, 61 Cal. 320, 324, 326, holding although charter under Consolidation Act remains in force, it is subject

to and controlled by such general laws as the legislature may enact, other than those for the "incorporation, organization, and classification" of cities and towns, Sharpstein and McKinstry, JJ., dissenting. Approved generally in People v. Pond, 89 Cal. 143; People v. Menzies, 110 Cal. 452; Kahn v. Sutro, 114 Cal. 320. Cited in Martin v. Election Comrs., 126 Cal. 411, construing section 8½ of constitution; Ex parte Braun, 141 Cal. 216 (dissenting opinion), and Ex parte Helm, 143 Cal. 558, discussing control of cities over municipal affairs.

**Municipal Corporations.**—Provisions of constitution relating to cities apply to consolidated cities and counties, p. 248.

Cited to this effect in Denman v. Broderick, 111 Cal. 103, 105; also in Kahn v. Sutro, 114 Cal. 320.

**Municipal Corporations.**—The charters of municipalities organized prior to the adoption of the constitution shall remain in force until changed or superseded as provided by law, p. 247.

Cited with approval in In re Carrillo, 66 Cal. 5, as to jurisdiction of city justice's court organized under a charter of 1874; also in similar case in In re Guerrero, 69 Cal. 100. Cited in dissenting opinion of McKinstry, J., in Thomason v. Ashworth, 73 Cal. 88, 93, the majority holding the legislature has the power to enact a general law affecting the charters of municipalities. Followed in City of Stockton v. Insurance Co., 73 Cal. 623, 624, but holding the legislature cannot, by a general law, substitute an entirely new charter for an old one. Cited in Huntington v. Nevada City, 75 Fed. Rep. 61, 62, holding legislature may exercise control of municipalities by general laws—this case contains a brief summary, by McKenna, J., of the California cases bearing in the subject. Note on "Special Legislation," to State v. Ellet, 21 Am. St. Rep. 788.

**General Citations.**—Cited in Barton v. Kalloch, 56 Cal. 104, where constitutional provisions respecting time of holding elections in municipalities is discussed. Cited in Ex parte Chin Yan, 80 Cal. 81, as having no bearing on question at issue.

#### 55 Cal. 254-256. GRUM v. BARNEY.

**Pleading.**—Defendant is not bound to anticipate plaintiff's case, p. 255.

Cited to same effect in Banning v. Marleau, 121 Cal. 243, as to allegation of fraud in transfer under which plaintiff claims; Summerville v. Stockton etc. Co., 142 Cal. 548, sustaining right of defendant to prove valid chattel mortgage, and sustaining sufficiency of answer to cross-complaint; Humphreys v. Harkey, 55 Cal. 284, where, in an action to recover personal property, it was held defendant, sheriff, need only deny plaintiff's ownership and right to possession; also in Stephens v. Hallstead, 58 Cal. 197, holding defendant is not required to plead any-

thing as to nature of plaintiff's title; *Mason v. Vestal*, 88 Cal. 397; 22 Am. St. Rep. 311; *Howe v. Johnson*, 107 Cal. 77. See notes to *Clark v. Foxcroft*, 20 Am. Dec. 315; *Savacool v. Boughton*, 21 Am. Dec. 208; *Davis v. Hooper*, 24 Am. Dec. 753. Note on "Estoppel by Judgment given in Evidence," to *Tyler v. Hall*, 27 Am. St. Rep. 346.

**Sale of Personal Property.**—Change of Possession must be actual, open, and substantial, p. 256.

Cited with approval in *Kelly v. Murphy*, 70 Cal. 563. See note on subject to *Clafin v. Rosenberg*, 97 Am. Dec. 341. Cited in *Tapscott v. Lyon*, 103 Cal. 310, holding sale to defraud creditors is absolutely void.

#### 55 Cal. 257-262. MYERS v. SPOONER.

**Abandonment.**—A question of intent to be determined from all circumstances, p. 260.

Cited to this effect in *McCann v. McMillan*, 129 Cal. 352, holding abandonment not shown under facts stated; *Oviatt v. Big Four Min. Co.*, 39 Or. 122, where owner of mining right and ditch left premises, sold movables and allowed property to be sold for taxes, and did not claim it for eighteen years, intent to abandon conclusively shown; *Trevaskis v. Peard*, 111 Cal. 805, further, if intention to abandon is once acted on, abandonment is absolute; also, in *Omar v. Soper*, 11 Colo. 390, 7 Am. St. Rep. 253, as to mining claim; *Marshall v. H. P. T. M. M. & M. Co.*, 1 S. Dak. 365; *Allen v. Southern California Ry. Co.*, 70 Fed. Rep. 375, as to abandonment of residence. Note on general subject to *Wyman v. Hurlburt*, 40 Am. Dec. 464, 465; *Moon v. Rollins*, 95 Am. Dec. 186.

**Mining Law.**—Locators are not bound by mistake of recorder in recording notice of location, p. 262.

Cited to same effect in *Oregon King Min. Co. v. Brown*, 119 Fed. 57, under Statutes of Oregon, October 14, 1898, relative to recordation of mining locations, record is sufficient if it is a substantial copy of notice posted on claim. *Weese v. Barker*, 7 Colo. 181, holding party complaining cannot avail himself of error when not misled thereby.

**General Citations.**—*Shephard v. Murphy*, 26 Colo. 364; *Lockhart v. Wills*, 9 N. M. 268.

#### 55 Cal. 263-265. PEOPLE v. ALIVTRE.

**Criminal Law.**—Threats made previous to the affray are admissible to show by whom it was commenced, p. 264.

Cited to same effect in *People v. Carlton*, 57 Cal. 85; 40 Am. Rep. 114; also, in *Vaughn v. State*, 88 Ga. 738, but not admissible when there is direct evidence to show who was the aggressor; *Bell v. State*, 69 Ark.

150, 86 Am. St. Rep. 190, noted under *People v. Arnold*, 15 Cal. 476. Note to *Campbell v. People*, 61 Am. Dec. 56.

**55 Cal. 267-272. CHANDLER v. CHANDLER.**

**Equity—Return of Consideration.**—Plaintiff cannot ask for a decree debarring defendant from asserting a claim under instrument executed by former, without restoring consideration received by him, p. 269.

Cited to same effect in *Benson v. Shotwell*, 87 Cal. 60. Cited in note on "Conveyance to take effect after Grantor's Death," to *Wilson v. Carrico*, 49 Am. St. Rep. 220; also in *Welborn v. Weaver*, 63 Am. Dec. 243.

**General Citation.**—*In re Fair's Estate*, 132 Cal. 535.

**55 Cal. 273-277. CROWLEY v. GENESEE MINING COMPANY.**

**Corporation—Agent.**—Authority of agent may be inferred from his admitted relations to the company, or from course of business, p. 276.

Cited in *City Ry. Co. v. Bank*, 62 Ark. 38, 54 Am. St. Rep. 284, where the powers of officers of corporation is carefully discussed, holding power to do an act will not be presumed merely from fact that it has been exercised. Distinguished in *Bank of Healdsburg v. Bailhache*, 65 Cal. 331, where acts performed were outside the usual course of business. Approved in *Streeten v. Robinson*, 102 Cal. 546, holding president of corporation has power to employ an attorney; *Bates v. Coronado Beach Co.*, 109 Cal. 162, where president, with knowledge of officers, acted as manager of corporation; *Fontana v. Pacific etc. Co.*, 129 Cal. 54, noted under *Pixley v. Western etc. Co.*, 33 Cal. 183; *Phillips v. Sanger etc. Co.*, 130 Cal. 434, and *Curtin v. Salmon R. etc. Co.*, 141 Cal. 311, on point that oral authority is sufficient for execution of corporate note by an officer; *Pettibone v. Lake etc. Co.*, 134 Cal. 229, and *G. V. B. etc. Co. v. Bank*, 95 Fed. 30, holding corporation bound by president's contract, under facts stated; *Scott v. Superior etc. Co.*, 144 Cal. 143, sustaining employment of physician for employees of corporation by one of its officers; *Magowan v. Groneweg*, 14 S. Dak. 544, when business of trading corporation was managed by secretary, and with consent of all officers and ninety-five per cent of stockholders he sold entire property in bulk to innocent purchaser for value, sale was valid against creditors; *Mathias v. W. S. S. Assn.*, 19 Mont. 362, where it was held that mere fact of presidency did not imply agency; dissenting opinion of Bigelow, C. J., in *Wright v. Carson Water Co.*, 23 Nev. 45; *Gillis v. Duluth etc. Ry. Co.*, 34 Minn. 303, holding certain contracts made by defendant's chief engineer binding on defendant; *Wright v. Lee*, 2 S. Dak. 626; *America Exchange Bank v. Oregon Pottery Co.*, 55 Fed. Rep. 266, holding president and secretary are presumed to have authority to execute note in name of corporation; *Cox v. Robinson*, 82 Fed. Rep. 286, where directors permitted officer to hold himself out as agent of com-

pany, Ross, J., dissenting. See extended note to *B. S. Green Co. v. Blodgett*, 50 Am. St. Rep. 152; also, note to *Higgins v. Reed*, 74 Am. Dec. 310.

**Contracts.**—Agreement to give share of product of mine in return for work performed therein is contract of employment, p. 274.

Cited to same effect in *Hudepohl v. Mining and Water Co.*, 80 Cal. 558, and is not a lease.

#### 55 Cal. 277-279. **EDDELBUTTEL v. DURRELL.**

When new trial sought on ground of insufficiency of evidence, statement must specify in what particulars evidence is insufficient, p. 279.

Cited to same effect in *Weyl v. Sonoma Valley R. R. Co.*, 69 Cal. 204; *Wise v. Burton*, 73 Cal. 167, where specifications were general, but allowed; *Parker v. Reay*, 76 Cal. 105, where specifications were said to be "too general"; *Anthony v. Jillson*, 83 Cal. 299, holding the mere designation of a finding by number, as not being sustained by evidence, is insufficient; *Spotts v. Hanley*, 85 Cal. 165; *Cummings v. Ross*, 90 Cal. 71; *Tromans v. Mahlman*, 92 Cal. 5, where exception is stated; *Dawson v. Schloss*, 93 Cal. 200, holding specification should distinguish each particular proposition of fact excepted to from all others involved in findings; *In re Yoakam*, 103 Cal. 505; *Kumble v. Grand Lodge A. O. U. W.*, 110 Cal. 214; *Haight v. Tyron*, 112 Cal. 7; *Livestock G. P. Co. v. Union Co.*, 114 Cal. 450, where the questioned specifications were held sufficient; *Van Pelt v. Parks*, 18 Utah, 147; *De Molera v. Martin*, 120 Cal. 546, holding further, as to how far necessary to particularize; *Swift v. Occidental etc. Co.*, 141 Cal. 168, sustaining specifications and stating rationale of rule; *Finlen v. Heinze*, 28 Mont. 561, following rule.

#### 55 Cal. 280-282. **WRIGHT v. LAUGENOUR.**

**State Lands—Contest.**—Each party must allege facts sufficient to show that he is entitled to the issue of a certificate, p. 282.

Cited to same effect in *Peabody v. Prince*, 78 Cal. 516. Cited in *Cunningham v. Shanklin*, 80 Cal. 125, and *Laugenour v. Hennagin*, 59 Cal. 626, as to questions of fact.

#### 55 Cal. 283-284. **HUMPHREYS v. HARKEY.**

**Evidence.**—In action to recover personal property, under denial of plaintiff's ownership, defendant may introduce evidence to show plaintiff acquired title by fraudulent conveyance from judgment debtor, p. 284.

Cited to same effect in *Stephens v. Hallstead*, 58 Cal. 197; and followed in *Mason v. Vestal*, 88 Cal. 397; 22 Am. St. Rep. 311; *Tapscott v. Lyon*, 103 Cal. 310, holding further a sale to hinder, delay or defraud creditors is absolutely void; *Banning v. Marleau*, 121 Cal. 243, and *Summerville v. Stockton etc. Co.*, 142 Cal. 548, noted under *Grum v. Barney*, 55 Cal. 254.

**55 Cal. 285-286. DICKENSON v. BOLYER.**

**Mechanic's Lien.**—Statute construed, p. 285.

Cited in *Booth v. Pendola*, 88 Cal. 43, holding, where there is a joint lien upon several buildings, failure of specification of materials and labor for each building operates only as a postponement of lien; *Williams v. Mountaineer G. M. Co.*, 102 Cal. 141, holding mechanic's lien cannot be claimed on part of a structure.

**55 Cal. 286-290. PEOPLE v. MAHONEY.**

**Assessment.**—The description of land assessed must be clear, certain and intelligible of itself, p. 289.

Cited with approval in *Palomares etc. Co. v. Los Angeles Co.*, 146 Cal. 536, assessment of land by false metes and bounds and containing no other description to identify it, is wholly void; *Miller v. Williams*, 135 Cal. 185, and *Auditor General v. Smith*, 125 Mich. 580, holding description of land insufficient; *Lake County v. S. B. Q. M. Co.*, 66 Cal. 20, holding further as to what descriptions are sufficient; *People v. Central Pacific Co.*, 83 Cal. 400, holding "tax proceedings are in invitum, and to be valid must be stricti juris"; *State v. C. P. R. R. Co.*, 21 Nev. 101, if not so described, assessment is void. Cited in *Central Pacific Co. v. Nevada*, 162 U. S. 525.

**Tax Deed.**—Description in is governed by that in assessment list, p. 289.

Cited to same effect in *Power v. Larabee*, 2 N. Dak. 148. Note to *Bank of Utica v. Mersereau*, 49 Am. Dec. 232; *Keane v. Cannovan*, 82 Am. Dec. 747.

**General Citation.**—*Jackson v. Sloman*, 117 Mich. 129.

**55 Cal. 290-299. PEOPLE v. REDINGER. 36 Am. Rep. 32.**

**Criminal Law—Appearance.**—Person charged with crime can only appear and defend when in actual or constructive custody, p. 293.

Cited to same effect in *Warwick v. State*, 73 Ala. 489, 49 Am. Rep. 62, where prisoner had escaped pending appeal; and in similar case in *Woodson v. State*, 19 Fla. 551; *Madden v. State*, 70 Ga. 384, holding appeal will be dismissed, when appellant has escaped and has not been captured prior to conclusion of term of court; *Gentry v. State*, 91 Ga. 673; *Sargent v. State*, 96 Ind. 67, holding accused cannot appear by counsel after he has escaped from custody. Disapproved in *State v. Jacobs*, 107 N. C. 781, 22 Am. St. Rep. 918, holding appellate court may proceed to hearing of appeal and render judgment, notwithstanding escape of appellant. Approved in *State v. Murrell*, 33 S. C. 96. Cited in dissenting opinion of McIver, C. J., in *State v. Railway Company*, 45 S. C. 446, as authority for holding appeal should be dismissed when it would be impossible to render a practical judgment thereon; Cited in *People v. Elkins*, 122 Cal.

655, dismissing appeal of escaped prisoner unless he should redeliver himself in time specified; but cf. *Vosburg v. Vosburg*, 131 Cal. 630, declining to apply rule in divorce case where appellant had failed to obey order of court as to custody of children; *State v. Handy*, 27 Wash. 471, and *State v. Dempsey*, 26 Mont. 506, both holding where convicted person appealed and thereafter escaped, appeal dismissed on condition that if he surrender within stated time, appeal will be reinstated; *People v. Tremayne*, 3 Utah, 333; also in *Allen v. Georgia*, 166, U. S. 142 holding the escape of appellant pending appeal, and nonappearance at hearing of, constitutes an abandonment of his case. Note to *State v. Plazencia*, 41 Am. Dec. 272, 273; also in *McGowan v. People*, 44 Am. Rep. 88; *State v. McMichael*, 50 La. Ann. 431.

#### 55 Cal. 299-302. BOEDEFELD v. REED.

**Insolvency Act.**—State act was merely suspended by federal bankruptcy law, and revived on repeal of latter, p. 302.

Cited as authority in *Linnell v. Frazer*, 55 Cal. 477; and followed in *Lewis v. County Clerk Santa Clara County*, 55 Cal. 605, holding act is operative as to debts contracted during existence of federal law; *Smith v. His Creditors*, 59 Cal. 268. Note to *Norton v. Cook*, 23 Am. Dec. 354, 357.

#### 55 Cal. 302-304. IN RE BAKER & HAMILTON.

**Insolvency.**—Neither act of 1852, nor act of 1876, applies to partnerships, p. 304.

Distinguished in *Hawley & Co. v. Campbell*, 62 Cal. 446, where partner sought to be discharged from his individual debts.

Re-enactment of Statute adopts its established construction, p. 304.

Cited in *Estate of Healy*, 122 Cal. 164, noted under *Hyatt v. Allen*, 54 Cal. 356.

#### 55 Cal. 304-308. PEOPLE v. GARDNER.

**Surveyor General.**—Sureties on bond are liable for failure to execute duties prescribed by statute, p. 307.

Cited in *People v. Smith*, 123 Cal. 73, as to assessor's failure to collect personal property taxes under section 3820, Political Code. Distinguished in *Sonoma County v. Hall*, 132 Cal. 591, liability of county recorder for failure to pay to county fees collected is barred in three years.

#### 55 Cal. 308-310. NELSON v. McCLANAHAN.

**Contest of Will—Res Gestae.**—Declarations made by testator at time of drawing will may be admissible as res gestae, p. 310.

Cited in *In re Gilmore*, 81 Cal. 243, holding declarations made five years after date of will are inadmissible as res gestae. See note to *In re Hess's Will*, 31 Am. St. Rep. 691.

**55 Cal. 310-316. ESTATE OF BOLAND.**

**Probate Law.**—Petition in proceedings for sale of real estate is the commencement of proceedings in nature of an action, p. 315.

Cited to this effect in *Estate of Montgomery*, 60 Cal. 648; *Kertchem v. George*, 78 Cal. 600, holding, if petition is defective, sale will be void for want of jurisdiction. Cited in *Scarf v. Aldrich*, 97 368, 33 Am. St. Rep. 196, holding defective description in petition does not affect jurisdiction, if property was sufficiently described in order of sale. Note to *Stuart v. Allen*, 76 Am. Dec. 561.

**Petition for Probate Sale of Real Estate** must set forth the condition of the property, p. 315.

Cited to same effect in *Smith v. Biscailuz*, 83 Cal. 349. Approved in *Wallace v. Grant*, 27 Wash. 135, order authorizing administrator to sell realty is void when based on petition merely stating that petitioner has sold all the personal property that in his judgment is advisable to sell at present time.

**Petition for Sale of Real Estate**, under section 1537 of the Code of Civil Procedure, must be verified, p. 315.

Cited with approval in *Wills v. Pauly*, 116 Cal. 581; *Wall v. Mines*, 130 Cal. 40, as to verification of articles of incorporation under Civil Code, section 292; *Estate of Cook*, 137 Cal. 188, noted under *Estate of Smith*, 51 Cal. 563; *Stow v. Schiefferly*, 120 Cal. 611, further, as to allegation that petition was verified, when in fact it was not.

**55 Cal. 316-320. LOWELL v. LOWELL.**

**Divorce—Pleading.**—Cross-complaint may be filed in action for divorce, p. 319.

Cited to same effect in *Mott v. Mott*, 82 Cal. 418.

**Pleading.**—Denials in answer held sufficient, p. 319.

Cited in *Weinberger v. Weidman*, 134 Cal. 601, on point that allegations of evidence are not admitted by nondenial.

**55 Cal. 320-322. BALL v. KENTFIELD.**

Officer is entitled to salary from time term of office commenced, p. 321.

Cited in *People v. Perkins*, 85 Cal. 511, 513, as to when term of office commences.

**55 Cal. 322-331. BANK OF CALIFORNIA v. SHABER.**

**Appeal.**—It is for board of supervisors to determine how far county will defend against a claim which has been prosecuted to judgment, p. 326.

Cited in *San Francisco Gas Light Co. v. Dunn*, 62 Cal. 598, holding auditor has no power to review the action of the board upon an appeal  
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from his refusal to allow a demand. Approved in Stoddard v. Benton, 6 Colo. 517, holding further as to procedure in case no action is taken. See note on "Liability of Municipalities for property destroyed by Mobs," to Prather v. City of Lexington, 56 Am. Dec. 589, 590; also, same subject, to Darlington v. Mayor of New York, 88 Am. Dec. 270.

**55 Cal. 331-337. PEOPLE v. BOARD OF EDUCATION.**

**Constitutional Law.**—Section 7, article 9, of the constitution, relating to text-books in public schools, is self-executing, p. 335.

Cited in Earle v. S. F. Board of Education, 55 Cal. 495, where it is stated the educational department is made a state care; also in State v. Haworth, 122 Ind. 476, holding legislature may require certain designated books to be used in schools; Leeper v. State, 103 Tenn. 534.

**55 Cal. 337-340. HEMME v. HAYS.**

**Practice—Frivolous Answer Defined.**—Judgment may be taken on pleadings, p. 339.

Approved in Montgomery v. Herrill, 62 Cal. 393; also in Loveland v. Garner, 74 Cal. 300; San Francisco v. Staude, 92 Cal. 563; Benham v. Connor, 113 Cal. 171. Cited in Hearst v. Hart, 128 Cal. 328, as to judgment when answer was unverified and sustaining notice of motion therefor.

**Appeal.**—Ruling on motion for judgment on pleadings cannot be reviewed on appeal if there be no bill of exceptions, p. 339.

Cited with approval in Purdum v. Taylor, 2 Idaho, 154.

**55 Cal. 340-344. HARLAN v. ELY. S. C. 68 Cal. 523.**

**Findings that allegations of answer are untrue, except so far as according with other facts expressly found, is insufficient,** p. 344.

Cited to same effect in Goodnow v. Griswold, 68 Cal. 600; Perkins v. West Coast Lumber Co., 120 Cal. 29, holding findings should be distinct on every material issue; Alameda Co. v. Crocker, 125 Cal. 103, noted under Johnson v. Squires, 53 Cal. 37; King v. Lux etc. Co., 129 Cal. 323, 324, noted under Ladd v. Tully, 51 Cal. 277; Gull River Lumber Co. v. School District, 1 N. Dak. 509; Maynard v. L. E. M. L. & A. Ins. Assn., 14 Utah, 462.

**Principal and Surety.**—Surety may be, as to creditor, principal, p. 343.

Cited with approval in Bank v. DeShorb, 137 Cal. 693, discussing liability of wife mortgaging her property to secure husband's debt; Daneri v. Gazzola, 139 Cal. 419, holding parties sureties and released by extension of time to principal; Leeke v. Hancock, 76 Cal. 130, where accommodation indorser made himself liable to subsequent indorsee as indorser for value; California Nat. Bank v. Ginty, 108 Cal. 151, holding one who signs as principal is liable to payee as such, notwithstanding

it was known he was in fact a surety. Cited in *Eppinger v. Kendrick*, 114 Cal. 625, 627, holding, where payee knew that indorser was surety, and acted with that knowledge, indorser may claim rights of surety, notwithstanding he signed, apparently, as principal; also, to same effect, in *Smith v. Freyler*, 4 Mont. 492, further, as to right to introduce parol evidence to show character of indorsement.

**55 Cal. 350-361. TAYLOR v. WARNAKY.**

**Way of Necessity.**—Grant of is implied when land granted is surrounded by other lands of grantor, p. 350.

Distinguished in *McDonald v. McElroy*, 60 Cal. 491, where grantor was not sole owner of land over which right of way was claimed. Approved in *Barnard v. Lloyd*, 85 Cal. 133; also in *Blum v. Weston*, 102 Cal. 367, 41 Am. St. Rep. 191, further, such right of way becomes appurtenant to the land; also, to same effect, in *Logan v. Stogsdale*, 123 Ind. 377; *Mead v. Anderson*, 40 Kans. 205, unless it be shown that no such grant was intended. See note to *Pettingill v. Porter*, 85 Am. Dec. 675.

**55 Cal. 352-359. MONTGOMERY v. SPECT.**

Whether a deed absolute in form be a mortgage is a mixed question of law and fact, p. 353.

Cited to same effect in *Husheon v. Husheon*, 71 Cal. 411, and further as to evidence by which it may be shown; also in *Booth v. Hoskins*, 75 Cal. 275; *Reavis v. Reavis*, 103 Fed. 818, holding instrument to be a mortgage and pledge. See note to *Turnipseed v. Cunningham*, 50 Am. Dec. 197.

Deed given to secure an indebtedness will be presumed to be a mortgage, p. 354.

Cited to same effect in *Hall v. Arnott*, 80 Cal. 352; *Allen v. Allen*, 95 Cal. 196; *Ferris v. Wilcox*, 51 Mich. 109; 47 Am. Rep. 554. Note to *Hutzler Brothers v. Phillips*, 4 Am. St. Rep. 707, 708.

**55 Cal. 359-365. DAVIS v. ROCK CREEK COMPANY.** 36 Am. Rep. 40.

**Corporations.**—Obligation contracted by officers of corporation, in name of corporation, if unauthorized by board of directors, is not binding, p. 364.

Cited to this effect in *Graves v. Mining Co.*, 81 Cal. 317; *Wyman v. Bowman*, 127 Fed. 274, contract between corporation and majority of directors, whereby latter loans money to former to pay debts, some of which are owing to latter, is only voidable at option of creditors or stockholders. Distinguished in *Seeley v. San Jose I. M. & L. Co.*, 59 Cal. 25, where acts of officers were subsequently ratified. Note to *Beach v. Miller*, 17 Am. St. Rep. 304.

**Trustee.**—One acting in fiduciary capacity cannot deal with himself in his individual capacity, p. 364.

Cited to this effect in *Pacific Vinegar & Pickle Works v. Smith*, 145 Cal. 364, 367, 368, where president of corporation purchased its notes and caused corporation by himself as president to endorse them to himself individually, guaranteeing their payment without authority of corporation, he cannot sue on indorsement; *Wickersham v. Crittenden*, 93 Cal. 29, holding courts will set such transaction aside at mere option of cestui que trust. Approved in *Blood v. La Serena L & W. Co.*, 113 Cal. 236, opinion of Britt, C., and followed in dissenting opinion of McFarland, J., holding further as to when broker cannot represent both parties to contract of sale; *Patrick v. Boonville Gas Light Co.*, 17 Mo. App. 468, where president of corporation was held to be trustee; *Hope v. Valley City Salt Co.*, 25 W. Va. 806, holding "such transactions will be viewed with jealousy"; *Santa Ana Water Co. v. Town of San Buenaventura*, 65 Fed. Rep. 328; *Bensick v. Thomas*, 66 Fed. Rep. 111; *Hutchinson v. Bidwell*, 24 Oreg. 223, as to directors of corporation.

#### 55 Cal. 365-367. HEARST v. EGGLESTONE.

**Tax Deed** based on void assessment is void, p. 367.

Cited with approval in *Hall v. Theisen*, 61 Cal. 525, where assessment was to owners known and unknown; *Axtell v. Gerlach*, 67 Cal. 484, holding injunction will be allowed to restrain execution of deed, when assessment is void; *Klumpke v. Baker*, 68 Cal. 561, when property was not assessed to owner; *Pearson v. Creed*, 69 Cal. 539, where assessment was made to deceased person; *Pearson v. Creed*, 78 Cal. 147; *Russ & Sons Co. v. Crichton*, 117 Cal. 703.

**Quieting Title.**—Action to quiet title may be maintained, although adverse claim rests on proceedings which are void, p. 367.

Cited to same effect in *Kittle v. Bellegarde*, 86 Cal. 564. *Grant v. Cornell*, 147 Cal. 567, where certificate of sale to state contained correct description of land and was not subject to defects alleged in assessment, its record imported constructive notice to purchase of land; *Dranga v. Rowe*, 127 Cal. 510, quoting *Kittle v. Bellegarde*, 86 Cal. 564.

Assessment made to "all parties, known and unknown," is void, p. 367.

Approved in *State v. Ernst*, 26 Nev. 127, where assessor returned assessment against E. and board of equalization ordered him to add name of M. L. & L Co. to E.'s assessment and to add certain property to assessment, and E. did not own such property and was only a stockholder in company, board's order was void; *Lewis v. Blackburn*, 42 Or. 116, assessment of land to "unknown to owners and to all owners and claimants, known and unknown," is void. Distinguished in *San Francisco v. Phelan*, 61 Cal. 619, where objectionable recital was surplusage. Approved in *Besworth v. Webster*, 64 Cal. 2; *Wilson v. Atkinson*, 68 Cal. 591, where the recital was contained in deed. Cited in *Wilson v. Atkinson*, 77 Cal. 487, s. c. 11 Am. St. Rep. 301, holding tax deed given under

such an assessment may be sufficient to set statute of limitations in motion. Approved in *San Luis Obispo v. Pettit*, 87 Cal. 502, holding statute must be followed strictly; *Jatunn v. O'Brien*, 89 Cal. 61; *Gwynn v. Dierssen*, 101 Cal. 586; *Russ & Sons Co. v. Crichton*, 117 Cal. 703, holding tax deed containing such recital is void, and it cannot be shown there was in fact a valid assessment.

**55 Cal. 368-373. PULLIAM v. BENNETT.**

Supreme Court has jurisdiction to modify judgment rendered in department, p. 373.

Cited to this effect in *Niles v. Edwards*, 95 Cal. 46.

**55 Cal. 373-375. COLUSA COUNTY v. DE JARNETT.**

Adjudication by board of supervisors if claim against county, is conclusive, p. 375.

Cited to same effect in *Sullivan v. Gage*, 145 Cal. 766, 767, applying rule, where state board of examiners had refused to audit claim for attorneys' fees, improperly allowed by court to receiver in suit by state to dissolve corporation; *McBride v. Newlin*, 129 Cal. 37, on point that board acts in quasi judicial capacity in passing on claim; *County v. McPherson*, 133 Cal. 284, applying rule to award of printing contract and allowance of claim therefor; *County v. Evers*, 136 Cal. 134, denying right to recover back moneys paid on claim so adjudicated; *McFarland v. McCowen*, 98 Cal. 331, auditor cannot refuse to draw his warrant; also, in *Lamberson v. Jeffers*, 118 Cal. 365; *Sheehan v. Headlee*, 17 Wash. 641, holding same as to county commissioners. Extended note to *Commissioners v. Heaston*, 55 Am. St. Rep. 208.

**55 Cal. 375-377. PEOPLE v. FRESHOUR.**

**Witness—Privilege.**—If witness, with knowledge of his rights, testifies about matter that may criminate him, he must submit to full cross-examination in reference thereto, p. 376.

Cited to same effect in *Ex parte Senior*, 37 Fla. 22. Approved in *Samuel v. People*, 164 Ill. 384, but holding rule does not apply to a case where admissions made prior to trial are brought forward and joined to answers given on trial; *Brown v. Walker*, 161 U. S. 597; *Ex parte Park*, 37 Tex. Cr. App. 598, 66 Am. St. Rep. 839, but holding witness entitled to exemption under facts stated; note to *Evans v. O'Connor*, 75 Am. St. Rep. 331, on general subject. Note to *Fries v. Brugler*, 21 Am. Dec. 61.

**55 Cal. 379-381. BANK OF WOODLAND v. TREADWELL.**

**Attorney's Fees.**—Plaintiff can recover as attorney's fees only such sum as he has paid or is liable to pay to his attorney, p. 380.

Approved in *Rapp v. Spring Valley Gold Co.*, 74 Cal. 535, holding further the agreement to pay may be implied; *Adams v. Seaman*, 82 Cal. 639, where it is stated that it is doubtful whether court is obliged to allow whole amount of fees mentioned in a note or mortgage; *Prescott v. Grady*, 91 Cal. 522, holding attorney's fees, provided for in agreement, are in nature of special damages authorized by contract, and must be specially averred; *McNamara v. Oakland etc. Assn.* 131 Cal. 346, but allowing fee on foreclosure proceedings under facts stated; *Warren v. Stoddart*, 6 Idaho, 702, stipulation in mortgage for attorney's fees in case of suit brought is enforced only for reasonable fee. Approved in *Bank of Benson v. Hove*, 46 Minn. 42, and plaintiff must show that such expense has been incurred.

Findings are required on every material issue, p. 380.

Cited to same effect in *Gull River Lumber Co. v. School dist.*, 1 N. Dak. 509; *Alameda Co. v. Crocker*, 125 Cal. 103, noted under *Johnson v. Squires*, 53 Cal. 37; *Krug v. Lux etc. Co.*, 129 Cal. 323, 324, noted under *Ladd v. Tully*, 51 Cal. 277.

#### 55 Cal. 382-383. COFFEY v. GREENFIELD.

Any interest in the matter in litigation is sufficient to entitle a party to intervene, p. 382.

Cited in *Kimball v. Richardson Co.*, 111 Cal. 393, where attaching creditor intervened to defeat the lien of prior attaching creditors; *Bowen v. Needles Nat. Bank*, 76 Fed. Rep. 177, intervention by receiver of bank; *Taylor v. Bank of Volga*, 9 S. Dak. 574; *McEldowney v. Madden*, 124, Cal. 109, noted under *Davis v. Eppinger*, 18 Cal. 378; *Dennis v. Kolm*, 131 Cal. 93, and *Muhlenberg v. City*, 25 Wash. 52, sustaining intervention under facts stated.

Fact that intervenor might protect his interest in some other way is immaterial, p. 383.

Cited to same effect in *Kimball v. Richardson Co.*, 111 Cal. 396; *Taylor v. Bank*, 9 S. Dak. 574.

General Citation.—*Dunn v. National Bank of Canton*, 11 S. D. 308.

#### 55 Cal. 389-392. SPARKS v. BUTTE GRAVEL MINING COMPANY.

Mechanic's Lien.—One who furnishes materials to the owner for the construction of a building is a "materialman" and not an "original contractor," p. 392.

Cited to same effect in *Schwartz v. Knight*, 74 Cal. 433. Cited in *La Grill v. Mallard*, 90 Cal. 376, holding, if there could be intermediate lienholders for work done or material furnished, the rule is otherwise. Approved in *Hinckley v. Field's Biscuit Co.*, 91 Cal. 140. Distinguished in *Baird v. Peall*, 92 Cal. 237, following *La Grill v. Mallard*, supra. Cited in *Pacific Mutual L. I. Co. v. Fisher*, 106 Cal. 233, holding further, when

contract is to furnish labor and material; Davis v. MacDonough, 109 Cal. 549, holding labor performed under void contract is deemed to have been performed at instance of owner. Approved in Roebling's Co. v. Humboldt Co., 112 Cal. 290, 292, further as to materials furnished materialman; Inman v. Henderson, 29 Oreg. 120.

Materialman must file claim within thirty days from completion of building, p. 302.

Cited to this effect in Willamette Co. v. College Co., 94 Cal. 237, holding further as to time for filing when contract is void; Santa Monica L. & M. Co. v. Hege, 119 Cal. 378, further as to claim filed prematurely.

#### 55 Cal. 395-396. WHITTLE v. RENNER.

**Appeal.**—Notice of, must be served upon attorney of record, p. 396.

Cited in Beardsley v. Frame, 73 Cal. 635, holding fact that attorney of record is not admitted to practice in supreme court does not invalidate a notice signed by him; McMahon v. Thomas, 114 Cal. 591, holding notice of motion for new trial signed by attorney not of record, and not regularly substituted, is ground for denying motion. Cited in Territory v. Harris, 7 Mont. 431, holding an appeal will be dismissed for want of jurisdiction when statute has not been followed in taking the appeal.

#### 55 Cal. 396-400. MEDLEY v. ROBERTSON.

**State Lands.**—Title to sixteenth and thirty-sixth sections does not vest in state until plat of survey has been approved by United States surveyor general, p. 399.

Cited to same effect in Gilson v. Robinson, 68 Cal. 543; also in Prentice v. Miller, 82 Cal. 572, holding application to purchase cannot be made until lands are surveyed by United States. Note to Terry v. Megerly, 85 Am. Dec. 93. Cited in Urton v. Wilson, 65 Cal. 14, but said to have no bearing on case.

State lands are deemed to be surveyed when the plat of survey is approved by United States surveyor general, p. 398.

Cited to same effect in Garfield v. Wilson, 74 Cal. 178.

#### 55 Cal. 400-406. PERKINS v. ECKERT.

**Contract.**—Whether a bill of sale be absolute, or only by way of security, is a question of fact, p. 404.

Cited to this effect in Cook v. Lion Fire Ins. Co., 67 Cal. 372, holding, the question having been determined, judgment will not be reversed if it appear there was evidence to sustain. See note to McNeal v. Braun, 26 Am. St. Rep. 453.

**Instructions** withdrawing from jury full consideration of evidence upon issues on which they are to pass are erroneous, p. 404.

Cited in *Jones v. Goldtree Bros. Co.*, 142 Cal. 387, holding instruction erroneous as given. Distinguished in *Renton, Holmes & Co. v. Monnier*, 77 Cal. 455, 456, holding each party is entitled to have the law given to the jury which is applicable to his theory of the case and the testimony of his witnesses.

**55 Cal. 406-407. PIERCE v. SCHADEN.**

**New Trial.**—Motion for, upon ground of insufficiency of evidence, is addressed to the discretion of the court, p. 407.

Cited to this effect in *Bronner v. Wetzlar*, 55 Cal. 420, and its decision will not be reversed unless for manifest abuse of discretion; *Savage v. Sweeney*, 63 Cal. 341; *Gerold v. Brunswick-Balke Co.*, 67 Cal. 124; *Pico v. Cohn*, 67 Cal. 280; *Mullins v. Wieland*, 68 Cal. 233; *Breckenridge v. Crock*, 68 Cal. 404; *Rolling Mill Co. v. Telegraph Hill Co.*, 79 Cal. 341; *In re Carriger*, 104 Cal. 83; *Bates v. Howard*, 105 Cal. 179; *Thompson v. Ulriksen*, 8 S. Dak. 570; all affirm the general rule.

**Negotiable Instrument.**—Notice of dishonor of promissory note may be given orally, p. 407.

Cited in *Stanley v. McElrath*, 86 Cal. 456, where it is held notice delivered at residence of indorser to person of discretion is sufficient.

**55 Cal. 408-419. SHUGGART v. LYCOMING INSURANCE COMPANY.**

**Insurance.**—Waiver of conditions in policy by local agent, when policy expressly provides he has no such power, is ineffectual, p. 414.

Distinguished in *Silverberg v. Phoenix Ins. Co.*, 67 Cal. 39, where policy contained no provision forbidding agent to modify or waive conditions. Approved in *Enos v. Sun Ins. Co.*, 67 Cal. 622. Cited in *Farnum v. Phoenix Ins. Co.*, 83 Cal. 259, 17 Am. St. Rep. 243, where it is held that the waiver by agent of conditions in regard to payment of premium may, in some cases, be binding on the company; *West Coast Lumber Co. v. State etc. Co.*, 98 Cal. 509, following *Silverberg v. Phoenix Co.*, *supra*. Approved in *Weidert v. State Ins. Co.*, 19 Oreg. 271, 20 Am. St. Rep. 814, holding, where assured has notice the powers of agent are limited, he relies on any acts in excess of such authority at his peril; *Hankins v. Rockford Ins. Co.*, 70 Wis. 6. Cited in *Kahn v. Traders' Ins. Co.*, 4 Wyo. 467; 62 Am. St. Rep. 47, said to be not clearly in point—this case goes into a careful discussion of the question of power of agent to modify conditions.

**55 Cal. 419-420. BRONNER v. WETZLAR.**

Motion for new trial on ground of insufficiency of evidence, is addressed to discretion of court, p. 420.

Cited with approval in *Savage v. Sweeney*, 63 Cal. 341, and order will not be disturbed unless abuse of discretion is shown; also, in *Gerold v.*

Brunswick & Blake Co., 67 Cal. 124; Pico v. Cohn, 67 Cal. 200; Mullins v. Wieland, 68 Cal. 233; Breckennridge v. Crock, 68 Cal. 404; In re Carriger, 104 Cal. 83; Bates v. Howard, 105 Cal. 179. Cited in Pierce v. Birkholm, 110 Cal. 672, holding further, as to effect upon judgment of order granting new trial. Approved in Wright v. Missouri Pac. Ry. Co., 20 Mo. App. 484; Rickroad v. Martin, 43 Mo. App. 603. Cited in Bedford v. Kissick, 8 S. Dak. 587, to the effect that record need not show a judgment, where appeal is from an order denying motion for new trial.

**Order Granting New Trial** has effect of vacating judgment. p. 420.

Cited in Knowles v. Thompson, 133 Cal. 247, noted under Thompson v. Smith, 28 Cal. 534.

55 Cal. 421-426. **HAYES v. CAMPBELL.** 36 Am. Rep. 43, S. C. 63 Cal. 145.

Power of factor to pledge goods of principal, p. 426.

Cited in Tevis v. Savage, 130 Cal. 416, holding corporation bound by agreement of general agent under facts stated; as authority for decision in Green v. Campbell, 55 Cal. 477. Note to Wright v. Solomon, 79 Am. Dec. 203.

55 Cal. 427-431. **BOYD v. BRINCKIN.**

Contract.—Offer to sell land on conditions set out in a circular issued and distributed, and acceptance by compliance with those conditions, constitutes a contract of sale, specific performance of which will be decreed by court of equity, p. 429.

Cited to same effect in Southern Pacific Co. v. Terry, 70 Cal. 485. Distinguished in Taylor v. C. P. R. R. Co., 67 Cal. 620, claimant purchaser not having complied with conditions of circular. Cited in Kelly v. Central Pacific Co., 74 Cal. 560, 5 Am. St. Rep. 472, but case goes off on other grounds, holding further as to when specific performance will be decreed. Cited in Crosby v. Clark, 132 Cal. 5, 7, discussing rights of such settler as against one who bought from the company under misrepresentations as to settler's abandonment; Mackenzie v. State, 32 Wash. 665, acceptance of offer to teach conveyed by re-election of teacher is established by her conference with principal during vacation concerning work for ensuing year, and resolution of board annulling her employment is breach of contract. Distinguished in Abbott v. 76 Land and Water Co., 101 Cal. 569, where claimant entered under lease containing no option as to right to purchase. Approved in Avila v. Pereira, 120 Cal. 595, an analogous case; Billings v. Sanderson, 8 Mont. 207, where the rule is approved, although on account of facts a different decision is reached. Cited in Ellsworth v. Southern Minnesota Ry. Co., 31 Minn. 552, where acts necessary to show acceptance of offer in unilateral contract is discussed.

**55 Cal. 431-442. SIGOURNEY v. ZELLERBACH.**

Same case, second appeal, 63 Cal. 636. Note on "Legal Damages cannot be awarded in action seeking equitable relief only," to Bradley v. Aldrich, 100 Am. Dec. 534.

**55 Cal. 443-453. SOWDEN v. IDAHO QUARTZ MINING COMPANY.**

Question Whether Person is an Expert is for the trial court to determine definitely, p. 450.

Approved in Aldrich v. Columbia Ry., 39 Or. 271, determining qualification of railroad contract as expert to construe contract for grading.

**Master and Servant.**—Employer assumes all risks naturally incident to, and within scope, of employment, p. 452.

Cited to same effect in Lucey v. Hannibal Oil Co., 129 Mo. 40, further, if servant during employment discovers danger, he will be presumed to have assumed risk; Berns v. Coal Co., 27 W. Va. 295, 55 Am. Rep. 307, holding further, if servant knows of defects, but has reasonable grounds to believe that the master has cured them or will do so immediately, he is not guilty of negligence in remaining in service. See note on "Duty of Master to Inform Servant of Latent Defects," to 3 McCrary, 435. Note on "Negligence of Servant in Continuing Work After Knowledge of Defects," to Buzzell v. Laconia Co., 77 Am. Dec. 224.

**55 Cal. 453-459. SACRAMENTO & PLACERVILLE RAILROAD COMPANY v. SUPERIOR COURT.**

Receiver may be appointed by Superior Court in all cases where receivers have heretofore been appointed by the usages of courts of equity, p. 456.

Approved in McLane v. P. & S. V. R. R. Co., 66 Cal. 616, where a receiver was appointed, pendente lite, in an action to enforce the specific execution of a trust mortgage; Loaiza v. Superior Court, 85 Cal. 36, 20 Am. St. Rep. 212. Cited in note to Cameron v. Groveland etc. Co., 72 Am. St. Rep. 88, on receivers. Distinguished in Michigan Trust Co. v. Lumber Co., 103 Mich. 402, holding mortgagor will not be deprived of possession of property before foreclosure, unless the right is clearly given by terms of contract.

**55 Cal. 459-462. FITZ v. BYNUM.**

**Contracts—Rescission.**—Party seeking to rescind contract on ground of misrepresentation or fraud must return or offer to return anything of value received under the contract, p. 461.

Cited with approval in Canal Co. v. Roach, 78 Cal. 554; also in Loaiza v. Superior Court, 85 Cal. 31, 20 Am. St. Rep. 208, holding further as to what constitutes a complete rescission; Brown v. Norman, 65 Miss. 376,

7 Am. St. Rep. 665, further as to when court will decree rescission, although impossible to place parties in *statu quo*.

**Stock—Market Value.**—Definition, p. 461.

Cited on this point in *Colton v. Stanford*, 82 Cal. 395; 16 Am. St. Rep. 164.

**General Citation.**—*Engeman v. Taylor*, 46 W. Va. 713.

**55 Cal. 462-463. PEOPLE v. GALLAGHER.**

**Summoning and Drawing Jurors**, p. 462.

See note to *Commonwealth v. Green*, 12 Am. St. Rep. 902.

**55 Cal. 465-468. FREEMAN v. BROWN.** See *Master v. Indiana Car etc. Co.*, 25 Ind. App. 182.

**55 Cal. 469. CREDITORS v. WELCH.**

**Change of Venue.**—Order denying motion will be sustained, when evidence as to defendant's residence is conflicting, p. 469.

Approved in *Hastings v. Keller*, 69 Cal. 607; also in *Daniels v. Church*, 96 Cal. 14.

**55 Cal. 470-472. SMITH v. SILSBY.**

**Promissory Note—Fraud—Liability of Surety.**—These subjects discussed, p. 471.

Cited in *Bedell v. Herring*, 77 Cal. 574, 11 Am. St. Rep. 309, holding fraud in procurement of note does not invalidate it as to a bona fide indorsee for value; *Jones v. Hanna*, 81 Cal. 511, to effect indorser may make any defense maker might make.

**55 Cal. 472-474. PEOPLE v. PEARSON.**

**Disbarring of Attorney.**—Unprofessional conduct that will justify, p. 473.

Cited in *In re Orton*, 54 Wis. 384, where manner of notifying attorney of charges is discussed. Cited in *In re Boone*, 83 Fed. Rep. 952, where general subject is discussed at length. Note in *In re Philbrook*, 45 Am. St. Rep. 83.

**55 Cal. 476-477. WILSON v. CREDITORS.**

**Insolvency.**—Notice to creditors to meet on a day just thirty days from date of first publication is sufficient, p. 477.

Cited with approval in *Dean v. Grimes*, 72 Cal. 445. Cited in *Hannah v. Green*, 143 Cal. 21, noted under *Misch v. Mayhew*, 51 Cal. 514.

**55 Cal. 483-485. BERRYMAN v. PERKINS.**

**Approval—Construction of Statute.**—Act of April, 1876, to provide for a supply of water for the university, et cetera, gives the governor power to approve or disapprove of the appraisal, at his discretion, p. 484.

Cited in *Cosner v. Colusa County*, 58 Cal. 278, holding, further, as to presumption of power to disapprove where approval is made necessary to validity of an act.

**Mandamus** cannot be used to control matters left to the discretion of an official, p. 484.

Cited to this effect in *Water Works v. San Francisco*, 82 Cal. 308, 16 Am. St. Rep. 126; also in *People v. Dental Examiners*, 110 Ill. 186, writ may be used to compel action, but not to control manner of action. Note to *Greenwood etc. Co. v. Routt*, 31 Am. St. Rep. 295.

**55 Cal. 485-487. SHEEHY v. HOLMES.**

**Prohibition.**—Writ of will issue to state court which denies alien defendants' application for removal of cause to United States courts, p. 487.

Disapproved in *S. P. R. R. Co. v. Superior Court*, 63 Cal. 614, holding, further, filing of petition and bond for removal does not divest state court of jurisdiction.

**55 Cal. 489-501. EARL v. SAN FRANCISCO BOARD OF EDUCATION.**

**Constitutional Provisions** are mandatory and prohibitory, unless specially declared otherwise, p. 491.

Cited in *Lewis v. Dunne*, 134 Cal. 296, construing section 24, article 4, thereof.

**Constitutional Law.**—Legislative act, local in character, is special legislation and unconstitutional, p. 491.

Cited to same effect in *Wood v. Election Commissioners*, 58 Cal. 569. Distinguished in *Ex parte Chin Yan*, 60 Cal. 81, holding the constitutional inhibition against special legislation applies to the legislature and not to municipal boards of supervisors. Distinguished in *People v. Henshaw*, 76 Cal. 446, where it is held that an act applying to certain classes of municipalities is not, necessarily, special legislation. Cited and explained in *City of Pasadena v. Stimson*, 91 Cal. 251. Approved in *Denman v. Broderick*, 111 Cal. 103.

**Special Law.**—Defined, p. 494.

Cited in *Bruch v. Colombet*, 104 Cal. 351, holding further as to arbitrary classification, and *People v. Central Pacific Co.*, 83 Cal. 404, where certain tests of special legislation are given; *San Francisco v. Broderick*, 125 Cal. 192, holding certain acts unconstitutional as being

special; State v. Pond, 93 Mo. 640, dissenting opinion of Sherwood, J. See extended note to State v. Ellet, 21 Am. St. Rep. 788.

**Amendment.**—What constitutes, within purview of section 24, Article IV of the constitution, p. 492.

Cited on this point in Hellman v. Shoulters, 114 Cal. 151.

**General Citations.**—Huntington v. City of Nevada, 75 Fed. Rep. 61.

**.55 Cal. 501-503. ECK v. HOFFMAN.**

To authorize attachment on contract not made in this state, there must be a stipulation that it is to be paid in this state, p. 503.

Cited to same effect in Tuller v. Arnold, 93 Cal. 168; Bank v. Sperry Flour Co., 141 Cal. 316, noted under Dulton v. Shelton, 3 Cal. 207; Trabant v. Rumrell, 14 Oreg. 19, subsequent promise to pay would not change rule where suit is on original contract.

**.55 Cal. 504-505. WREDEN v. SUPERIOR COURT.**

**Prohibition.**—Writ will issue only when inferior tribunal is proceeding without jurisdiction, p. 505.

Approved in Powelson v. Lockwood, 82 Cal. 615, holding writ is not allowable to prevent justice's court from trying a cause without a jury; also, in Woodward v. Superior Court, 95 Cal. 276. Modified in Havemeyer v. Superior Court, 84 Cal. 398, 18 Am. St. Rep. 239, where appeal did not afford an adequate remedy.

**.55 Cal. 505-507. JONES v. CHALFANT.**

**Offset of Judgment** disallowed under facts stated, p. 506.

Cited in Haskins v. Jordan, 123 Cal. 160, noted under Porter v. Liscom, 22 Cal. 430.

**.55 Cal. 508-515. McLERAN v. McNAMARA.**

**Stipulation.**—Relief may be granted from judgment obtained in violation of stipulation, p. 513.

Cited in Holter L. Co. v. F. F. Ins. Co., 18 Mont. 286, holding further, as to dismissal of action affecting rights of parties. Note to Payton v. McQuown, 53 Am. St. Rep. 451; Little Rock Ry. Co. v. Wells, 54 Am. St. Rep. 239.

**Errors in Record**, p. 508.

Cited in Sheldon v. Gunn, 57 Cal. 40, as to power of court to correct.

**Where It is Necessary to Enter Formal Judgment** of dismissal when stipulation for dismissal was made, it will be considered as done, p. 512.

Approved in Boyd v. Steele, 6 Idaho, 630, 631 633, neglect or refusal

of clerk to enter formal judgment of dismissal will not defeat dismissal.

**Attorney.**—Power to dismiss action is implied from general authority, p. 515.

Cited to this effect in *In re Will of Heath*, 83 Ia. 219 where attorney, without special consent of client, withdrew motion for new trial. See note to *Clark v. Randall*, 76 Am. Dec. 258.

**General Citation.**—*Thomas v. Jones*, 98 Va. 329.

#### 55 Cal. 516. **BROCK v. MARTINOVICH.**

**Fictitious Names.**—Amendment of complaint by insertion of true names does not entitle defendant to service of copy of amended complaint and extended time in which to answer, p. 516.

Cited with approval in *Harney v. Corcoran*, 60 Cal. 317, where complaint was amended by dismissing action as to certain defendants; *McDonald v. Swett*, 76 Cal. 259; *Ligare v. California S. R. R. Co.*, 76 Cal. 612; *Kittle v. Bellegarde*, 86 Cal. 563, where, on death of plaintiff his executor was substituted; *Curtis v. Bunnell etc. Co.*, 6 Idaho, 305, amendment to complaint in foreclosure that acknowledgement of mortgage by married woman was legally made, but that certificate by inadvertence fails to show separate examination, is immaterial and need not be served on defendant.

#### 55 Cal. 525-530. **HASSEY v. WILKE.**

**Notice.**—Registration of a conveyance operates as constructive notice to all subsequent purchasers of any estate in same property, p. 528.

Cited with approval in *Frink v. Roe*, 70 Cal. 313, where agent acted in excess of authority and such want of authority was patent upon face of record. See note to *Ramsdell v. Fuller*, 87 Am. Dec. 107; also, to *Shaw v. Hill*, 96 Am. Dec. 423.

**Conveyance.**—The word as used in codes includes mortgages, p. 528.

Cited to same effect in *In re McConnell*, 74 Cal. 218; also, in *Tolman v. Smith*, 74 Cal. 349; *Merrill v. Luce*, 6 S. Dak. 360; 55 Am. St. Rep. 848.

Wife, in mortgaging her separate property to secure payment of husband's debt, becomes, as between herself and husband, a surety only, p. 528.

Cited to same effect in *Bull v. Coe*, 77 Cal. 62, 11 Am. St. Rep. 240. Cited in *London Bank v. Smith*, 101 Cal. 420, where surety is defined; *Denny v. Seeley*, 34 Or. 366, noted under *Spear v. Ward*, 20 Cal. 659.

#### 55 Cal. 531-543. **ELDRIDGE v. WRIGHT.**

**Redemption.**—Redemptioner having lien upon undivided interest can

only redeem by paying the whole purchase money and redeeming the whole land, p. 534.

Cited in *Southern Cal. L. Co. v. McDowell*, 105 Cal. 101, further, as to power of defendant to redeem when he owned only a portion of premises sold, which portion had been previously conveyed. Note to *Bagley v. Ward*, 99 Am. Dec. 271; *Horn v. Indianapolis Bank*, 21 Am. St. Rep. 248.

If judgment debtor redeems, the effect of sale is terminated, p. 535.

Cited in *Settemire v. Newsome*, 10 Oreg. 447, further, as to lands sold for less than judgment debt and redeemed by grantee of judgment debtor. Notes on general subject to *Frink v. Murphy*, 81 Am. Dec. 151; *Whitney v. Higgins*, 70 Am. Dec. 754; *Flanders v. Aumack*, 67 Am. St. Rep. 515.

#### 55 Cal. 544-550. DOWNING v. GRAVES.

**Findings** are sufficient when ultimate facts are deducible, p. 547.

Cited to same effect in *Murphy v. Bennett*, 68 Cal. 530. Cited in *Perry v. Quackenbush*, 105 Cal. 306, holding further findings as to probative facts will not, generally, affect findings of ultimate facts.

#### 55 Cal. 550-553. EX PARTE WESTERFIELD. 36 Am. Rep. 47.

**Sunday Laws.**—An act forbidding certain classes to engage in labor on Sunday is special legislation and void, p. 551.

Distinguished in *Ex parte Koser*, 60 Cal. 191, where it is held that the legislature has power to determine what acts are mala in se and punishable criminally. Cited in *Johnson v. Goodyear etc. Co.*, 127 Cal. 16, 78 Am. St. Rep. 28, ruling similarly as to act concerning liens of laborers of corporations doing business in this state (Stats. 1897, p. 231); *People v. Central Pacific R. R. Co.*, 83 Cal. 410, to effect that it is exception to general rule. Approved in *Ex parte Jentzsch*, 112 Cal. 475; *State v. Goodwill*, 33 W. Va. 183, 25 Am. St. Rep. 867, further, as to acts restricting privileges of certain classes of citizens, and not of others. Note to *Eden v. People*, 52 Am. St. Rep. 373.

**General Law**, defined, p. 552.

Approved in *Dougherty v. Austin*, 94 Cal. 621; also in dissenting opinion of McCabe, J., to *Henderson v. State*, 137 Ind. 574, where the question as to what is special and what general law is carefully considered.

**Special Legislation**, p. 550.

Cited on general subject in *Oil Co. v. Matheson*, 48 La. 1324.

Constitutionality of act may be inquired into on habeas corpus proceedings.

Note to *Ex parte Rosenblatt*, 3 Am. St. Rep. 903.

**.55 Cal. 555-563. HARPENDING v. MEYER.**

**Conversion.**—Where possession is obtained from one having no right to transfer it, right of action accrues against transferee as soon as he acquires possession, p. 559.

Cited to same effect in *Yore v. Murphy*, 18 Mont. 346, and Statute of Limitations begins to run when right of action accrues; *Velsian v. Lewis*, 15 Oreg. 546, 3 Am. St. Rep. 191, and demand of possession is unnecessary; *Willard v. Monarch etc. Co.*, 10 N. Dak. 406, holding demand unnecessary under facts stated; *Kinkead v. Holmes etc. Co.*, 24 Wash. 220, holding action barred by limitation. See notes to *Stanley v. Gaylord*, 48 Am. Dec. 652; *Bailey v. Colby*, 66 Am. Dec. 758; *Sargent v. Sturm*, 83 Am. Dec. 122; *Bolling v. Kirby*, 24 Am. St. Rep. 798; *Carpenter v. Innes*, 25 Am. St. Rep. 258.

**Statute of Limitations** begins to run when cause of action arises, p. 561.

Cited to same effect in *Wood v. Curry*, 57 Cal. 210.

**.55 Cal. 564-567. HOAG v. HOWARD.**

**Construction of Statute.**—A word repeatedly used in a statute will bear the same meaning throughout, unless it is apparent another meaning is intended, p. 566.

Cited to same effect in *Miller v. Dunn*, 72 Cal. 466; 1 Am. St. Rep. 70. Definition of "instrument," as used in codes, p. 566.

Cited in *Foorman v. Wallace*, 75 Cal. 555; also, in *Warnock v. Harlow*, 96 Cal. 307, 31 Am. St. Rep. 214, holding further, a notice of lis pendens is not an instrument; *Todd v. Board*, 122 Cal. 107, holding resolution of board not a "written instrument"; *S. P. Co. v. Prosser*, 122 Cal. 420, holding a letter not an "instrument in writing" within sections 1001, 1002, Civil Code; *Colton L. & W. Co. v. Swartz*, 99 Cal. 285, holding a "map" not an instrument, which effects title of real property within meaning of recording act; *Baker v. Bartlett*, 18 Mont. 451; 56 Am. St. Rep. 598.

**Attachment.**—Unrecorded is effective as against a subsequent attachment of property of grantor, p. 565.

Cited to same effect in *Morrow v. Graves*, 77 Cal. 219; *Ward v. Waterman*, 85 Cal. 507.

**.55 Cal. 567-569. WINANS v. CHENEY.**

**Deeds—Description.**—Call for metes and bounds generally prevails over call for area, p. 569.

Cited in *Moran v. Lezotte*, 54 Mich. 90, holding quantity, in description, may control, when circumstances show it is least likely to be wrong; *Hoffman v. City of Port Huron*, 102 Mich. 435, further, as to when area becomes a material consideration.

55 Cal. 570-574. **BLAND v. SOUTHERN PACIFIC COMPANY.** 36 Am. Rep. 50.

**Railroad.**—Passenger cannot be ejected from car for failure to pay fare without first returning money paid, p. 573.

Cited in same case on second appeal, 65 Cal. 627. Distinguished as to facts in Wright v. California Cent. Ry. Co., 78 Cal. 365. Approved in Railroad Co. v. Orndorff, 55 Ohio St. 595, where party with child was ejected without returning ticket; Braun v. Railway Co., 79 Minn. 411, 79 Am. St. Rep. 501, and Railroad Co. v. Orndorff, 55 Ohio St. 595, 60 Am. St. Rep. 719, and note, where party and child were ejected without returning ticket. Distinguished in Elliott v. Southern Pacific Co., 145 Cal. 453 (approved in dissenting opinion, p. 454) holding where holder of limited return ticket did not use it within time limit and where conductor improperly retained it after it became void, passenger could not remain on train without presenting valid ticket.

Right of conductor to eject passengers for refusing to pay fare, p. 573.

Cited in note on discriminating between fare paid at ticket office and fare paid on train to Commonwealth v. Power, 41 Am. Dec. 483, 484; also, to Poole v. Northern Pacific Co., 8 Am. St. Rep. 293; Toledo Ry. Co. v. Wright, 34 Am. Rep. 285; Root v. Long Island Ry. Co., 11 Am. St. Rep. 650; Wardwell v. Chicago Ry. Co., 24 Am. St. Rep. 249.

#### 55 Cal. 574-588. **ESTATE OF CROSBY.**

**Estates of Deceased Persons.**—Proceeding for sale of real estate is a special proceeding of civil nature, p. 588.

Cited to this effect in Estate of Montgomery, 60 Cal. 648.

**Same.**—Where heirs contest the allowance of claims against the estate, the burden of proof is thrown on them, p. 579.

Cited with approval in Estate of Swain, 67 Cal. 642. See note on "Power of Heirs to Dispute Validity of Allowed Claim" to Beckett v. Selover, 68 Am. Dec. 257.

**Same—Statute of Limitations.**—Application of statute to probate proceedings discussed, p. 584.

Cited in Scherer v. Ingerman, 110 Ind. 433, where statute is held applicable.

Courts of probate may refuse an order for sale of real estate where the delay in making application amounts to laches, p. 586.

Cited to same effect in Wingerter v. Wingerter, 71 Cal. 111, where there was a delay of thirteen years which was held to be laches; In re Arguello, 85 Cal. 154, holding further, the power is discretionary; Cole v. Lafontaine, 84 Ind. 451, as to right of heirs to plead statute of limitations to claim of creditor; Gunby v. Brown, 86 Mo. 258, 259. See extended note to Killough v. Hinton, 26 Am. St. Rep. 22-29. Distinguished Notes Cal. Rep.—177.

in *Estate of Freud*, 131 Cal. 673, as to sale to pay expenses of administration.

**Findinga.**—Whenever issues of fact are tried by probate court, findings of fact are proper, p. 576.

Cited in *In re Arguello*, 85 Cal. 153, *quaere*, whether findings upon probate order of sale are necessary; *In re Heldt*, 98 Cal. 555.

#### 55 Cal. 588-593. PEOPLE v. FERRIS.

**Drunkenness as Justification.**—Drunkenness is no excuse for crime, but evidence of may be admitted for purpose of determining degree of crime, p. 592.

Cited with approval in *People v. Jones*, 63 Cal. 169; also, in *People v. Franklin*, 70 Cal. 643; *People v. Vincent*, 95 Cal. 428, and such evidence should be received with great caution; *Goodwin v. State*, 96 Ind. 556; *People v. Fellows*, 122 Cal. 239, and *People v. Methewer*, 132 Cal. 332, noted under *People v. Lewis*, 36 Cal. 533; *People v. Hill*, 123 Cal. 49, noted under *People v. Balencia*, 21 Cal. 544. Note on general subject to *Flanigan v. People*, 40 Am. Rep. 566.

**Insanity as Excuse for Crime.**—Burden of proving rests on defendant, p. 591.

Approved in *People v. Messersmith*, 61 Cal. 248, and further, as to evidence necessary to establish. See notes on subject to *State v. De Rance*, 44 Am. Rep. 436; *People v. Garbutt*, 97 Am. Dec. 176.

#### 55 Cal. 593-599. JAMISON v. SAN JOSE & SANTA CLARA RAIL-ROAD COMPANY.

Common Carrier of passengers must use utmost care and diligence in providing and operating conveyances, p. 598.

Cited to same effect in *Treadwell v. Whittier*, 80 Cal. 592; 13 Am. St. Rep. 190; *Franklin v. Motor Road*, 85 Cal. 70, "carriers owe more than ordinary duty to their passengers"; *Peniston v. C. St. L. & N. R. R. Co.*, 34 La. 780, 44 Am. Rep. 447, holding further, same rule applies to all appurtenances. See note on "Degree of Care Demanded of Carriers of Passengers," to *Ingalia v. Bills*, 43 Am. Dec. 355. Note to *McElroy v. Nasua Ry. Co.*, 50 Am. Dec. 795; *Hegeman v. Western R. R. Co.*, 64 Am. Dec. 524.

Negligence generally a question of fact, p. 597.

Cited to same effect in *Franklin v. Motor Road Co.*, 85 Cal. 70; also, in *Wall v. Helena Street Ry. Co.*, 12 Mont. 50. Cited in *Louisville & Nash. R. R. Co. v. Ritter*, 85 Ky. 372, further as to burden of showing. Approved *Omaha Street Ry. Co. v. Craig*, 39 Neb. 615; *Bowers v. U. P. R. R. Co.*, 4 Utah. 224, holding, it is duty of court to leave question to jury, unless it is clear of all doubt; *Grand Trunk Ry. Co. v. Ives*, 144 U. S. 417; *Northern Pacific Co. v. Charless*, 51 Fed. Rep. 576. Note on

"Contributory Negligence of Passengers," to *Ingalls v. Bills*, 43 Am. Dec. 384. Note to *Richardson v. Kies*, 91 Am. Dec. 685.

**55 Cal. 604-606. LEWIS v. CLERK OF SANTA CLARA COUNTY.**

**Insolvency.**—The existence of United States bankruptcy act merely postponed operation of state act, p. 605.

Cited to same effect in *Seattle C. & T. Co. v. Thomas*, 57 Cal. 200, further, enactment of state law during existence of United States law is not unconstitutional; *Smith v. His Creditors*, 59 Cal. 268. See note to *Morton v. Cook*, 23 Am. Dec. 357.

**55 Cal. 606-607. GOLDEN GATE PACKING COMPANY v. FARMERS' UNION.**

**Agency—Grant of.**—Exclusive agency does not prevent owner from selling his own property, p. 607.

Cited with approval in *Dole v. Sherwood*, 41 Minn. 537; 16 Am. St. Rep. 732.

**55 Cal. 611. McGREW v. MAYOR OF SAN JOSE.**

**Constitutional Law.**—Justices of Peace are judicial officers within meaning of constitution, p. 611.

Cited to same effect in *People v. Ransom*, 58 Cal. 560, and must be elected at general election; *Ex parte Henshaw*, 73 Cal. 507.

**55 Cal. 612-627. PEOPLE v. HOGE.**

**Constitutional Law.**—Section 8, article XI, of the California Constitution, relating to city charters, is self-acting, p. 618.

Cited to same effect in *People v. Hecht*, 105 Cal. 629; 45 Am. St. Rep. 102; also, *People v. Davie*, 114 Cal. 364. Cited in *Willis v. Mabon*, 48 Minn. 150, 31 Am. St. Rep. 629, as an instance of affirmative self-executing provision in a constitution, followed in *Russell v. Ayer*, 120 N. C. 196, dissenting opinion of Clark, J. Cited in *In re Cloherty*, 2 Wash. 143, further as to right of cities to create municipal courts; *Anderson v. Whatcom County*, 15 Wash. 53, where certain constitutional provisions were declared self-executing; *Illinois Central Ry. Co. v. Ihlenberg*, 75 Fed. Rep. 879, as to when provisions are self-executing. Note, *Cook County v. School*, 8 Am. St. Rep. 416.

City of San Francisco is a city within meaning of section 8, article XI, of the California constitution, p. 618.

Cited to this effect in *Kahn v. Sutro*, 114 Cal. 322. Cited in *Morgan v. Menzies*, 60 Cal. 347, as authority for holding the city and county of San Francisco a city within meaning of section 1058 of the Code of Civil Procedure; *Ex parte Braum*, 141 Cal. 209, discussing power of cities as to municipal affairs.

**General Citations.**—Cited in Holmes & Bull Furniture Co. v. Hedges, 13 Wash. 701, 703, on subject of self-executing provisions in constitutions; also, on same point, in dissenting opinion of Hoyt, C. J., in Fawcett v. Superior Court, 14 Wash. 617.

**55 Cal. 627-632. HINKLE v. SAN FRANCISCO & NORTH PACIFIC RAILROAD COMPANY.**

**Impeachment of Witness** cannot be accomplished by evidence of particular wrongful acts, p. 632.

Cited to this effect in Sharon v. Sharon, 79 Cal. 673; also, in Evans v. De Lay, 81 Cal. 105; Estate of James, 124 Cal. 657, holding evidence improperly admitted.

Order granting new trial on grounds of errors in law, will be reviewed as presenting questions of law only, p. 629.

Cited to this effect in Aultman & Taylor Co. v. Gunderson, 6 S. Dak. 232; 55 Am. St. Rep. 841; State v. Schepel, 23 Mont. 529, distinguishing between such motion and one based on insufficiency of evidence.

**55 Cal. 633-641. ALTSCHUL v. POLACK.**

**Statute of Limitations** does not begin to run against an action to establish a resulting trust in lands until the cestui que trust in possession has been ousted, p. 641.

Cited to same effect in Snider v. Johnson, 25 Oreg. 331; also, in Fawcett v. Fawcett, 85 Wis. 338, 39 Am. St. Rep. 847, "no matter what the nature of the trust may be"; Lakin v. Sierra Buttes Gold Mining Co., 11 Sawy. 246, 25 Fed. Rep. 347.

**Judgment.**—When against tenant may bind landlord, p. 633.

Note to Oetgen v. Ross, 95 Am. Dec. 473.

**55 Cal. 642-651. BOARD OF EDUCATION v. KEENAN.**

**Evidence.**—Objection to a mass of evidence as a whole cannot be sustained where part of evidence is admissible, p. 645.

Cited to same effect in Shatto v. Crocker, 87 Cal. 631; also, in Harris v. Zanone, 93 Cal. 71, holding objection must point out what portions are irrelevant. Followed in Board of Education v. Martin, 57 Cal. 139.

**Res Gestae** are Those Circumstances which are the undesigned incidents of a particular litigated act, which are admissible when illustrative of such act, p. 649.

Approved in Coffin v. Bradbury, 3 Idaho, 787, determining whether telephonic message as to responsibility of purchaser of goods was res gestae, when sent two hours after order given.

**55 Cal. 651-652. SCHMITT v. DUNN.**

Board of Election Commissioners has power to appoint clerks mentioned in section 29 of the act of March 18, 1878, p. 652.

Cited to same effect in Falk v. Reis, 88 Cal. 515.

Same.—Has power to fix number of clerical assistants to be employed by registrar, but power of selecting and employing is vested in registrar, p. 652.

Approved in Falk v. Reis, 88 Cal. 517.



## **VOLUME LVI,**

**By C. H. SQUIRE.**

**Revised to include citations to Volume 147, by CHARLES L. THOMPSON.**

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### **56 Cal. 1-4. LEONARD v. JANUARY.**

**Constitutional Law.**—County Government Act of 1880, unconstitutional, p. 4.

Cited to same effect in Barton v. Kalloch, 56 Cal. 104; also, in Meyers v. Alameda County, 60 Cal. 288; Treadwell v. Yolo County, 62 Cal. 574. Cited in Hearn v. Louttit, 42 Or. 576, Laws of 1893, page 134, amending codes, section 711, is void, as title does not express subject matter; Harland v. Territory of Washington 3 Wash. Ter. 149, to the effect that the designation of an act in its title, as an act to amend a specified section of the code, is insufficient. Cited in Marston v. Humes, 3 Wash. 282, as being “too unsatisfactory to be cited for any point.”

### **56 Cal. 4-7. PEOPLE v. JENKINS.**

**Amendment of Verdict.**—Court can, at any time while the jury is before it, and under its control, see that the verdict is amended as may be required, p. 7.

Distinguished in People v. Lee Yune Chong, 94 Cal. 385, holding that the court cannot recall the jury after discharge to correct or amend the verdict. Approved in People v. Bidleman, 104 Cal. 615; State v. Novak, 109 Iowa, 740.

### **56 Cal. 8-10. SAN JOSE v. FREYSCHLAG.**

**Dedication of property for street renders condemnation proceedings therefor improper,** p. 9.

Cited in City v. Pomeroy, 124 Cal. 612, noted under Sacramento etc. Co. v. Moffatt, 7 Cal. 577.

### **56 Cal. 10-11. BARRY v. BARRY.**

**Appeal from final judgment in partition does not authorize review of interlocutory decree,** p. 10.

Cited in Quirk v. Rooney, 130 Cal. 509, as to similar decree; Deyoe v.

Superior Court, 140 Cal. 486, noted under *McCourtney v. Fortune*, 42 Cal. 387.

**56 Cal. 11-15. FARMER v. UKIAH WATER COMPANY.**

**Appurtenance.**—An artificial water course, through which water passes to land where it is used for domestic and irrigation purposes, is appurtenant to such land, and passes by conveyance of the land, p. 14.

Cited to same effect in *Standart v. Round Valley Water Co.*, 77 Cal. 401, 402; also in *Coonradt v. Hill*, 79 Cal. 590, holding further that it need not be set out as a separate item in owner's return to the assessor; *McShane v. Carter*, 80 Cal. 315; also in *Ely v. Ferguson*, 91 Cal. 190; *Crooker v. Benton*, 93 Cal. 370; *Clyne v. Benecia Water Co.*, 100 Cal. 314; *Dixon v. Schermeier*, 110 Cal. 585; *Eshelman v. Snyder*, 82 Ind. 502, holding an artificial channel which conducts water to a mill (under the facts in the case), is appurtenant to the mill. Cited in *Lumber Company v. Water Company*, 48 Kan. 184, 30 Am. St. Rep. 303, where it is held that electric light poles and wires are appurtenant to the premises of the company where the electricity is generated. Approved, in *Frank v. Hicks*, 4 Wyo. 530; *Wilson v. Higbee*, 62 Fed. Rep. 726, holding that a reservation in a deed relating to appurtenances must be construed strictly; *Scheel v. Alhambra Co.*, 79 Fed. Rep. 825, holding grant of an easement implies license to make it fruitful; note to *Baker v. Bessey*, 40 Am. Rep. 384.

**General Citations.**—*Mulrooney v. O'Bear*, 80 Mo. App. 475; *North Powder Milling Co. v. Coughanour*, 34 Or. 18.

**56 Cal. 15-26. KNIGHT v. ROCHE.**

**Decision against Law.**—In the absence of finding on all the material issues in a cause, the decision is against law, p. 18.

Cited to same effect in *Cummings v. Conlan*, 66 Cal. 414; also in *Spots v. Hanley*, 85 Cal. 168; *Langan v. Langan*, 89 Cal. 195, holding that a decision is against law when the findings are contradictory on a material issue; *Senior v. Anderson*, 138 Cal. 722, reversing judgment for such insufficiency; *Swift v. Occidental etc. Co.*, 141 Cal. 167, discussing divisions of "decisions against law"; but see *Kaiser v. Dalto*, 140 Cal. 169, here decision in main case is followed expressly under rule of stare decisis; *Nuttall v. Lovejoy*, 90 Cal. 168; *Brison v. Brison*, 90 Cal. 328, holding in such a case there has been a mistrial; *Adams v. Helbing*, 107 Cal. 301; *Haight v. Tyron*, 112 Cal. 6.

**New Trial.**—Definition of, p. 17.

Cited in *People v. George*, 2 Idaho, 850.

**Findings.**—Defective findings must be excepted to, p. 17.

Cited in note to *Jenkins v. Frink*, 89 Am. Dec. 140.

**56 Cal. 26-36. GOODALE v. DISTRICT COURT.**

**Receiver.**—It is competent for a court of equity, in same cases, to appoint a receiver in partition suits, p. 32.

Cited to same effect in Woodward v. Superior Court, 95 Cal. 276; approved in dissenting opinion of Beatty, C. J., same case, p. 278.

**Partition—Equity.**—No such thing as a suit in equity for partition distinct from proceeding provided for in the act, dissenting opinion of Sharpstein, J., p. 35.

Cited in note to Gates v. Salmon, 95 Am. Dec. 152.

**Certiorari.**—Whether power of the court has been properly exercised cannot be determined upon certiorari, p. 33.

Cited as authority in Shimmins v. District Court, 57 Cal. 148.

**56 Cal. 36-43. PEOPLE v. CROWLEY.**

**Murder.**—Degree determined by the presence or absence of deliberation and malice, p. 43.

Approved in dissenting opinion of Thornton, J., in People v. Kernaghan, 72 Cal. 620, holding that whether the killing was voluntary or involuntary is not the question. Approved, as stating the common-law rule, in Spearman v. State, 23 Tex. App. 228, but not applicable under Texas statute.

**Appeal—Review.**—If the ruling of the trial court is well taken on any ground it will be affirmed by the appellate court, p. 39.

Approved in Wakeham v. Barker, 82 Cal. 50; also in Davey v. Southern Pacific Company, 116 Cal. 330, holding, "it is judicial action, and not judicial reasoning, which is the subject of review."

**Indictment.—Indorsement of witness' name by wrong initial is not reversible error when defendant not misled thereby, p. 39.**

Cited in People v. Quinn, 127 Cal. 543, ruling similarly as to omission of initials, and People v. Breen, 130 Cal. 76, as to use of "Mrs. E." X instead of "Mrs. Susie" X.

**Jury.—Summoning and Drawing, p. 37.**

Cited in note to Commonwealth v. Green, 12 Am. St. Rep. 902.

**56 Cal. 43-51. PFISTER v. WADE.**

**Interpleader allowed when same thing, debt, or duty, is claimed by several, without independent liability of plaintiff to either, or personal interest, p. 46.**

Cited as authority for decision in Pfister v. Wade, 59 Cal. 274; also cited in Bliss v. Superior Court, 62 Cal. 543; Pfister v. Wade, 69 Cal. 136; McCauley v. Sears, 3 Idaho, 681, 682, where two suitors are seek-

ing to recover from a general debtor, the one upon express contract and the other upon contract, there can be no substitution of defendants; note on "Interpleader in Equity," Shaw v. Coster, 35 Am. Dec. 697, 699, 702, 707.

**General Citation.**—Goodrich v. Williamson, 10 Okla. 607.

**56 Cal. 55-61. CHURCHILL v. ANDERSON.**

Patent not void upon its face is conclusive, and not subject to collateral attack by one claiming no higher title, p. 60.

Approved in Montgomery v. Donnelly, 57 Cal. 69. Distinguished in McFaul v. Pfankuch, 98 Cal. 404.

**Same.**—Decision of land officers is conclusive as to all facts upon which validity or authority to issue patent depends, as against collateral attack of persons not claiming by title paramount, p. 61.

Approved in dissenting opinion of Ross, J., in McLaughlin v. Heid, 63 Cal. 216; the opinion of the majority in this case appears to deny the rule; also approved in Galvin v. Palmer, 113 Cal. 53, holding that a deed from a city is *prima facie* evidence that the officers performed their duty in issuing it.

**State Lands.**—The right to purchase is a personal privilege, which cannot be transferred by direct assignment or otherwise, p. 57.

Approved in McGregor v. Donelly, 67 Cal. 150, holding an agreement to acquire swamp lands from the state, for the use and benefit of a person other than the applicant, is void.

**56 Cal. 61-65. McKIERNAN v. LENZEN.**

**Corporations—Agency.**—Managing agent may do in transaction of ordinary business all that corporation may do, p. 63.

Cited to same effect in Seeley v. S. J. I. M. & L. Co., 59 Cal. 24. Distinguished in Bank of Healdsburg v. Bailhache, 65 Cal. 331, holding manager cannot bind the corporation by transactions falling outside the general scope of his authority. Approved in Jennings v. Bank of California, 79 Cal. 328; S. C. 12 Am. St. Rep. 149, holding "the officers who transact the ordinary business of a corporation are presumed to have authority to do all acts which are usual and incidental thereto"; Greig v. Riordan, 99 Cal. 322; Bates v. Coronado Beach Company, 109 Cal. 162, where president was acting manager; R. E. Lee S. M. Co. v. O. & G. S. & R. Co., 16 Colo. 127, as regards the power of a mining superintendent and manager to bind the corporation by contract for sale of ores; Rigby v. Lowe, 125 Cal. 615, but denying the right of local agent of foreign corporations to assign check for collection; Wells etc. Co. v. Enright, 127 Cal. 672, sustaining agreement not to plead statute of limitations, signed by president and general manager of bank; Mc-

**Cormick v. Stockton etc. Co.**, 130 Cal. 104, sustaining corporate note signed by president; **Hyde v. Larkin**, 35 Mo. App. 371, facts similar, approving generally, but on the main proposition disapproving; **Bank v. Shoemaker**, 68 Mo. App. 596, but not in point since the act of the agent was ratified by entire body of stockholders; **Sacalaris v. Eureka Ry. Co.**, 18 Nev. 165; **S. C. 51 Am. Rep. 741**; **Cox v. Robinson**, 82 Fed. Rep. 286, as to when directors cannot invoke a by-law to show agent had no authority.

A corporation may enter into any contract essential for its purposes, and for the transaction of its ordinary affairs, p. 63.

Cited to same effect in **Getty v. Milling Company**, 40 Kan. 284, holding further as to contracts not essential to the purposes of the corporation.

**56 Cal. 65-69. TURPEN v. BOOTH. S. C. 38 Am. Rep. 48.**

**Civil Liability of Officers.—Grand Juror** is not responsible in a civil suit for his action on the grand jury, p. 67.

Cited with approval in **Pickett v. Wallace**, 57 Cal. 557, where it is stated that "judges of courts of record are not liable to civil actions for their judicial acts, even when the acts are in excess of their jurisdiction"; **Going v. Dinwiddie**, 86 Cal. 837. See note on "officers who exercise discretionary powers," to **Robinson v. Chamberlain**, 90 Am. Dec. 727; also note to **Commonwealth v. Green**, 12 Am. St. Rep. 919. Cited in **Bailey v. Barkey**, 81 Fed. Rep. 742, holding, further, that an assessor is liable for an excessive assessment made maliciously or corruptly.

**56 Cal. 73-77. LANGFORD v. POPPE.**

**Adverse Possession** of real property for the period required by the statutes of limitations gives absolute title, p. 75.

Cited to same effect in **Sharp v. Blankenship**, 69 Cal. 289, hence legislature cannot divest; also in **Johnson v. Brown**, 63 Cal. 393, and provision of code requiring payment of taxes as an element of adverse possession has no application where statute has run prior to the adoption of that provision; **Woodward v. Faris**, 109 Cal. 18. Note "what entry by owner will terminate adverse possession," **Peabody v. Hewett**, 83 Am. Dec. 500. Note to **Arrington v. Liscom**, 94 Am. Dec. 742; **Cannon v. Stockman**, 95 Am. Dec. 209.

An unsuccessful suit, leading to no change of possession, does not stop the running of the statute, p. 76.

Cited to same effect in **Barrell v. Title Guarantee Co.**, 27 Oreg. 89; **Montecito Valley Co. v. Santa Barbara**, 144 Cal. 593, holding adverse possession established; **Barrett v. Stradl**, 73 Wis. 399, **S. C. 9 Am. St. Rep. 803**, mere notice of claim of title superior to that held by one in possession does not interrupt adverse possession.

Actual adverse possession of a part of a tract gives constructive possession of the balance, p. 77.

Cited to same effect in Kendrick v. Latham, 25 Fla. 837, but intimates there might be some question in case of a large tract.

**56 Cal. 77-83. PEOPLE v. NELSON.**

**Criminal Law—Instructions.**—If the charge harmonizes as a whole and fairly presents the law bearing on the issues tried, the judgment will not be reversed, p. 81.

Cited to same effect in People v. Clark, 84 Cal. 583; also in People v. Bernard, 2 Idaho, 180.

**Same—Ownership of Stolen Property.**—The possession of the prosecuting witness is *prima facie* proof of his ownership, p. 82.

Approved in People v. Davis, 97 Cal. 195; also in People v. Tomlinson, 102 Cal. 24; also in People v. Oldham, 111 Cal. 652; note to State v. McCune, 70 Am. Dec. 181.

**New Trial.**—Technical error at trial, which did not prejudice complainant, will not warrant a new trial, p. 82.

Cited to same effect in People v. Clark, 106 Cal. 40.

**Criminal Law—Robbery.**—Indictment for robbery must aver every fact necessary to constitute larceny, p. 80.

Cited to same effect in State v. Legermond, 40 Kan. 111; S. C. 10 Am. St. Rep. 173. Note on "What Constitutes Robbery," to State v. McCune, 70 Am. Dec. 178, 191.

**General Citation.**—State v. Bartmess, 33 Or. 126.

**56 Cal. 83-84. MCCONKY v. SUPERIOR COURT.**

Clerical and typographical errors will be corrected by the court when error is apparent from the context of the statute, p. 84.

Cited to same effect in Gould v. Mise, 18 Nev. 263.

**Appeal—Undertaking—Query.**—Whether an appeal from justice's court undertaking may be filed in the superior court, p. 84.

Cited in Gray v. Amador County, 61 Cal. 337, holding the superior court may permit appellant to file undertaking in lieu of the undertaking insufficient in form. Distinguished in Laws v. Trout, 147 Cal. 174, appeal from justice's court to superior court is perfected by deposit with justice of money in lieu of undertaking under Civil Code of Procedure, § 926.

**56 Cal. 85-88. MARCH v. McKOY.**

**Fixtures.**—Personal property does not become real by mere affixing to realty, p. 87.

Cited to this effect in *Hendy v. Dinkerhoff*, 57 Cal. 7; S. C. 40 Am. Rep. 110.

**56 Cal. 89-94. MOORE v. MOORE.** S. C. 81 Cal. 195.

**Fraud—Conveyance.**—Where there is a great mental weakness, and the consideration given is grossly inadequate, a court of equity will, on reasonable application, set the conveyance aside, p. 94.

Cited to same effect in *Richards v. Donner*, 72 Cal. 210; *Ikerd v. Beavers*, 106 Ind. 490, holding that from lack of consideration, old age, sickness and mental depression of defendant, an inference of undue influence arises, which it is incumbent on plaintiff to repel. Distinguished in *Holmes v. Hill*, 22 Neb. 435. Note to Richmond's Appeal, 21 Am. St. Rep. 104; *Hess's Will*, 31 Am. St. Rep. 684.

In actions for relief on ground of fraud or mistake, the statute does not begin to run until the discovery of the fraud or mistake, p. 90.

Cited in *Goodnow v. Parker*, 112 Cal. 446, where the code sections are construed further; *Morgan v. Morgan*, 10 Wash. 107, holding further as to general subject; *Duff v. Duff*, 71 Cal. 529. Approved in *Larsen v. Utah Loan etc. Co.*, 23 Utah, 458, applying rule in action to recover amount of special deposit fraudulently loaned by bank without security.

**56 Cal. 95-114. BARTON v. KALLOCH.**

**Constitutional Law.**—The constitution of 1879 does not determine the time for holding municipal elections, p. 106.

Approved in *People v. Harvey*, 58 Cal. 338; *People v. Ransom*, 58 Cal. 561. Cited in dissenting opinion of Myrick, J., *Wood v. Election Com.*, 58 Cal. 571, in which he reaffirms the views expressed by him in dissenting opinion in *Barton v. Kalloch*, i. e. the constitution does determine the time for election of all officers, state, county, township, and municipal. Cited in opinion of Myrick, J., *Staude v. Election Com.*, 61 Cal. 323, reaffirming views expressed above.

**Same.**—The provisions of section 10, article XXII. of the constitution, do not apply to municipal or county officers, p. 103.

Cited to same effect in *People v. Henry*, 62 Cal. 557.

**Same.**—The legislature may by general laws regulate the election of municipal officers, p. 104.

Cited in *Huntington v. Nevada*, 75 Fed. Rep. 61.

**56 Cal. 117-119. LIN TAI v. HEWILL.**

**Criminal Law—Bill of Exceptions.**—Mandamus will issue to compel a judge to sign, p. 119.

Cited to same effect as regards a referee in *Careaga v. Fernald*, 66 Cal. 353; also in *Wood v. Strother*, 76 Cal. 190; S. C. 9 Am. St. Rep. 253;

People v. Bitancourt, 74 Cal. 190, "although the writ will not issue to compel the settlement in any particular way"; Keane v. Murphy, 19 Nev. 95.

**56 Cal. 119-121. PEOPLE v. AH YUTE.**

Where It Appears from Indorsements on notice of appeal that notice was served on certain day and that service thereof was admitted underneath indorsement of filing, it will be presumed that service was made on day of filing, p. 120.

Approved in Reynolds v. Corbus, 7 Idaho, 485, on appeal from probate court order of filing and service of notice of appeal is immaterial.

The testimony of the reporter, based on his notes, is incompetent to prove the testimony of a witness given in a foreign language, at a former trial, and taken down by the reporter from the interpreter, p. 121.

Cited in People v. Lem Deo, 132 Cal. 202; People v. John, 137 Cal. 221, 222; and People v. Lewandowski, 143 Cal. 578; noted under People v. Lee Fat, 54 Cal. 527; People v. Lee Yute, 60 Cal. 96, to the effect that the interpreter is the proper person to call for the purpose of proving what was sworn to in foreign language by witness; Reid v. Reid, 73 Cal. 207, holding that the stenographer's testimony, under such circumstances, would be hearsay. Distinguished in People v. Sierp, 116 Cal. 250.

**56 Cal. 122-124. LANE v. PFERDNER. S. C. 57 Cal. 135.**

State Lands Contest.—Jurisdiction of the district court is special, dependent upon the fact that the surveyor general has made an order referring the contest, p. 123.

Cited to same effect in Sherman v. Wright, 133 Cal. 541, denying mandamus against surveyor general to compel reference, when fee not properly paid or rendered; Polk v. Sleeper, 143 Cal. 74, holding demurrer to complaint improperly overruled; Eads v. Clark, 68 Cal. 484, holding further as to how the fact which gives jurisdiction can be proved.

Onus Probandi rest on each party to establish his own right, p. 124.

Approved in Gilson v. Robinson, 68 Cal. 543; also in Garfield v. Wilson, 74 Cal. 178; also in Prentice v. Miller, 82 Cal. 573, but this does not change the general rule, that material allegations which are not denied must be taken as true.

**56 Cal. 128-130. MARTIN v. SPLIVALO.**

Ejectment—Tenant at Will.—After termination of tenancy no demand of possession is necessary on part of the lessor before bringing ejectment, p. 129.

Cited to same effect in Joy v. McKay, 70 Cal. 446.

**Unlawful Detainer—Tenant at Will.**—Complaint must aver that notices required have been given, p. 130.

Cited to this effect in *Fish v. Benson*, 71 Cal. 436.

**56 Cal. 131-133. ANDERSON v. TAYLOR.** S. C. 38 Am. Rep. 52.

**Forcible Entry and Detainer.—Measure of Damages** is the natural and proximate result of the forcible entry or unlawful detainer, p. 132.

Cited in *Martin v. Dietz*, 102 Cal. 68; S. C. 41 Am. St. Rep. 161, further, as to measure of damages for torts, generally.

**Damages for Mental Anguish** are not recoverable in action for forcible entry and detainer, p. 132.

Cited to this effect in *Chapman v. W. U. T. Co.*, 88 Ga. 771; S. C. 30 Am. St. Rep. 188; also in *Hitchcock v. Pratt*, 51 Mich. 270. Note on general subject to *West v. W. U. T. Co.* 7 Am. St. Rep. 536; *Ewing v. Ry. Co.*, 30 Am. St. Rep. 712.

**56 Cal. 133-134. PURDY v. SINTON.**

**Constitutional Law.—Mandamus** will not issue to compel public officer to perform some act, when petitioner has not complied with statute requiring conditions precedent, p. 134.

Cited to same effect in *Hevren v. Reed*, 126 Cal. 221, denying prohibition when defendant could not revoke void license nor grant valid one; dissenting opinion of Thornton, J., in *Raisch v. Board of Education*, 81 Cal. 550.

**56 Cal. 136-138. WILD v. ODELL.**

**Malicious Prosecution.—Definition**, p. 138.

Cited in *Sandell v. Sherman*, 107 Cal. 396, holding where party states all facts within his knowledge to counsel, and then acts under his advice, the absence of malice is established, and want of probable cause negated; note to *Ross v. Hixon*, 26 Am. St. Rep. 156.

**56 Cal. 139-142. LASSING v. PAIGE.**

**Law of the Case**, when determined by the supreme court, is binding on lower court, and also on the supreme court should the same case come before it again, p. 142.

Cited to same effect in *Furth v. Snell*, 13 Wash. 665.

**56 Cal. 143-151. SANTA CRUZ v. SANTA CRUZ RAILROAD COMPANY.**

**Pleading.**—Complaint must aver all facts necessary to state plaintiff's cause of action, p. 151.

Cited to this effect in *Santa Cruz v. Spreckels*, 57 Cal. 133.

**License Tax** cannot be collected by civil action when there is no city ordinance providing for the collection by such an action, p. 150.

Distinguished in City of Los Angeles v. Southern Pacific Co., 61 Cal. 64; also in Mendocino County v. Bank of Mendocino, 86 Cal. 258, holding tax may be collected by civil action where ordinance provides for collecting by that means. Approved in Merced County v. Helm, 102 Cal. 166.

**Jurisdiction** of the district court over cases transferred to it under section 838 of the Code of Civil Procedure, is special, p. 147.

Cited in Arroyo D. & W. Co. v. Superior Court, 92 Cal. 52; S. C. 27 Am. St. Rep. 94, holding, further, the superior court cannot exercise original jurisdiction in matters in which its jurisdiction is only appellate. Distinguished in Baker v. Southern Cal. Ry. Co. 114 Cal. 506, 507.

**Police Court—Transfer.**—Case cannot be transferred from police court to district court, p. 148.

Denied in City of Santa Barbara v. Eldred, 95 Cal. 380.

#### 56 Cal. 152-156. **BASCOMB v. DAVIS.**

**Mexican Grant.**—Statute "to quiet land titles in California," construed, p. 154.

Approved in Watriss v. Reed, 99 Cal. 135, holding the act includes those who in good faith have purchased land from those who claimed to be Mexican grantees; also in Betley v. Naphtaly, 169 U. S. 361.

#### 56 Cal. 157-159. **WOOD v. ORFORD.**

**Judgment.**—Surety on appeal on judgment against two defendants is liable for whole judgment when decision is reversed as to one defendant only, p. 158.

Approved in Nichols v. Dunphy, 58 Cal. 607, as to defendant not appealing—judgment against two defendants—reversed as to one appealing; also in Bern v. Shoemaker, 7 S. Dak. 521, holding a reversal in part does not discharge the undertaking.

#### 56 Cal. 159-162. **FABIAN & CO. v. CALLAHAN.**

**Pleading.**—Where the statute requires the performance of certain conditions in order to maintain an action, compliance with these conditions must be alleged, p. 161.

Cited to same effect in Sweeney v. Stanford, 67 Cal. 636.

**Contract.**—If signed by party to be charged it is sufficient, p. 161.

Cited to this effect in Benson v. Shotwell, 87 Cal. 54.

**New Trial.**—Notice of motion for, must designate upon what the motion will be based, p. 160.

Approved in Gregg v. Garrett, 13 Mont. 12.

**56 Cal. 163-165. JONES v. SPEARS.**

Motion for New Trial does not operate as a stay of proceedings, p. 164.

Cited to same effect in *Young v. Brehe*, 19 Nev. 383; S. C. 3 Am. St. Rep. 895, holding, further, it does not effect the operation of the judgment therein as an estoppel; *Ex parte Craig*, 130 Mo. 595, holding it will not operate per se to stay the issuance of an execution.

**56 Cal. 165-171. DAVIS v. SCOTT.**

Pre-emption.—Right of cannot be acquired by intrusion and trespass upon lands in the actual possession of others, p. 171.

Cited to same effect in *Field v. Gray*, 1 Ariz. Ter. 407, holding, further, as regards title given by mere possession of mining claim. Approved in *McBrown v. Morris*, 59 Cal. 74. Cited in *Haven v. Haws*, 63 Cal. 517, holding that a pre-emptor may pre-empt land in the possession of another, provided he does not forcibly intrude upon the possession of such other. This case appears in effect to overrule *Davis v. Scott*. Approved in *Bullock v. Rouse*, 81 Cal. 593, 595, holding one party cannot forcibly or surreptitiously intrude upon the possession of another, and thereby acquire a right to the land by filing a pre-emption claim; *Peterson v. Kinkead*, 92 Cal. 377; *Nichols v. Winn*, 17 Nev. 195.

**56 Cal. 171-173. MALLETT v. SWAIN.**

Appeal.—Findings will not be disturbed where evidence on all material issues is conflicting, p. 173.

Cited to this effect in *McLain v. Baker*, 82 Cal. 532; *Lindblom v. Sonstelle*, 10 N. Dak. 144, but sustaining right of court for good cause to extend time for exception, under local statutes.

Instructiona.—Exception taken after jury has retired is ineffectual, p. 172.

Cited to same effect in *Garoutte v. Williamson*, 108 Cal. 141.

**56 Cal. 173-175. PIPER v. CENTINELA LAND COMPANY.**

Appeal from Order.—The supreme court has power to determine how papers on appeal shall be authenticated and brought before it, p. 174.

Cited in *People v. Terrill*, 131 Cal. 113, holding authentication under Rule 32, necessary in case of appeal from order setting aside information for want of legal commitment; *Nash v. Harris*, 57 Cal. 243, holding "unauthenticated papers in a transcript in which there is no bill of exceptions constitute no part of a record which can be considered on appeal"; *Clark v. Crane*, 57 Cal. 634; *People v. Jordan*, 65 Cal. 648; *Cummings v. Conlan*, 66 Cal. 413; *Schammel v. Schammel*, 70 Cal. 73, and appellant may cure certain omissions in transcript by proceeding as prescribed in

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rule 13 of the supreme court. Denied in Herrlich v. McDonald, 80 Cal. 476; also denied in Somers v. Somers, 81 Cal. 609, 612; but approved in dissenting opinions of Thornton and Sharpstein, JJ., pp. 614, 615.

Certificate of judge that papers were used on motion before him is sufficient authentication, p. 174.

Cited to same effect in Fish v. Benson, 71 Cal. 432, holding, further, affidavits contained in transcript, but not authenticated as having been used on motion for new trial, constitute no part of the record. Not approved in Herrlich v. McDonald, 80 Cal. 476, holding that the only proper way that copies of papers can be brought into the record upon appeal and identified is by bill of exceptions or statement. Overruled in Somers v. Somers, 81 Cal. 609, 612, holding that there is no law authorizing such proceedings; but approved in dissenting opinions of Thornton and Sharpstein, JJ., pp. 614, 615, 616. Cited in Barber v. Briscoe, 8 Mont. 224, which follows Fish v. Benson, *supra*. Cited in Bailey v. Scott, 1 S. Dak. 340, holding, under statute, on appeal from order made upon affidavits, the clerk may certify to the papers, and no bill of exceptions or statement is necessary. Distinguished in Simmons etc. Co. v. Alturas Com. Co., 4 Idaho, 390, attorneys of record are authorized to certify that transcript on appeal contains correct copies of all papers used on hearing of a motion below.

**Motion for Change of Place of Trial** on ground of convenience of moving parties, will not be granted unless all defendants join, p. 175.

Cited to same effect in McKenzie v. Barling, 101 Cal. 460, 461, holding, further, cause may be shown why certain defendants have not joined; note to Shattuck v. Myres, 74 Am. Dec. 243.

#### 56 Cal. 175-177. SMITH v. TUNSTEAD.

**Negligence of Attorney** does not entitle a party to relief from a judgment entered against him because of such negligence, p. 177.

Cited in Douglass v. Todd, 96 Cal. 660, S. C. 31 Am. St. Rep. 250, which case holds that relief will be granted, where party has relied on erroneous advice of counsel as to the law applicable to his case. Distinguished in Jensen v. Barbour, 12 Mont. 575. Approved in dissenting opinion of Murphy, J., Horton v. New Pass. Co., 21 Nev. 192.

#### 56 Cal. 178-185. MEREDITH v. SANTA CLARA MINING ASSN.

**Estoppel by Judgment**.—Parol evidence is inadmissible to show that matters outside the issues were passed upon, p. 181.

Cited in Rosema v. Porter, 112 Mich. 15, holding such evidence properly excluded.

Under plea of non assumpsit any defense showing there was no subsisting cause of action at time suit brought, is admissible, p. 183.

Approved in Heaton-Hobson etc. Offices v. Arper, 145 Cal. 284, applying rule in action for attorney's fees.

**56 Cal. 185-194. BANFIELD v. MARKS.**

**Damages—Contract.**—Plaintiff who has agreed to pay moneys due third persons by defendant may recover same although no payment in fact made, p. 187.

Cited in Meyer v. Parsons, 129 Cal. 656, allowing recovery of amounts so promised to be paid to creditors, under facts stated.

**56 Cal. 194-208. WELLS, FARGO & CO. v. BOARD OF EQUALIZATION.**

**Boards of Equalization.**—The state board equalizes values as between counties—the county board as between different parcels or articles of property in the same county, p. 198.

Cited to same effect in People v. Sacramento County, 59 Cal. 324; also in People v. Dunn, 59 Cal. 330; and concurring opinion of Sharpstein, J., same case, p. 337, 339, which points out particularly that the state board has no authority to raise or lower individual assessments; S. F. & N. P. R. R. Co. v. State Board, 60 Cal. 30; Cottle v. Spitzer, 65 Cal. 465; Baldwin v. Ellis, 68 Cal. 497, 499; Board v. Board, 129 Cal. 604, applying rule of construction to "corporate authorities" as used in section 12, article 11, of constitution; Davis v. Pacific Imp. Co., 137 Cal. 252, holding action of state board not an "assessment" in se; People v. Ames, 27 Colo. 131, holding equalization by state board improper under local statutes; State v. Nichols, 29 Wash. 172, state board of equalization may raise valuation of certain classes of property in certain counties even if thereby aggregate valuation of all property in state is increased. Distinguished in Farmer's Bank v. Board, 97 Cal. 324, holding, further, the legislature may grant other powers or impose other duties on the respective boards. Approved in State v. Vaile, 122 Mo. 47; State v. Equalization Board, 18 Mont. 481.

**General Citations.**—Gray v. Stiles, 6 Okla. 495; Wallace v. Bullen, 9 Okla. 7.

**56 Cal. 208-209. ESTATE OF MARTIN.**

**Order of Probate Court.**—No appeal lies from an order directing officer to proceed with sale of property previously ordered to be sold, p. 209.

Approved in Stuttmeister v. Superior Court, 71 Cal. 324.

**56 Cal. 209-213. GREER v. TRIPP.**

**Tenants in Common—Ouster.**—Denial of title of cotenant in an answer is equivalent to an ouster, p. 212.

Cited to same effect in Phelan v. Smith, 100 Cal. 167; Fenton v. Miller, 94 Mich. 211, holding such act evidence of ouster; La Riviere v. La Riviere, 77 Mo. 517, holding defendant, by controverting plaintiff's title,

admits ouster, and supersedes necessity of proof thereof; *Gilchrist v. Middleton*, 107 N. C. 683.

**Estoppel.**—A party will not be held to be estopped by inference, when grounds for estoppel do not clearly appear, p. 212.

Approved in *Barber v. Mulford*, 117 Cal. 360.

#### 56 Cal. 213-215. **SEDGWICK v. SEDGWICK.**

**Alteration of Written Contract** made before its execution need not be explained, p. 214.

Cited to same effect in *Burdell v. Taylor*, 89 Cal. 616. Cited in *Wilson v. Morton*, 85 Cal. 600, but not in point; *Mulkey v. Long*, 5 Idaho, 216, 217, where note shows on face that it has been altered, it must be shown that alteration was made prior to its receipt by party offering it in evidence; *Maldander v. Smith*, 102 Wis. 36.

#### 56 Cal. 217-219. **WOOD v. FRANKS.**

**Chattel Mortgage.**—Measure of damage for seizure by officer, under process, of mortgaged property is amount of mortgage debt, p. 219.

Approved in *Wood v. Frank*, 67 Cal. 33; also in *Meherin v. Oaks*, 67 Cal. 59; *Sherman v. Finck*, 71 Cal. 71; *Chittenden v. Pratt*, 89 Cal. 183. Cited in *Wilkerson v. Thorp*, 128 Cal. 226, noted under *Treadwell v. Davis*, 34 Cal. 606. Distinguished in *Irwin v. McDowell*, 91 Cal. 123, holding that in no case the damages can exceed the value of the converted property; concurring opinion of De Haven, J., holds that *Wood v. Franks* is wrongly decided. Cited in *Rochefleau v. Boyle*, 12 Mont. 597, approving *Irwin v. McDowell*, *supra*, holding the measure of damage to be the value of the chattels, converted to an amount not exceeding the mortgage debt; also, in *Sheehan v. Levy*, 1 Wash. 154; and *Levy v. Sheehan*, 3 Wash. 422; also in *Keith v. Haggart*, 4 Dak. 442, holding measure of damage for such illegal levy is the value of the property at time of levy, and fair compensation to mortgagee for time and money expended in pursuit of the property; the opinion further states (p. 444) that the reasoning upon which the decision in *Woods v. Frank* appears to be based "is fallacious, and the conclusion arrived at is incorrect." Distinguished in *Keith v. Haggart*, 4 Dak. 450-452.

**Remedies.**—Action lies for breach of obligation arising by operation of law, p. 218.

Cited, in dissenting opinion of Garoutte, J., in *Bancroft v. Bancroft*, 110 Cal. 386; also in *Wise v. Jefferis*, 51 Fed. Rep. 644.

#### 56 Cal. 219-228. **ROWELL v. PERKINS.**

**State Lands—Curative Act of 1872.**—Under this act, party who made first payment in proper county, acquired the right to complete his pur-

chase in the land office, even if lands were not subject to location or disposition when he filed his application, p. 226.

Cited to this effect in *Muller v. Carey*, 58 Cal. 542; also approved in *Upham v. Hosking*, 62 Cal. 259. Cited in *Gilson v. Robinson*, 68 Cal. 544, holding further that the act is not prospective in its operation; *Cucamonga Fruit-Land Co. v. Moir*, 83 Cal. 106, holding that it was not the intention of the act to, and it could not, pass title to land which the state did not own at the time of its passage. See, also, dissenting opinion of Patterson, J., same case, p. 110. Approved in *Barker v. Freeman*, 85 Cal. 534.

**Same—Curative Act of 1870.**—Provisions construed, p. 223.

Cited in *People v. Harrison*, 107 Cal. 547, which case holds that the act of 1870 validates a contract of purchase with the state, regardless of the time of acquisition of title by the state.

**56 Cal. 229-241. KALLOCH v. SUPERIOR COURT. S. C. 57 Cal. 155.**

**Criminal Law—Indictment.**—Examination and commitment by a magistrate, as provided in section 872 of the Penal Code, is a prerequisite to proceedings by information, p. 234.

Cited to same effect in *People v. McCurdy*, 68 Cal. 579. Distinguished in *People v. Cokahnour*, 120 Cal. 254, holding that a written acknowledgment of offense charged is sufficient evidence upon which to hold defendant to answer without swearing other witnesses to prove the facts confessed. Approved in *State v. Braithwaite*, 2 Idaho, 860, holding the provisions of the statute relating to proceedings by information are mandatory.

Proceeding by information is according to "due process of law," hence constitutional, p. 241.

Approved in *State v. Boswell*, 104 Ind. 543; *State v. Whisner*, 35 Kans. 278; *People v. Flannelly*, 128 Cal. 86, holding constitutional provisions as to information not void; *Hurtado v. California*, 110 U. S. 520, holding a conviction and sentence of death upon an information to be legal. Note on general subject to *Bardwell v. Collins*, 20 Am. St. Rep. 555.

**Pendency of Former Indictment**, or information for the same offense constitutes no ground of abatement, p. 236.

Approval in *State v. Bank of Clark*, 2 S. Dak. 544; also in *United States v. Eldredge*, 5 Utah, 191. Cited in *People v. Cummings*, 123 Cal. 273, holding latter proceeding not abated.

**56 Cal. 242-248. LIEBRAND v. OTTO.**

**Cloud on Title.**—Laches in bringing action to remove is not imputable to a party in possession, p. 248.

Cited to same effect in *Hyde v. Redding*, 74 Cal. 500.

**Same.**—Who may bring action to remove discussed, p. 247.

Cited in *Pennie v. Hildreth*, 81 Cal. 130, holding action may be brought by anyone having the right of possession against anyone claiming an interest adverse to that right. Note to *Arrington v. Liscom*, 94 Am. Dec. 742.

Where the cloud on the title arises from breach of condition subsequent, plaintiff may either maintain an action for a reconveyance, or proceeding in equity to remove cloud from title, p. 248.

Cited to same effect in *Parsons v. Smilie*, 97 Cal. 657; *Quatman v. McCray*, 128 Cal. 291, enforcing forfeiture for breach of condition, under facts stated, by action to compel reconveyance; *Papst v. Hamilton*, 133 Cal. 633, sustaining action to cancel deed and quiet title. Note to *Cross v. Carson*, 44 Am. Dec. 757.

**Breach of Condition**, p. 242.

Note on what constitutes to *Cross v. Carson*, 44 Am. Dec. 750.

**56 Cal. 249-251. CLUNE v. SULLIVAN.**

**Discretion.**—Mandamus will not lie to control discretion, p. 250.

Cited to this effect in dissenting opinion of Thornton, J., in *Raisch v. Board of Education*, 81 Cal. 550.

**56 Cal. 251-257. PEOPLE v. TRAVIS.**

**Criminal Law.**—Instructions as to what constitutes self-defense, p. 254.

Approved in *People v. Westlake*, 62 Cal. 307; also in *People v. Tamkin*, 62 Cal. 470. Criticised in *People v. Conkling*, 111 Cal. 627, and holding further as to when the assailed may set up self-defense.

**Evidence of Threats** by deceased, for what purposes admissible, p. 252.

Cited on this point in *People v. Thompson*, 92 Cal. 511, holding such threats are admissible to show who was the aggressor in the fatal affray; note on "Uncommunicated threats," to *Campbell v. People*, 61 Am. Dec. 56.

**.56 Cal. 257-262. HOSMER v. DUGGAN.**

**Pre-emption.**—No right of pre-emption can be acquired in land which is in the possession of others, p. 261.

Cited to same effect in *Field v. Grey*, 1 Ariz. Ter. 407; also, in *McBrown v. Morris*, 59 Cal. 74. Denied in *Haven v. Haws*, 63 Cal. 516, holding that a pre-emptor can initiate a valid claim to the whole of a quarter section of land, by performing acts of settlement on one half while the other half is enclosed and cultivated by another person at the time the attempt begins. Approved in *Bullock v. Rouse*, 81 Cal. 595; also in *Nickals v. Winn*, 17 Nev. 195.

**Pleading.**—Allegations necessary to obtain equitable relief, where land officers have awarded legal title to another, p. 280.

Cited on this point in *Plummer v. Brown*, 70 Cal. 546.

**56 Cal. 262-264. McCORD v. SEALE.**

**Variance.**—Allegations and proofs offered under them must correspond, p. 284.

Cited in *Wise v. Williams*, 72 Cal. 547, holding partnership relation need not be shown in the caption of the complaint, provided it is specifically averred in the body. Approved in *Weinreich v. Johnson*, 78 Cal. 257, holding that a copartner can recover on a promissory note alleged to have been executed to the firm, when the proof shows that it was executed to him alone. Distinguished in *Shain v. Forbes*, 82 Cal. 584; also in *Williams v. Southern Pacific Co.*, 110 Cal. 461, holding a copartner may recover an amount due the firm, unless the defendant plead the nonjoinder of the other members of the firm. Approved in *Elmore v. Elmore*, 114 Cal. 521, holding further as manner of taking advantage of variance; *Prey v. Salt Lake City*, 11 Utah, 338; note to *Green v. Covillaud*, 70 Am. Dec. 739.

**56 Cal. 265-266. HIBERNIA LOAN SOCIETY v. SUPERIOR COURT.**

**Judgment by Default**, p. 265.

Note on general subject to *Sessions v. Stevens*, 46 Am. Dec. 345.

**56 Cal. 266-296. CHAPMAN v. QUINN.**

**Patent.**—The decision of the land office as to facts upon which the patent is granted is conclusive, p. 274.

Cited to same effect in *McLaughlin v. Heid*, 63 Cal. 214, 216, dissenting opinion of Ross, J., and McKee, J., but the case decides, in effect, against the rule; *South End Mining Co. v. Tinney*, 22 Nev. 57, dissenting opinion of Murphy, J.; *Cosmos etc. Co. v. Gray Eagle Oil Co.*, 112 Fed. 12, noted under *Poppe v. Athearn*, 42 Cal. 606. Approved in *Los Angeles Milling Co. v. Hoff*, 48 Fed. Rep. 344. Note on general subject to *Boatner v. Ventress*, 20 Am. Dec. 273, 274.

Patent procured by fraudulent means is voidable at the suit of the government, or any person in privity with the paramount source of title, p. 278.

Cited to same effect in *Plummer v. Brown*, 70 Cal. 546, holding, further, that the facts constituting the fraud must be distinctly alleged and clearly proven; *Cucamonga Fruit-Land Co. v. Moir*, 83 Cal. 110, dissenting opinion of Patterson, J.; *Dreyfus v. Badger*, 108 Cal. 63, holding further as to a person seeking to have a patentee of land declared his trustee; *Galvin v. Palmer*, 113 Cal. 53, holding a deed to be like a patent, and further that either is *prima facie* evidence that the officers per-

formed their duty in issuing it; Power v. Sla, 24 Mont. 250, noted under Boggs v. Merced etc. Co., 14 Cal. 279; Phillips v. Carter, 135 Cal. 606, noted under Doll v. Meador, 16 Cal. 326. Dissenting opinion of Murphy, J., in South End M. Co. v. Tinney, 22 Nev. 54.

General Reference to, and approval of, in Newman v. Bank of California, 80 Cal. 370, S. C. 13 Am. St. Rep. 170, holding, further, that recovery by one cotenant inures to the benefit of other cotenants; this case, as well as Chapman v. Quinn, is cited to this effect in King v. Hyatt, 51 Kan. 511; S. C. 37 Am. St. Rep. 308.

**56 Cal. 297-307. HIBERNIA SAVINGS AND LOAN SOCIETY v. HAYES.**

**Remedy.**—Right to any particular remedy is not a vested right, but is subject to the will of the legislature, p. 303, dissenting opinion of McKee and Sharpstein, JJ.

Cited to same effect in Mill & Lumber Co. v. Almstead, 85 Cal. 85, holding, however, that adequate means for enforcing the right must remain; Anglo-Nevada Assurance Corporation v. Nadeau, 90 Cal. 397. Approved in Teralta Land Co. v. Shaffer, 116 Cal. 523; S. C. 58 Am. St. 197.

**Estates of Deceased Persons—Foreclosure of Mortgage.**—Where notice to creditors was published before amendments to sections 1493 and 1500 of the Code of Civil Procedure went into effect, foreclosure of mortgage afterward falling due was not barred by failure to present claim, p. 299.

Approved in Anglo-Nevada Assurance Corporation v. Nadeau, 90 Cal. 397, but it does not appear to be in point.

**Same—Presentation of Claims.**—Claim may be presented before notice is published, p. 306, dissenting opinion of McKee, J.

Cited to same effect in McCann v. Pennie, 100 Cal. 552; note to Fallon v. Butler, 81 Am. Dec. 146.

**56 Cal. 307-316. HOLMES v. RICHET. 38 Am. Rep. 54.**

**Contracts—Arbitration.**—An agreement to arbitrate, which operates to oust the jurisdiction of the courts, is void, p. 312.

Approved in Loup v. California S. R. R. Co., 63 Cal. 101; Prader v. Accident Association, 95 Iowa, 161; Whitney v. Masonic Association, 52 Minn. 385; note on general subject to Nettleton v. Gridley, 56 Am. Dec. 384, 385.

**Condition Precedent.**—A stipulation in a contract that certain acts shall be performed before defendant shall become indebted to plaintiff, is a condition precedent, performance of which must be alleged to show right of action in plaintiff, p. 316.

Cited to same effect in *Loup v. California S. R. R. Co.*, 63 Cal. 103; also in *Cox v. McLaughlin*, 63 Cal. 207, but plaintiff may show cause why they were not performed; *Sausalito Land & Dock Co. v. Commercial Assur. Co.*, 66 Cal. 250. Distinguished in *Lennenkohl v. Winkelmeyer*, 54 Mo. App. 574. Approved in *Ball v. Doud*, 26 Oreg. 20; *Sullivan v. Susong & Co.*, 30 S. C. 323; *Insurance Co. v. Clancy*, 71 Tex. 10, holding an agreement in an insurance policy providing for the ascertainment of loss by arbitration is valid. Cited in *Commercial Assur. Co. v. Meyer*, 9 Tex. Civ. App. 15.

**Arbitration.**—An agreement to pay only such sum as arbitrators shall award is in effect a condition precedent and valid, p. 315.

Approved in *M. E. Church v. Seitz*, 74 Cal. 292, holding, further, such arbitration proceedings need not be conducted according to the rules which govern courts in their investigations; *Talley v. Parsons*, 131 Cal. 520, applying rule to procurement of architect's certificate; *Gray v. La Societe etc.*, 131 Cal. 572, as to provision for arbitration to determine value of extra work under building contract; *Roche v. Baldwin*, 135 Cal. 526-528, holding instruction in action on quantum meruit for attorney's fees erroneous; *Eighmy v. Brotherhood*, 113 Iowa, 683, as to provision in certificate in benefit society that amount of injuries received by accident should be submitted to certain officials; *Hong Sling v. Royal etc. Co.*, 8 Utah, 142, as to arbitration provision in fire insurance policy; *McNamara v. Harrison*, 81 Iowa, 491; *Chippewa Lumber Co. v. Insurance Co.*, 80 Mich. 121, holding an agreement to submit the question of unliquidated damages to arbitration, as a condition precedent to bring suit, valid; *Randall v. American Ins. Co.*, 10 Mont. 354; S. C. 24 Am. St. Rep. 59; note to *Commercial Assur. Co. v. Hocking*, 2 Am. St. Rep. 569; *Cole Manufacturing Co. v. Collier*, 30 Am. St. Rep. 901.

**Cross-complaint.**—Designation immaterial since the court will determine character of pleading, p. 311.

Cited to same effect in *Meeker v. Dalton*, 75 Cal. 156; *Gregory v. Bovier*, 77 Cal. 124; *Mills v. Fletcher*, 100 Cal. 148. Cited in *McDougald v. Hulet*, 132 Cal. 160, applying rule to pleading treated as counterclaim at trial; *Hibernia etc. Soc. v. Insurance Co.*, 138 Cal. 260, noted under *Hibernia etc. Soc. v. Fella*, 54 Cal. 598; *Dunham v. Travis*, 25 Utah, 70, where, in action on written contract, answer, after denying allegations of complaint, alleged mutual mistake made in contract and prayed to have it corrected, answer constitutes counterclaim.

**Mechanic's Lien.**—Materialman must show that the material, by the terms of the contract, was to be used in the building and was so used, p. 310.

Approved in *Patent Brick Co. v. Moore*, 75 Cal. 211; *Cohn v. Wright*, 89 Cal. 88; *Roebling Sons Co. v. Bear Valley Irrigation Co.*, 99 Cal. 490; note on general subject to *Odd Fellows' Hall v. Masser*, 64 Am. Dec. 678.

**General Citation.**—*McCormick v. St. Louis*, 166 Mo. 327.

**56 Cal. 317-320. TAYLOR v. NORTH PACIFIC RAILWAY COMPANY.**

Contracts—Breach.—Measure of Damages for failure to construct fences is amount it would reasonably cost to construct them, p. 317.

Approved in Cincinnati Southern Ry. Co. v. Hudson, 88 Ky. 486.

**56 Cal. 321-322. CRAWFORD v. NEAL.**

Guardian ad Litem may be appointed ex parte, p. 321.

Cited in Granger v. Sheriff, 133 Cal. 418, holding notice of application not necessary.

Pleading.—Guardian ad litem must show by allegations capacity to sue, p. 322.

Cited to this effect in In re Cahill, 74 Cal. 55; also in Security Loan Co. v. Kauffman, 108 Cal. 223.

**56 Cal. 322-327. ESTATE OF WOOTEN.**

Contest of Will—Parties.—Contestant is plaintiff and petitioner defendant, p. 325.

Cited to same effect in Barney v. Hayes, 11 Mont. 107.

Will Contest.—Proponent cannot offer testimony upon allegation contained in complaint which was denied by answer, but as to which contestant had offered no evidence, p. 326.

Cited in Estate of McKenna, 143 Cal. 592, holding court not required to take additional evidence in favor of probate of will on issue of nonexecution where contestant had abandoned that issue.

**56 Cal. 327-330. PEOPLE v. McGARNEY.**

Change of Place of Trial, p. 327.

Distinguished in Gage v. Downey, 79 Cal. 155.

**56 Cal. 330-335. WILLIAMS v. LERCH.**

Sale of Personal Property.—Change of Possession takes place when third party in possession agrees and consents to retain the goods for the vendee, p. 334.

Cited with approval in Garlick v. Bowers, 66 Cal. 122, holding, further, that statements made by vendor after the sale, in regard to the delivery, are inadmissible to impeach the sale. Explained and distinguished in Etchepare v. Aguirre, 91 Cal. 294, 295; S. C. 25 Am. St. Rep. 83, 85. Cited in Pearce v. Boggs, 99 Cal. 343, 344, where it is stated the opinion of a court is always to be read in connection with the facts of the case in which it is given. Cited in Murphy v. Mulgrew, 102 Cal. 551, S. C. 41 Am. St. Rep. 205, holding there is no delivery and change of possession where wife buys horses from husband, but leaves them in his care to

manage; cited in *Rosenbaum v. Hayes*, 10 N. Dak. 324, noted under *Montgomery v. Hunt*, 5 Cal. 366; *Murphy v. Braase*, 3 Idaho, 551, following rule. Note on general subject to *Walden v. Murdock*, 83 Am. Dec. 142.

**56 Cal. 335-338. CARTER v. KALLOCH.**

**New City Hall Commissioners.**—Contracts are invalid unless executed in manner prescribed by act, p. 336.

Cited in *State v. Coad*, 23 Mont. 137, noted under *Zottman v. San Francisco*, 20 Cal. 97.

**56 Cal. 339-341. SANTA CRUZ BANK v. COOPER.**

**Homestead** is lost by death of wife and arrival of children at the age of maturity, p. 341.

Not approved in *Stanley v. Snyder*, 43 Ark. 433. Distinguished, not in point, in *Roth v. Insley*, 86 Cal. 138, holding that a homestead is not terminated by the dissolution of the family.

**56 Cal. 342-344. WELLS v. HARTER.**

**Mortgage Lien** is extinguished by lapse of time within which an action can be brought upon the principal obligation, p. 343.

Cited to same effect in *Jeffers v. Cook*, 58 Cal. 152; also in *Henderson v. Grammar*, 66 Cal. 336; *Hughes v. Cannedy*, 92 Cal. 387; *Newhall v. Sherman*, 124 Cal. 512, noted under *Lord v. Morris*, 18 Cal. 482; *Law v. Spence*, 5 Idaho, 253, following rule.

Lien barred by the statute of limitation is not revived by a renewal of the note secured, p. 344.

Cited in *S. P. Co. v. Prosser*, 122 Cal. 417 (and cf. *Daniels v. Johnson*, 129 Cal. 417, 79 Am. St. Rep. 125), and dissenting opinion in *Newhall v. Hatch*, 134 Cal. 276, not held inapplicable to renewal of debt before bar of statute; but cf. original opinion p. 420; *Weinberger v. Weidman*, 134 Cal. 600, holding lien of mortgage so extinguished; *Wilson v. Pickering*, 28 Mont. 439, Civil Code, section 3842, has no application to mortgage renewed by extension of note which it secured prior to taking effect of statute. Distinguished in *London and S. F. Bank v. Bandmann*, 120 Cal. 223, this being a case where the note was renewed before the statute had run; note to *McCormick v. Brown*, 95 Am. Dec. 175.

**Vendor's Lien** is waived by taking a mortgage or other security in its place, p. 344.

Approved in *McKeown v. Collins*, 38 Fla. 289; note to *Baum v. Grigsby*, 81 Am. Dec. 156.

**Statute of Limitations.**—Debt barred by insufficient consideration for new promise to pay, p. 344.

Cited in McDonald v. Randall, 139 Cal. 252, noted under McCormick v. Brown, 36 Cal. 184.

**General Citation**.—People's State Bank v. Francis, 8 N. D. 375.

**56 Cal. 345-349. PEOPLE v. PERRIN.**

**Corporations**.—Statutes relating to formation of, construed, p. 345.

Cited in Green v. Knife Falls Boom Corporation, 35 Minn. 161, where Minnesota statute is construed.

**Corporations**.—State may be estopped from denying powers recognized as existing by its legislative enactments, p. 347.

Cited in State v. Lincoln etc. Co., 144 Mo. 595, 596, but holding state not so estopped under facts stated; State v. Evans, 161 Mo. 110, 84 Am. St. Rep. 677, applying principle to powers of policemen under local statutes.

**56 Cal. 350-369. BRADY v. BARTLETT.**

**Street Assessment**.—Construction of Statute.—Failure to comply with section 26, page 822, of the statutes of 1871-72, does not invalidate the assessment, p. 362.

Approved in Ede v. Knight, 93 Cal. 162, holding that where provisions of the statute are merely directory to the officers, and not of the essence of the thing required to be done, failure to comply does not operate to the prejudice of the contractor.

**Same**.—Right of taxpayer to have work done by lowest bidder, p. 364.

Note on "Responsible bidders," in State v. Rickards, 50 Am. St. Rep. 490, 497.

**Same**.—Certificate of certain officials is *prima facie* evidence that the work has been duly and fully performed, p. 364.

Cited to this effect in Ede v. Knight, 93 Cal. 163.

**56 Cal. 370-373. WITHERS v. LITTLE.**

**Practice**.—Appeal not properly taken, p. 373.

Cited to this effect in Little v. Superior Court, 74 Cal. 221; also in Withers v. Jack, 79 Cal. 300; S. C. 12 Am. St. Rep. 144.

**Same**.—Supreme Court in bank has power to make such modifications in the judgment of the court in department as justice may seem to demand, and whether it shall do this from the record or order further argument rests in its discretion, p. 373.

Cited to this effect in Niles v. Edwards, 95 Cal. 46.

**.56 Cal. 374-383. BIDDEL v. BRIZZOLARA.**

To establish a new contract, made after the statute has run, there must be a promise to pay to the creditor, or acknowledgment from which a promise is implied, p. 381.

Approved in *Biddel v. Brizzolara*, 64 Cal. 355; *S. P. Co. v. Prosser*, 122 Cal. 415-419 (quoted in *Bullion etc. Bank v. Hegler*, 93 Fed. 893, 895); *Rodgers v. Byers*, 127 Cal. 530, and *Pierce v. Merrill*, 128 Cal. 476, 79 Am. St. Rep. 65, noted under *McCormick v. Brown*, 36 Cal. 180; *Kelly v. Leachman*, 3 Idaho, 636, following rule; *Curtis v. City of Sacramento*, 70 Cal. 414, holding, further, if the acknowledgment be accompanied by conditions, no implied promise to pay absolutely is created; *Braithwaite v. Harvey*, 14 Mont. 225, S. C. 43 Am. St. Rep. 635, holding, further, if promise or acknowledgment is uncertain or indefinite, it is insufficient to remove the bar; note to *Furgeson v. Harris*, 39 Am. St. Rep. 740; also to *McCormick v. Brown*, 95 Am. Dec. 175.

**Findings may be of probative facts when ultimate facts necessarily result**, p. 381.

Cited to same effect in *Murphy v. Bennett*, 68 Cal. 530; *Oneto v. Restano*, 78 Cal. 376; *Bull v. Bray*, 89 Cal. 288; *Southern Pacific Co. v. Whitaker*, 109 Cal. 274.

**Limitations—Construction of Statute.**—The purpose of section 360 of the Code of Civil Procedure is to establish a rule with respect to the kind of evidence by which the promise or acknowledgment shall be proved, p. 380.

Cited to same effect in *Tuggle v. Minor*, 76 Cal. 101.

**.56 Cal. 388-396. DURKEE v. CENTRAL PACIFIC COMPANY. 38 Am. Rep. 59.**

**Damages—Instructions.**—For injury to child, parent can only recover such damages as he himself has sustained, p. 392.

Distinguished in *Baker v. Railroad Co.*, 91 Mich. 302, 30 Am. St. Rep. 474, holding, further, that where child has recovered for an injury, and the loss of service to his father has been considered as an element of damage, no right of action remains to the father to prosecute a suit in his own name for such loss.

**Negligence.**—In case of injury to a minor two rights of action arise—one to the child and one to the parent, p. 392.

Cited to same effect in *Sibley v. Ratcliff*, 50 Ark. 480; also in *Herdick v. Ilwaco R. & N. Co.*, 4 Wash. 404; note on general subject to *Carey v. Berkshire*, 48 Am. Dec. 624; *Fordyce v. McCouts*, 14 Am. St. Rep. 72.

**General Citation.**—*McDonald v. Lund*, 13 Wash. 419.

**56 Cal. 396-397. PEOPLE v. QUVISE.**

Information should not charge two separate offenses, p. 397.

Note on subject to Ben v. State, 58 Am. Dec. 249.

**56 Cal. 397-401. PEOPLE v. ANTHONY.**

Criminal Law—Reasonable Doubt.—Instructions as to circumstantial evidence required to convict, p. 400.

Cited on this point in People v. Davis, 64 Cal. 441; also in Dossett v. United States, 3 Oklahoma, 504; People v. Murphy, 146 Cal. 507, upholding instruction in prosecution for murder of convict who with others escaped from prison and another convicted committed the homicide.

New Trial—Misconduct of Juror.—When evidence concerning is conflicting, the action of the trial court in refusing a new trial will be sustained, p. 399.

Approved in People v. Thornton, 74 Cal. 488. Cited in People v. Lee Chuck, 78 Cal. 335, where it is held that the drinking of intoxicating liquors by the jurors while deliberating on the verdict, is ground for new trial.

Evidence which is merely impeaching or cumulative in character is insufficient to support a motion for a new trial, p. 399.

Cited to same effect in People v. Goldenson, 76 Cal. 352; also in People v. Loui Tung, 90 Cal. 379; Wood v. Moulton, 146 Cal. 322, applying rule in action for injury to land by wrongfully turning of water thereon; Chalmers v. Sheehy, 132 Cal. 462, 84 Am. St. Rep. 64, holding motion properly denied.

**56 Cal. 401-402. PEOPLE v. MILES.**

Supreme Court—Jurisdiction.—Court in bank, of its own motion, has power to correct or modify a judgment rendered in department, p. 402.

Approved in Niles v. Edwards, 95 Cal. 46.

State cannot be sued except where the same is permitted by statute, p. 402.

Cited to same effect in Sawyer v. Colgan, 102 Cal. 292; also in Alpin v. Board of Supervisors, 73 Mich. 183, S. C. 16 Am. St. Rep. 577, holding "a suit cannot be maintained, directly or indirectly, involving a common law issue only, against the state;" Auditor General v. Supervisors, 74 Mich. 549; Tucker v. Pollock, 21 R. I. 320, holding garnishment against department of state government not allowable when state could not be sued.

**56 Cal. 403-405. McCREARY v. MARSTON.**

Pleading—Evidence.—It is error to admit evidence to prove facts not raised by the pleadings, p. 404.

Cited to same effect in *Nordholt v. Nordholt*, 87 Cal. 556, S. C. 22 Am. St. Rep. 271, holding, where the execution of a deed is admitted, it cannot be proved that it was made under duress; *Commissioners v. Barnard*, 98 Cal. 202, and a finding outside the issues cannot form an element in determining the judgment; *Rudel v. Los Angeles County*, 118 Cal. 287.

**56 Cal. 405-406. PEOPLE v. BROWN.**

**Criminal Law.—Instruction as to when jury may acquit held erroneous**, p. 406.

Cited to same effect in *People v. Carrillo*, 70 Cal. 645.

**56 Cal. 407-410. ESTATE OF KEANE.**

**Administrators.**—Where one who is entitled to administrate upon an estate waives his right, and the court appoints some one else, it is not error to refuse to revoke the grant of letters at the request of the one who has waived his right, p. 410.

Cited in *Estate of Wooten*, 56 Cal. 327, but a prior right to letters may be asserted at any time against one who has obtained letters by virtue of a secondary right. Approved in *Estate of Moore*, 68 Cal. 283.

**Appeal does not lie from an order refusing to revoke letters of administration**, p. 408.

Cited to same effect in *In re Ohm*, 82 Cal. 162; *Harper v. Hildreth*, 99 Cal. 269, holding no appeal from an order refusing to vacate a non-appealable order.

**56 Cal. 413-420. ESTATE OF PICO.**

**Estoppel.**—A judgment directly upon a point in issue is as a plea, a bar in any subsequent suit between the parties and their privies, p. 420.

Cited to same effect in *McLennan v. McDonnell*, 78 Cal. 278.

**Adoption.**—Section 230 of the Civil Code, relating to adoption, construed, p. 419.

Cited in *In re Jessup*, 81 Cal. 421, 422, holding that the section is to be liberally construed.

**56 Cal. 421-424. FLETCHER v. MOWER.**

**Pre-emption.**—No pre-emption rights can be acquired in land which is in the actual possession of another, p. 424.

Approved in opinion of Patterson, J., in *Cucamonga Fruit-Land Co. v. Moir*, 83 Cal. 109.

**56 Cal. 428-429. BROOKS v. RICE.**

**Merger.**—The conveyance of the legal estate to one having an equit-

able estate does not operate as a merger, if there be an intervening estate, p. 428.

Cited with approval in *Scrivner v. Dietz*, 84 Cal. 299; also in *Tolman v. Smith*, 85 Cal. 289; *Shaffer v. McCloskey*, 101 Cal. 580; *Anglo-Californian Bank v. Field*, 146 Cal. 654, where assignee of plaintiff's mortgage took it from plaintiff pending suit, with guaranty of priority and subsequently acquired fee from mortgagor under deed reciting that it was taken subject to both mortgages, prior mortgage is not merged in fee as against subsequent mortgage; *Davis v. Randall*, 117 Cal. 17, holding, further, "if a merger would be disadvantageous to the party holding the fee, his intention that merger shall not result will be presumed and maintained"; *Shattuck v. Bank*, 63 Kan. 446, applying rule to union of fee and mortgagee's interest in same person; *Bowling v. Garrett*, 49 Kan. 522, S. C. 33 Am. St. Rep. 383, holding further as to mechanic's lien; *Cook v. Foster*, 96 Mich. 614, as to the effect of fraudulent acts on part of grantor. Cited in *Brackett v. Banegas*, 116 Cal. 285, S. C. 58 Am. St. Rep. 168, as to the effect of notice of lien by purchaser.

#### 56 Cal. 429-430. HUART v. GOYENECHE.

Default will be set aside where it is shown there has been no negligence on part of defendant or his attorneys, p. 430.

Approved in *Johnson v. Sweeney*, 95 Cal. 306, holding further as to oral stipulation for extension of time to answer; Cited in *Crane v. Crane*, 121 Cal. 100, holding vacation of default improperly refused in view of stipulation. *McGowan v. Kreling*, 117 Cal. 36; *Hull v. Vining*, 17 Wash. 358, as to excusable negligence.

#### 56 Cal. 431-442. PRICE v. RIVERSIDE LAND COMPANY.

Mandamus.—Judgment should be for specific and certain relief, p. 436.

Cited in *Bates v. Gerber*, 82 Cal. 556.

Water Companies.—Corporation formed under the act of May 14, 1862, has impressed upon it a public trust, p. 433.

Approved in *Merrill v. Southern Irrigation Co.*, 112 Cal. 430, holding, further, as to presumptions arising from engagement in business under the act; *San Diego Land Co. v. National City*, 74 Fed. Rep. 87; *Lanning v. Osborne*, 76 Fed. Rep. 332, 334, further as to rights of consumers of water; *Grand Hotel v. Wharton*, 79 Fed. Rep. 43; *Crow v. San Joaquin etc. Co.*, 130 Cal. 313, holding supply of water improperly refused when established rate was tendered; *Hildreth v. Water Co.*, 139 Cal. 26, discussing rights of beneficiaries under such public use; *Kelsey v. Board*, 113 Mich. 221, discussing and sustaining right of board to fix water rates as stated; *San Diego etc. Co. v. Souther*, 90 Fed. 169, but sustaining right of irrigation company to make contracts for sale of water

when rates have not been established; San Joaquin etc. Co. v. Stanislaus Co., 90 Fed. 521, on point that such companies are quasi public corporations. Distinguished in Balknap Sav. Bank v. Lamar etc. Co., 28 Colo. 339, court cannot appoint receiver for canal company organized to irrigate own lands and those of its grantees, and to authorize receiver's certificate which shall be prior lien to mortgage bonds.

**Mandamus.**—When a proper remedy to compel performance of duty by private corporation, p. 434.

Cited on this point in Wheeler v. Irrigation Co., 10 Colo. 590, 3 Am. St. Rep. 607; also in Haugen v. Albina Light and Water Co., 21 Oreg. 422. See notes on general subject in Fremont v. Crippen, 70 Am. Dec. 714, and City of Potwin Place v. Topeka Ry. Co., 37 Am. St. Rep. 319-321.

**General Citation.**—Atlantic Trust Co. v. Woodbridge, 79 Fed. Rep. 506.

**Mandamus—Demand.**—Before making an application for a writ of mandamus, demand must be made on defendant to perform the act sought to be enforced by the writ, p. 435.

Cited to this effect in Territory v. Hauxhurst, 3 Dak. Ter. 215, but holding demand unnecessary in that case.

**General Citation.**—State v. Associated Press, 159 Mo. 421.

#### 56 Cal. 442-445. PEOPLE v. FERRIS.

Presumption is that Oral Instructions were taken down by shorthand reporter, p. 445.

Cited with approval in People v. Bourke, 66 Cal. 457; also in People v. Ludwig, 118 Cal. 329. State v. Preston 4 Idaho, 222, following rule.

**Same—Indictment.**—Not insufficient for defects in matter of form, which do not tend to prejudice a substantial right of defendant, p. 444.

Approved in People v. Rozelle, 78 Cal. 90, holding an information charging facts sufficient to constitute defendant an accessory at common law, is sufficient under the codes; People v. Smith, 103 Cal. 567, holding a variance between allegation and proof as to middle names or initials is immaterial; Long v. Campbell, 37 W. Va. 669, holding further as to the subject in civil cases.

**Forgery.**—Essentials stated, p. 442.

Cited in State v. Patch, 21 Mont. 537, sustaining information for forgery of indorsement of certificate of deposit. Note on subject to Hendricks v. State, 8 Am. St. Rep. 466.

#### 56 Cal. 446-453. SHORB v. BEAUDRY.

Corporation created for purposes of a partnership holds its property in trust as partnership assets, p. 450.

Notes Cal. Rep.—179.

Cited in Hunt v. Davis, 135 Cal. 34, noted under Chater v. San Francisco etc. Co., 19 Cal. 247; Cornell v. Corbin, 64 Cal. 200, to the effect that the court affirms of the facts of this case what is said of the facts in Shorb v. Beaudry; dissenting opinion of Sharpstein, J., same case, p. 203, declares that Shorb v. Beaudry does not sustain appellants. Approved in Clute v. Loveland, 68 Cal. 259. Approved in dissenting opinion of Thornton, J., in Kohl v. Lilienthal, 81 Cal. 397. Approved in Behlow v. Fischer, 102 Cal. 217, dissenting opinions of Peterson and Fitzgerald, JJ. Cited in Agricultural Society v. Eichholtz, 45 Kan. 167, holding the officers and directors of a corporation to be trustees of the stockholders. Distinguished in Nightingale v. Milwaukee Furniture Co., 71 Fed. Rep. 240. Cited in note on "Effect on firm of death of partner," to Childs v. Hyde, 77 Am. Dec. 115.

#### 56 Cal. 453-461. PICO v. PICO.

**Replevin.**—The general denial, if plaintiff fails to prove his averments, determines that property should go to defendant, p. 458.

Cited in Flinn v. Ferry, 127 Cal. 653, noted under O'Connor v. Blake, 29 Cal. 317; Kirsch v. Brigard, 63 Cal. 322, to the effect that the California Code does not provide for anticipatory pleading. Approved in Pitts Works v. Young, 6 S. Dak. 563; Iba v. Central Assn., 5 Wyo. 374, further, as to recovery of real property.

The answer must contain a prayer for the return of the property or its value, p. 459.

Cited to same effect in Banning v. Marleau, 101 Cal. 239.

**Replevin—Verdict.**—Special verdict as to the value is a statutory requisite, p. 460.

Approved in Etchepare v. Aguirre, 91 Cal. 292, S. C. 25 Am. St. Rep. 182, holding, further, that the verdict on all other issues may be general; Wheeler v. Jones, 16 Mont. 90, holding further that plaintiff cannot complain of jury's failure to bring in an alternative verdict.

#### 56 Cal. 464-465. WINDER v. HENDRICKS.

**United States Court Commissioner** is not authorized to administer oaths within the meaning of section 1494 of the Code of Civil Procedure, p. 465.

Cited to same effect in Garfield v. Wilson, 74 Cal. 177; Haile v. Smith, 128 Cal. 420, 421, but sustaining power of district attorney to make verifications of pleadings.

#### 56 Cal. 466-469. KELLER v. LEWIS.

**Law of the Case.**—Court below has no authority to enter a different judgment or pursue a different course from that directed in remittitur, p. 469.

Cited to same effect in Heinlen v. Martin, 59 Cal. 182; Kimpton v. Jubilee etc. Co., 22 Mont. 110, noted under Argenti v. Sawyer, 32 Cal. 414; Cowdery v. London etc. Bank, 139 Cal. 307, noted under Argenti v. San Francisco, 30 Cal. 467.

**Appeal.**—Bill of Exceptions or Statement must be authenticated before motion for new trial can be heard, p. 469.

Cited to same effect in Adams v. Dohrmann, 63 Cal. 418, 419, holding “the signature and certificate of the judge are indispensable”; Jackson v. Puget Sound Lumber Co., 115 Cal. 635, holding further, “if the bill, or statement, be filed without being certified, by inadvertence of the judge, the right to a proper certificate is not forever lost”; Parrott v. City of Hot Springs, 9 S. Dak. 206, holding an unauthenticated statement to be a nullity.

#### 56 Cal. 470-476. ESTATE OF CARTERY.

Will—Contest.—Only such issues will be determined by jury as are raised by contestants' pleading, p. 472.

Cited to this effect in Estate of Gharky, 57 Cal. 279, holding where unsoundness of mind is relied on to defeat a will, the question of ineptitude should not be submitted to the jury as a special issue.

Before a court can admit a will to probate it must require proof of all acts requisite to the execution of a valid will, p. 472.

Approved in Estate of Learned, 70 Cal. 142. Cited in Estate of Gregory, 133 Cal. 136, on point that will cannot be probated until contest is decided.

New Trial.—Surprise at testimony of a disappointing witness, the truth of which is not denied, is not ground for new trial, p. 474.

Approved in Overton v. State, 57 Ark. 64; note to Delmas v. Margo, 78 Am. Dec. 519.

#### 56 Cal. 476-478. HEWITT v. ANDERSON. 38 Am. Rep. 65.

Reward.—When offer of, becomes contract, p. 477.

Distinguished in Wilson v. Stump, 103 Cal. 258, S. C. 42 Am. St. Rep. 113, holding further on subject; note on general subject to Ryer v. Stockwell, 73 Am. Dec. 639.

#### 56 Cal. 478-481. SCHOOL DISTRICT v. HEATH.

Dedication to Public Use is good without a donee to take, p. 480.

Cited to same effect in San Leandro v. Le Breton, 72 Cal. 175, holding dedication complete without formal acceptance; Smith v. San Luis Obispo, 95 Cal. 470, holding further as to the manner of making dedication; School District v. Hart, 3 Wyo. 565, holding further as to abandonment. See extended note on subject to State v. Trask, 27 Am. Dec. 562-567.

**56 Cal. 486-488. HINDS v. GAGE.**

**Appeal.**—Motion for new trial before final decision of trial court is premature and of no avail, p. 488.

Approved in Bixby v. Bent, 59 Cal. 532, holding an appeal, while proceedings are pending for modification of a decree, is premature; Duff v. Duff, 71 Cal. 518, 519; Dominguez v. Mascotti, 74 Cal. 270. Doubted in Arnold v. Sinclair, 11 Mont. 567, S. C. 28 Am. St. Rep. 493, holding “a reference to a referee after judgment does not, per se, determine the character of the judgment as to its finality.”

**Interlocutory Decrees,** p. 487.

Cited in Thompson v. White, 63 Cal. 509, holding such decrees valid and binding until vacated by appropriate proceeding.

**56 Cal. 489-493. LIVERMORE v. WEBB.**

**Amended Pleading** appearing in judgment-roll is presumed on appeal to have been regularly served, p. 492.

Cited in Riverside Co. v. Stockman, 124 Cal. 224, when decree also recited due service.

**Attorneys.—Notice of Substitution** may be waived by adversary's recognition of new attorneys, p. 490.

Cited in Hoppin v. Bank, 25 Nev. 90, noted under Roussin v. Stewart, 33 Cal. 208.

**Motion for New Trial** may embrace validity of conclusions of law, p. 493.

Cited in Swift v. Occidental etc. Co., 141 Cal. 166, where stated to have been overruled by later cases.

**56 Cal. 493-498. SIMMONS v. HAMILTON.**

**New Trial** will be granted on the ground that the court misapplied the law, p. 495, opinion of McKee and Thornton, JJ.

Denied in In re Doyle, 73 Cal. 571, holding, the code does not provide for a re-examination of issues of fact, when the findings are indisputably correct. Approved in Marshall v. Golden Fleece Co., 16 Nev. 174, holding new trial is proper remedy if decision is against law, and further as to when decision is against law, note to Jenkins v. Frink, 89 Am. Dec. 140.

**Contracts.—Modification** of terms of written contract discussed, p. 495.

Cited in Thompson v. Gorner, 104 Cal. 170. S. C. 43 Am. St. Rep. 82, holding may be modified by executed oral agreement.

**56 Cal. 499-508. O'CONNOR v. FRASHER.**

**Patent—Jurisdiction of Land Officers.**—Decision of land officers is

conclusive as to all facts upon which validity or authority to issue patent depends, as against collateral attack of person not claiming by title paramount, p. 501.

Cited to same effect in *Kentfield v. Hayes*, 57 Cal. 410. Affirmed, generally, in *O'Connor v. Good*, *O'Connor v. Hazard*, 60 Cal. 622. Cited in *Miller v. Grunsky*, 141 Cal. 457, noted under *Moore v. Wilkinson*, 13 Cal. 478; *McCreery v. Fuller*, 63 Cal. 32, holding further as to the effect of judgment of a court on parties to an action and their privies; *Dreyfus v. Badger*, 108 Cal. 63; *Galvin v. Palmer*, 113 Cal. 53, holding further, as to the presumption of duty performed on part of officers who issued deed.

**56 Cal. 508-513. SCHUMACKER v. TOBERMAN.**

**Taxation.**—Injunction lies to restrain any illegal action which would increase the burden of taxation, p. 512.

Cited to this effect in *Gibson v. Board of Supervisors*, 80 Cal. 366, holding further as to rights of taxpayer.

**Street Improvements—Assessments.**—Statute relating to, construed, p. 510.

Cited in *Ryan v. Altschul*, 103 Cal. 177, to the effect that the assessment is void if it include for work upon land lying outside of the district to be assessed.

**Constitutional Law.**—The legislature cannot legalize a void assessment, p. 511.

Approved in *Mowry v. Blandin*, 64 N. H. 4; see note; *People v. Seymour*, 78 Am. Dec. 529.

**56 Cal. 513-522. MEEKS v. SOUTHERN PACIFIC COMPANY. S. C. 38 Am. Rep. 67.**

**Negligence.**—Contributory Negligence on part of plaintiff does not release defendant from liability, unless it, immediately or proximately, contributed to the result, p. 519.

Cited to same effect in *Harrington v. Los Angeles Ry. Co.*, 140 Cal. 522, 523, sustaining judgment for plaintiff under facts stated; *Martin v. Chicago etc. Co.*, 194 Ill. 148, holding defendant liable under facts stated; *Holmes v. South Pacific Coast Ry. Co.*, 97 Cal. 169, holding the negligence of defendant must be independent of the negligence of the person injured; *Fox v. Oakland Street Ry. Co.*, 118 Cal. 62, 63; *I. P. & C. R. R. Co. v. Pitzer*, 109 Ind. 188, S. C. 58 Am. Rep. 393; *Deans v. Wilmington R. R. Co.*, 107 N. C. 690-692, S. C. 22 Am. St. Rep. 904, 905, holding further as to duty of engineer on discovering persons on the track; *South & North R. R. Co. v. Donovan*, 84 Ala. 148, holding further as to negligence per se; *Kennedy v. Denver, S. P. & P. R. Co.*, 10 Colo. 498, holding "a technical trespass does not deprive the trespasser of

his rights to recover damages for an injury suffered by the negligence of another"; L. E. & St. L. Con. R. R. Co. v. Lohges, 6 Ind. App. 291; Windsor v. H. & St. J. Ry. Co., 45 Mo. App. 131; C. B. & Q. Ry. Co. v. Grablin, 38 Neb. 102. Cited in Smith v. Railroad, 114 N. C. 741, 742, as to contributory negligence of intoxicated person; same case, p. 762; note on subject to Freer v. Cameron, 55 Am. Dec. 668, 674.

**Law of the Case.**—The decision on a former appeal, being upon a different state of facts, does not apply, p. 513.

Cited to same effect in Sharon v. Sharon, 79 Cal. 655; Balch v. Haas, 73 Fed. Rep. 978; note to Gee's Admir. v. Williamson, 27 Am. Dec. 635.

**Negligence of infant trespasser** discussed, p. 513.

Cited in Atlanta Ry. Co. v. Gravitt, 93 Ga. 374, S. C. 44 Am. St. Rep. 149, as to the rule imputing to a child of tender years the negligence of its parents; Norfolk & W. R. R. Co. v. Dunnaway, 93 Va. 38, 39; West Chicago etc. Co. v. Liderman, 187 Ill. 473, 79 Am. St. Rep. 231, noted under Schierhold v. North Beach etc. Co., 40 Cal. 447. See notes to Houston & Texas Ry. Co. v. Sympkins, 38 Am. Rep. 637; Cauley v. Railroad, 40 Am. Rep. 667; Schmidt v. Kansas City Distilling Company, 59 Am. Rep. 25; Westbrook v. Mobile R. R. Co., 14 Am. St. Rep. 506; and extended note to Barnes v. Shreveport R. R. Co., 49 Am. St. Rep. 426-429.

**General Citation.**—Vogel v. Walker, 3 Utah, 229.

#### 56 Cal. 522-523. DOUGHERTY v. HAGGIN.

**Uncertainty in verdict** is cause for new trial, p. 523.

Cited to same effect in Stewart v. Taylor, 68 Cal. 7, holding such verdict cannot serve as basis for a judgment; Riverside Water Co. v. Sargent, 112 Cal. 233. Approved in Walsh v. Wallace, 26 Nev. 330, applying rule to suit to restrain diversion of waters.

#### 56 Cal. 524-527. AUCKER v. MCCOY.

**Justice Court—Pleading—Jurisdiction.**—Judgment on complaint defective in form is valid, court having jurisdiction of the parties, against collateral attack, p. 526.

Approved in Town of Hayward v. Pimental, 107 Cal. 389; note on "Pleadings in justices' court," to Stuart v. Lander, 76 Am. Dec. 539.

**Homestead.**—Claimant must actually reside on the premises when the declaration is filed, p. 527.

Cited to same effect in Skinner v. Hall, 69 Cal. 198; also in In re Crowley, 71 Cal. 304, holding, further, the land must be appropriate to and connected with the occupation of the house; Lubbock v. McMann, 82 Cal. 228, S. C. 16 Am. St. Rep. 110, and homestead cannot be taken so as to include two dwellings; Tromans v. Mahlman, 92 Cal. 7.

**56 Cal. 527-533. HUBBELL v. CAMPBELL.**

**Tax Deed.**—The requirements of the statute must be strictly pursued or the deed will be void, p. 532.

Cited to same effect in Anderson v. Hancock, 64 Cal. 456, holding the omission of a recital as to the time at which purchaser would be entitled to a deed, is fatal to the validity of the deed; Burroughs v. Goff, 64 Mich. 488, holding further as to recitals required in second deed, where first is destroyed; Gilfillan v. Hobart, 35 Minn. 186.

**56 Cal. 533-538. PEOPLE v. RAMIREZ. 38 Am. Rep. 73.**

**Instructions.**—It is an immaterial error to omit to give the cause of refusal of instructions which have already been given in substance, p. 538.

Cited to same effect in People v. Douglas, 100 Cal. 6.

**Confessions,** p. 533.

Note to Daniels v. State, 6 Am. St. Rep. 243, 249.

**56 Cal. 539-554. LOS ANGELES IMMIGRATION ASSOCIATION v. PHILLIPS.**

**Contracts—Specific Performance.**—A court of equity will not compel the specific performance of a contract unless it be final and definite in its terms, p. 548.

Approved in Magee v. McManus, 70 Cal. 557; Breckenridge v. Crocker, 78 Cal. 536, where it was held that the contract was too uncertain to warrant damages for breach; Talmadge v. Arrowhead R. Co., 101 Cal. 371.

**56 Cal. 554-558. MACE v. MERRILL.**

**State Lands—Contest.**—The decision of the land department is conclusive as to parties who appear before it, p. 555.

Approved in Sullivan v. Shanklin, 63 Cal. 250.

**56 Cal. 559-562. WILKINSON v. MERRILL.**

**State Lands—Contest.**—The decision of land department is conclusive against party who subsequently seeks to acquire title from the state, p. 560.

Approved in Sullivan v. Shanklin, 63 Cal. 250.

**56 Cal. 563-567. BRODRIB v. BRODRIB.**

**Pleading.**—Cross-complaint, as a bill in equity, must state facts as fully as is required by an original bill, p. 566.

Cited to this effect in *Winter v. McMillan*, 87 Cal. 263; S. C. 22 Am. St. Rep. 247.

Probate Court.—*Jurisdiction*, p. 563.

See note to *Deck v. Gerke*, 73 Am. Dec. 560.

*Judgment of Probate Court* in settling final account of guardian is conclusive against guardian and his sureties, p. 565.

Cited to same effect in *Treweek v. Howard*, 105 Cal. 445, as regards executors; *Botkin v. Kleinschmidt*, 21 Mont. 6, 69 Am. St. Rep. 644, holding sureties on bond for sale of real estate so concluded; *Silva v. Santos*, 138 Cal. 541, noted under *Graff v. Mesmer*, 52 Cal. 638; *Guardianship of Wells*, 140 Cal. 353, as to decrees settling guardians' accounts; *Knepper, Administrator, v. Glenn*, 73 Iowa, 733; *Dugan v. Dugan*, 22 Nev. 197, S. C. 58 Am. St. Rep. 745, holding whatever binds and concludes the guardian equally binds and concludes his sureties; note to *Fox v. Minor*, 91 Am. Dec. 571.

General Citation.—*Hornung v. Schramm*, 22 Tex. Civ. App. 329.

**56 Cal. 571-581. OSGOOD v. ELDORADO MINING COMPANY.**

**Water Rights—Patent.**—Where a party has acquired a vested right to appropriate water on public land, this right is reserved in a patent issued to another for the land, p. 580.

Cited to same effect in *Farley v. Spring Valley Company*, 58 Cal. 144, where the statute of 1870 is construed. Cited on this point in *Lux v. Haggin*, 69 Cal. 347, 348. Approved in dissenting opinion of Myrick, J., in *Lux v. Haggin*, 69 Cal. 449; *South Yuba Water Co. v. Rosa*, 80 Cal. 337, holding the right is acquired under statutes. Approved in *De Necochea v. Curtis*, 80 Cal. 407, on statutory grounds. Distinguished in *De Necochea v. Curtis*, 80 Cal. 403. Cited in *Mount Carmel etc. Co. v. Webster*, 140 Cal. 187, and *Howell v. Johnson*, 89 Fed. 558, sustaining rights as granted by section 2340, United States Revised Statutes; *Shenandoah Mining Co. v. Morgan*, 106 Cal. 416, holding lands are no longer public lands after certificate of purchase has been issued; *McGuire v. Brown*, 106 Cal. 887, "only vested rights are reserved"; *Union Mining Co. v. Dangberg*, 81 Fed. Rep. 95; note to *Heath v. Williams*, 43 Am. Dec. 280, 281.

**Water Rights.**—In a question of priority between appropriator of water and pre-emptioner, rights of latter date only from his patent, p. 581.

Cited in *Lux v. Haggin*, 69 Cal. 433, 439, where the rule is not approved, the case holding that common-law rules apply, and that under these the pre-emptor's possessory rights are protected; *Shenandoah Mining Co. v. Morgan*, 106 Cal. 416, follows *Lux v. Haggin*; *Cruse v. McCauley*, 96 Fed. 372, sustaining rights of second appropriator where first did not pursue actual appropriation with due diligence. Denied

in McGuire v. Brown, 106 Cal. 671. Approved in Ellis v. Pomeroy Improvement Co., 1 Wash. 577. Denied in Scott v. Toomey, 8 S. Dak. 650; note on "Statutes concerning appropriation of water," to Nevada Ditch Co. v. Bennett, 60 Am. St. Rep. 800.

**Notices of Appropriation** are to be liberally construed, p. 579.

Cited to same effect in Floyd v. Boulder Flume Co., 11 Mont. 437.

Rights of appropriators relate back to the time of giving notice or beginning work, p. 581.

Cited in Ellis v. Pomeroy Improvement Co., 1 Wash. 576; Union Mining Co. v. Dangberg, 81 Fed. Rep. 109; note to Nevada Ditch Co. v. Bennett, 60 Am. St. Rep. 809.

#### 56 Cal. 582-588. SHELDON v. GUNN.

**Intervention**.—Rule as to when complaint in intervention may be withdrawn, p. 587.

Approved in Schaetzel v. City of Huron, 6 S. Dak. 139.

#### 56 Cal. 588-592. REAVIS v. COWELL.

Presumption is, when no venue is stated, that the affidavit was taken within the jurisdiction of the officer taking the affidavit, p. 590.

Approved in Railway Company v. Deane, 60 Ark. 525; also in Kincaid v. Griffith, 64 Mo. App. 676; State v. Henning, 3 S. Dak. 494; Ormsby v. Ottman, 85 Fed. Rep. 499. Cited in Baker v. Agr. Ld. Co., 62 Kan. 83, sustaining affidavit though venue stated as "\_\_\_\_\_ county"; McCord etc. Co. v. Glen, 6 Utah, 142, ruling similarly as to omission of letters "ss".

Whether change of venue will be granted on ground of convenience of witness is a question left to the discretion of the court, pp. 592.

Cited to same effect in D. & R. G. Ry. Co. v. Cahill, 8 Colo. App. 164, and the decision is final unless abuse of discretion is shown.

**Notary Public**.—Power to act where he is an attorney or interested party.

Cited in Spokane etc. Co. v. Loy, 21 Wash. 505, holding sureties on appeal bond liable, though acknowledging before their cosurety as notary. Note to Wilkowski v. Halle, 95 Am. Dec. 378.

**General Citation**.—Kosminsky v. Raymond, 20 Tex. Civ. App. 703.

#### 56 Cal. 593-597. CUMMINGS v. PETERS.

**Eminent Domain**.—The right of eminent domain is restricted to the taking of private property for public use, p. 597.

Approved in Lorenz v. Jacob, 63 Cal. 75, holding, where the substantial object of the action is to secure private property for private use,

the right cannot be exercised; also in *Bradley v. Fallbrook Dist.*, 68 Fed. Rep. 959, holding further, as to taking private property for the support of an irrigation system which furnishes water to land owners alone.

**Public Use—Water.**—What constitutes a sufficient averment of a public use, p. 598.

Cited in *Irrigation District v. Williams*, 76 Cal. 370, where the public use of water is discussed; in *Rialto Irrigation District v. Brandon*, 103 Cal. 386, where a similar complaint was considered.

**General Citation.**—Cited in *Joy v. McKay*, 70 Cal. 447, to the effect, that, in ejectment, a general verdict is sufficient.

#### 56 Cal. 598-599. BUTCHER v. VACA RAILROAD COMPANY.

**Witnesses.**—Testimony on former trial, p. 598.

Cited in *Union Pacific Ry. Co. v. De Busk*, 12 Colo. 297, S. C. 13 Am. St. Rep. 223, but apparently not in point. Approved in *Reynolds v. Fitzpatrick*, 28 Mont. 174, testimony of witness at former trial inadmissible on showing of sheriff's return that he could not find witness, and on affidavit that party had written witness' daughter, who said she had not heard from him in two years, and that another party had said he was in Klondike.

#### 56 Cal. 607-609. RECLAMATION DISTRICT v. COGHILL.

**Default.**—Affidavit of merits cannot be contradicted on motion to vacate, p. 609.

Cited in *Minn. etc. Co. v. Holz*, 10 N. Dak. 24, noted under *Francis v. Cox*, 33 Cal. 325; note on "Delegation of powers of taxation," to *Mayor of Baltimore v. State*, 74 Am. Dec. 574.

#### 56 Cal. 610-612. HODGDON v. GRIFFIN.

**Appeal.**—Objection, that statement on motion for new trial was made too late, cannot be raised for first time on appeal, p. 611.

Approved in *Brichman v. Ross*, 67 Cal. 602.

#### 56 Cal. 612-615. TOWNSEND v. COPELAND.

Certiorari can only be used for the purpose of reviewing judicial acts, p. 615.

Cited to same effect in *Frasher v. Rader*, 124 Cal. 134, denying writ as to granting by board of fire commissioners of permit to build blacksmith shop where action is ministerial and discretionary; *Quinchard v. Board of Trustees*, 113 Cal. 671, holding, under the writ, legislative acts of a city council cannot be reviewed; note on subject to *Wulzen v. Board*, 40 Am. St. Rep. 39.

**56 Cal. 616-619. BRYAN v. SWAIN.**

Covenants implied from the word "grant" in a deed, p. 618.

Cited to this point in Maddock v. Russell, 109 Cal. 424.

An executory agreement for the sale of land is extinguished by the delivery and acceptance of a deed in pursuance thereof, p. 617.

Cited with approval in Keator v. Coal Company, 3 Colo. App. 192; note to Clifton v. Jackson Iron Co., 16 Am. St. Rep. 623; Thurgood v. Spring, 139 Cal. 597, citing main case also as to breach of implied covenants.

**General Citations.**—Cited in Maddock v. Russell, 109 Cal. 426, as to the right to rescind a contract. Cited in note on "Parol evidence to show warranty outside of deed," to Green v. Batson, 5 Am. St. Rep. 199.

**56 Cal. 619-624. BEATTY v. DIXON.**

**Decree—Amendment.**—The court, of its motion, may amend the decree, when there are matters of record by which the amendment can be made, p. 624.

Cited to same effect in Dickey v. Gibson, 113 Cal. 34; S. C. 54 Am. St. Rep. 328.

**56 Cal. 625-626. SCOTLAND v. EAST BRANCH MINING COMPANY.**

Appeal prematurely taken should be dismissed, p. 626.

Approved in Home of Inebriates v. Kaplan, 84 Cal. 488, holding an appeal taken before judgment is entered of record is premature; also in School District v. Whalen, 17 Mont. 15; holding the entry of a default is not a final judgment.

**56 Cal. 629-630. GHIRADELLI v. BREEENE.**

**Justice's Court.—Jurisdiction** is not lost over an action on account of the fact that title to land is incidentally made an issue—it not being material, p. 630.

Approved in Schroeder v. Witram, 66 Cal. 640.

Failure to serve a copy of the complaint with the summons is not a ground for demurrer, p. 629.

Approved in Lyons v. Roach, 84 Cal. 29, holding "appearance is equivalent to personal service of summons and complaint"; Rush v. Foos etc. Co., 20 Ind. App. 530, discussing service of process on foreign corporations.

**56 Cal. 631-632. GLENN v. ARNOLD.**

**Insolvency—Partnership.**—Discharge in insolvency of the individual members of a firm does not relieve the firm, p. 632.

Approved in *Freeman v. Campbell*, 56 Cal. 639, for the reason that the court acquires no jurisdiction of the firm. Distinguished in *Hawley & Co. v. Campbell*, 62 Cal. 446, holding the discharge of an individual from all his debts operates as a discharge from his individual liability for the firm debts.

**Appeal—Findings.**—Where the record contains no findings, and it is not shown that they were waived, it will be presumed that the court found necessary facts to support the judgment, p. 631. .

Approved in *Campbell v. Coburn*, 77 Cal. 37, holding, further, how error may be shown in case findings were not waived.

#### 56 Cal. 633-638. PEOPLE v. TOWNSEND.

**Constitutional Law.**—The act of 1874, "to regulate the assessment of migratory herds," declared unconstitutional, p. 638.

Cited in *Knox v. Los Angeles*, 58 Cal. 61, but to what point is not apparent. Cited in note on "Place where property may be taxed," to *City of Albany v. Meekin*, 58 Am. Dec. 534, 537.

#### 56 Cal. 639-640. FREEMAN v. CAMPBELL.

**Insolvency—Partnership.**—Individual discharge in insolvency does not release from firm debts as a firm, p. 639.

Distinguished in *Hawley & Co. v. Campbell*, 62 Cal. 446, holding such discharge does release from individual liability for firm's debts.

#### 56 Cal. 642-646. WEDEKIND v. CRAIG.

**School Lands.**—Mineral Lands were not excepted from the grant of the sixteenth and thirty-sixth sections to the state for school purposes, p. 644.

Denied in *Hermocilla v. Hubbell*, 89 Cal. 8, holding mineral lands are excluded from all grants.

#### 56 Cal. 647. PEOPLE v. WILLIAMS.

**Reclamation Districts** are public corporations, p. 647.

Cited to same effect in *Irrigation District v. Williams*, 76 Cal. 368, holding, further, districts formed under act of March 7, 1887, are quasi public corporations; also in *Irrigation District v. De Lappe*, 79 Cal. 353; *Sels v. Greene*, 81 Fed. Rep. 555, holding, further, that it is not liable to a private action for negligence in the performance of its duties, or for a nuisance; note to *Mayor v. State*, 74 Am. Dec. 574.

#### 56 Cal. 648-649. PEOPLE v. BOGGS.

**Constitutional Law.**—Section 3872 of the Political Code, relating to surveys, held constitutional, p. 649.

Cited to same effect in *San Bernardino Co. v. Reichert*, 87 Cal. 290.

**56 Cal. 649-655. EWING v. OROVILLE MINING COMPANY.**

Constitutional Provision that it shall be considered mandatory applies to all sections alike, p. 654.

Cited in Lewis v. Dunne, 134 Cal. 296, 86 Am. St. Rep. 263, construing article 4, section 24 thereof.

Constitutional Law—Construction.—Provisions requiring legislation to enforce are not self-executing, p. 654.

Cited in Oakland Paving Co. v. Hilton, 69 Cal. 484, 485, holding, where the constitutional provision is prohibitory in its language, no legislation is required to execute such provision; note on general subject to County of Cook v. Industrial School, 8 Am. St. Rep. 417.

Corporations.—Section 359 of the Civil Code is in conflict with the constitution and is void, p. 652.

Distinguished in Union Loan & Trust Co. v. California Motor Road, 51 Fed. Rep. 850, holding the section of the constitution referred to does not apply to "the first creation of bonded indebtedness."

General Citation.—State v. Bradford, 12 S. D. 214.



## **VOLUME LVII.**

By C. H. SQUIRE.

**Revised to include citations to Volume 147, by CHARLES L. THOMPSON.**

**57 Cal. 3-7. HENDY v. DINKERHOFF.** 40 Am. Rep. 107.

**Fixtures.**—Whether personal property annexed to realty changes its character depends on the intention of the party annexing, p. 6.

Approved in Jordan v. Myres, 126 Cal. 566, 567, 570, holding certain property to be personality; Hertzberger v. Witte, 22 Tex. Civ. App. 322, sustaining tenant's right to remove buildings under lease discussed; Palmateer v. Robinson, 60 N. J. L. 437, but quaere, if realty passes into hands of third party without notice; Binkley v. Forkner, 117 Ind. 181, holding, further, as to exceptions to the rule; Atchinson v. Morgan, 42 Kan. 28, S. C. 18 Am. St. Rep. 472, holding, further, as to tests for determining when personality changes its character. Note on general subject to Lansing Iron Works v. Walker, 30 Am. St. Rep. 491.

**General Citations.**—McFarlane v. Foley, 27 Ind. App. 487; Ice etc. Co. v. Lone Star Engine etc. Works, 15 Tex. Civ. App. 697.

**57 Cal. 8-10. CARMICHAEL v. McGILLIVRAY.**

**Mortgage Foreclosure.**—Decree cannot state order in which property shall be sold when not specially prayed for, p. 9.

Distinguished in Bank v. Reed, 131 Cal. 601, sustaining decree specifying such order when prayed for although not in accordance with the prayer.

**57 Cal. 11-12. STUFFLEBEEEM v. ARNOLD.**

Consideration for release may be shown by parol, p. 11.

Cited in Field v. Austin, 131 Cal. 383, noted under Hendrick v. Crowley, 31 Cal. 476.

**57 Cal. 12-14. WITTENBROCK v. BELLMER.**

**New Trial Practice.**—Where no notice of motion for new trial is served upon a party in whose favor judgment was rendered, such party is not affected by an order granting a new trial, p. 14.

Cited in *Bauder v. Tyrrel*, 59 Cal. 100, holding, further, "the order granting a new trial does of itself vacate the decision"; *Wittenbrock v. Bellmer*, 62 Cal. 559, *San Diego Land Co. v. Neale*, 78 Cal. 65, and it is proper to grant a new trial to the one served; *Fletcher v. Nelson*, 6 N. Dak. 99, noted under *Calderwood v. Brooks*, 28 Cal. 153.

**Agency.**—Evidence of a ratification made subsequent to the commencement of the suit is inadmissible, p. 13.

Cited in *Johnston v. Milwaukee Investment Co.*, 49 Neb. 78; *Hill v. Den*, 121 Cal. 46, on point that cause of action cannot be established by matters occurring after suit brought; *Dingley v. McDonald*, 124 Cal. 685, 686, applying principle to ratification of assignment pending suit by assignee; *Graham v. Williams*, 114 Ga. 719, noted under *Taylor v. Robinson*, 14 Cal. 396; *McIntyre v. Ajax Mining Co.*, 20 Utah, 339, holding certain matters not assertable by supplemental complaint; *Johnson v. Johnson*, 31 Fed. Rep. 703, holding, after suit, the payee may ratify and approve the assignment of a note by an unauthorized person; see extended notes to *Persons v. McKibben*, 61 Am. Dec. 88; also to *Atlee v. Bartholomew*, 5 Am. St. Rep. 114; *Read v. Buffum*, 12 Am. St. Rep. 134.

#### 57 Cal. 15-19. SWEENEY v. CENTRAL PACIFIC COMPANY.

**Negligence.**—A party entering upon a dangerous and hazardous employment must be held to have assumed the consequences of such risks, p. 17.

Cited to same effect in *Sanborn v. Madera Flume Co.*, 70 Cal. 267. Cited in *Magee v. N. P. R. R. Co.*, 78 Cal. 437, S. C. 12 Am. St. Rep. 74, holding the question of servant's knowledge of the danger to which he was exposed is one for the jury. Approved in *Patton v. Central Ry. Co.*, 73 Iowa, 308; also in *Southern Pacific Co. v. Johnson*, 69 Fed. Rep. 573. See extended note on subject to *Buzzell v. Manufacturing Company*, 77 Am. Dec. 222.

#### 57 Cal. 19-20. SHELDON v. DALTON.

**Appeal taken before the substitution of a successor to a deceased litigant is premature**, p. 20.

Cited to same effect in *Pedlar v. Stroud*, 116 Cal. 462, holding, further, that the service of notice of appeal on attorney of deceased litigant is ineffective to constitute an appeal. Approved in *Coffin v. Edgington*, 2 Idaho, 597.

#### 57 Cal. 20-40. BEESON v. GREEN MOUNTAIN MINING COMPANY.

**Negligence—Damages.**—Jury may assess such damages as under all the circumstances of the case may be just, p. 33.

Cited to same effect in *McKeever v. Market St. Ry.*, 59 Cal. 301. Ap-

proved in *Cook v. Clay Street Hill Ry. Co.*, 60 Cal. 609; also in *Nehrbas v. Central Pacific Co.*, 62 Cal. 336; dissenting opinion in *Wales v. Pacific etc. Co.*, 130 Cal. 525, as overruled by main decision therein; *Keast v. Mining Co.*, 136 Cal. 260, sustaining similar instruction in case of death of husband of plaintiff; *Webb v. Denver etc. Co.*, 7 Utah, 20, 21 (and see page 24), as followed in *Cleary v. Railroad Co.*, 76 Cal. 240, on question of mental anguish; *Pool v. S. P. R. R. Co.*, 7 Utah, 311, sustaining instructions; *Wolford v. Lyon Gravel Mining Co.*, 63 Cal. 484, holding further, in an action for negligence resulting in death of a human being, a verdict assessing damages at one dollar will be set aside, and new trial granted; *Cleary v. City R. R. Co.*, 76 Cal. 241; *Munro v. Dredging Co.*, 84 Cal. 525, S. C. 18 Am. St. Rep. 255, but damages for mental suffering cannot be allowed. Distinguished in *Morgan v. Southern Pacific Co.*, 95 Cal. 517, 518, 519 (S. C. 29 Am. St. Rep. 145, 146, 147), holding, an instruction that the jury is not limited by the actual pecuniary injury sustained by the parent by reason of the death of his child is error. Approved in *Harrison v. Sutter St. Ry. Co.*, 116 Cal. 169; *Board v. Legg*, 93 Ind. 530, 531; S. C. 47 Am. Rep. 392, 393; *Klepsch v. Donald*, 4 Wash. 443, S. C. 31 Am. St. Rep. 942, holding, pecuniary loss should be the measure; *Walker v. McNeil*, 17 Wash. 583, domestic relations may be considered. See note to *Carey v. R. R. Co.*, 48 Am. Dec. 638; *Louisville v. Goodykoontz*, 12 Am. St. Rep. 376.

**Master and Servant—Fellow Servant.—Definition, p. 31.**

Approved in *McKune v. Cal. S. Ry. Co.*, 66 Cal. 305, holding a superintendent having authority to employ and discharge men, and direct the movements of trains, is not a fellow employee with a track laborer; *Brown v. Sennett*, 68 Cal. 230; S. C. 58 Am. Rep. 11; *Brown v. Central Pacific Co.*, 68 Cal. 176, holding further as to servants in different departments but under same general employment; *Cerrillos etc. Co. v. Desserant*, 9 N. Mex. 58, as followed in *Railway Co. v. Herbert*, 116 U. S. 653. Distinguished in *Congrave v. S. P. Ry. Co.*, 88 Cal. 369. Cited in *North P. Ry. Co. v. Herbert*, 116 U. S. 653, holding car repairer and yardmaster not to be fellow-servants within rule exempting employer from liability; dissenting opinion, Bradley, J., and three other justices; note on general subject to *Fox v. Sandford*, 67 Am. Dec. 589.

**Same.—Negligence.**—The servant assumes all the ordinary risks of personal employment, except the negligence of his employer, p. 30.

Approved in *Sanborn v. Madera Flume Company*, 70 Cal. 266, holding, further, the master cannot delegate his duties so as to relieve himself from responsibility; *Cunningham v. U. P. Ry. Co.*, 4 Utah, 214, holding further as to defective machinery; *Bowers v. U. P. Ry. Co.*, 4 Utah, 222, 223; *Kelly v. Fourth of July Mining Co.*, 16 Mont. 498, holding further as to master's duty to provide a safe place for servant to work.

Notes Cal. Rep.—180.

**Damages for Death.**—Jury may consider loss of society to surviving wife, p. 38.

Cited in *Dyas v. S. P. Co.*, 140 Cal. 308, approving similar instruction. Distinguished in *Holt v. Spokane etc. Ry.*, 3 Idaho, 712, in action for death of infant son, where complaint did not demand damages for loss of infant's society, and no proof offered as to social relations existing between plaintiff and infant, error to instruct that jury should consider injury by loss of child's society.

#### 57 Cal. 40. **SHELDON v. GUNN.**

**Amendment of Record.**—Clerical error as to date in judgment may be amended after adjournment of term, p. 40.

Cited in *People v. Murback*, 64 Cal. 372, where it was held that power to amend a clerical mistake is not suspended by appeal.

#### 57 Cal. 41-44. **LEVEE DISTRICT v. HUBER.**

**Reclamation Districts—Assessment.**—The commissioners have no power to levy an assessment which does not cover all the land in the district, p. 44.

Cited to this effect in *Hoke v. Perdue*, 62 Cal. 547. See extended note on delegation of power of taxation to *Mayor of Baltimore v. State*, 74 Am. Dec. 594.

#### 57 Cal. 44-47. **PARKS MINING COMPANY v. HOYT.**

**Water Rights—Ditch.**—Bed of stream is artificial conduit only to extent of water made to pass through it artificially, p. 47.

Cited to this effect in *Paige v. Rocky Ford Canal Co.*, 83 Cal. 94, holding, further, as to different rights that may exist in a natural stream. See extended note on general subject to *Heath v. Williams*, 43 Am. Dec. 279.

**Ownership of Water.**—Appropriator does not become owner of water, as personal property, until he has acquired control of it in conduits or reservoirs of his own, p. 46.

Approved in *Riverside Water Co. v. Gage*, 89 Cal. 418, but holding further as to the right to divert water from a stream; *McGuire v. Brown*, 106 Cal. 670. See note to *Heath v. Williams*, 43 Am. Dec. 282.

Cited in *Dunsmuir v. Port Angeles etc. Co.*, 24 Wash. 114, noted under *People v. Blake*, 19 Cal. 579; *Senior v. Anderson*, 198 Cal. 723, discussing joinder of plaintiffs in action for diversion; *Salt Lake City v. Water etc. Co.*, 24 Utah, 266, following rule.

Water flowing in its natural course is a part of realty, p. 46.

Cited in *Ball v. Kehl*, 95 Cal. 613, where rights to water in natural and artificial streams is discussed; *Fudickar v. East Riverside*, 109 Cal. 37, holding, further, as to water rights appurtenant to realty.

**57 Cal. 48-49. ROOT & NEILSON v. BRYANT.**

Lien.—Mortgage lien attaches when the instrument is executed, p. 49.

Cited to same effect in *Bank of Ukiah v. Petaluma State Bank*, 100 Cal. 591, holding, further, an attaching creditor is not a bona fide purchaser within the meaning of section 1214 of the Civil Code. See note on "bona fide purchaser" to *Anthony v. Wheeler*, 17 Am. St. Rep. 290.

**57 Cal. 49-51. MCBETH & COMPTON v. McINTYRE.**

Bond of Indemnity.—When right of action accrues against sureties, p. 50.

Cited in *Oaks v. Scheifferly*, 74 Cal. 480, holding where bond is given to indemnify sheriff for all damages, et cetera, right of action does not accrue until sheriff is compelled to pay damages; *Tunstead v. Nixdorf*, 80 Cal. 651, but where bond is given against liability, right of action accrues when sheriff becomes liable; *Showers v. Wadsworth*, 81 Cal. 273.

**57 Cal. 51-56. LADDA v. HAWLEY.**

Contracts—Illegal Consideration.—Contract which is founded on a transaction prohibited by statute is void, p. 55.

Approved in *Swanger v. Mayberry*, 59 Cal. 94, holding a note given for the purchase price of timber growing on public land is void; *O'Hanlon v. Denvir*, 81 Cal. 62, S. C. 15 Am. St. Rep. 20, but a pre-emptor may clear public land for cultivation; *Gardner v. Tatum*, 81 Cal. 373, holding a physician cannot recover for services, when, at the time contract was made, he had not received a certificate permitting him to practice. Distinguished in dissenting opinion of Fox, J., in *Gardner v. Tatum*, 81 Cal. 376; also distinguished in dissenting opinion of Thornton, J., in *Jones v. Hanna*, 81 Cal. 515.

Same.—And the defect is not cured by the parties subsequently being in condition to contract, p. 56.

Cited to same effect in *Gardner v. Tatum*, 81 Cal. 375; also in *Moffat v. Bulson*, 96 Cal. 112; 31 Am. St. Rep. 196.

**57 Cal. 56-64. HILLMAN v. NEWINGTON.**

Pleading—Parties—Joinder.—Where the injury complained of is the result of the concerted action of several parties, these parties may be joined as defendants, p. 64.

Cited to same effect in *People v. Gold Run Mining Co.*, 66 Cal. 149, S. C. 56 Am. Rep. 85; also, concurring opinion of Thornton, J., same case, p. 155. Distinguished, *Heinlen v. Heilbron*, 71 Cal. 561. Cited in *Miller v. Highland Ditch Co.*, 87 Cal. 433, S. C. 22 Am. St. Rep. 256, holding several tort feasors, not acting in concert or by unity of design, are not liable to a joint action for damages, but an injunction will be

sustained. Approved in *Saint v. Guerrerio*, 17 Colo. 453, S. C. 31 Am. St. Rep. 323, equity proceedings; *Kansas City v. Stangstrom*, 53 Kan. 438, holding it is optional with the injured party to proceed against one or all contributing to the injury; *Lockwood Company v. Lawrence*, 77 Me. 307, S. C. 52 Am. Rep. 767; *Cuddy v. Horn*, 46 Mich. 604, C. C. 41 Am. Rep. 182; *Meyer v. Phillips*, 97 N. Y. 491, S. C. 49 Am. Rep. 540—a proceeding in equity. Approved in the "Debris Case," 16 Fed. Rep. 30; S. C. 8 Saw. 633, 634; *Union Mill and Mining Co. v. Dangberg*, 81 Fed. Rep. 89; *Montecito Valley Co. v. Santa Barbara*, 144 Cal. 595, holding no misjoinder of parties of cause of action shown in action for diversion of water; *West Pt. etc. Co. v. Moroni etc. Co.*, 21 Utah, 237, denying injunction against diversion of water, for lack of necessary parties defendant; but cf. *Pacific etc. Co. v. Hanley*, 98 Fed. 329, granting injunction and holding bill not multifarious for joinder of defendants; *Morris v. Bean*, 123 Fed. 619, prior appropriator of water from stream by means of irrigating ditch may sue all junior appropriators who by withdrawing water from stream above him prevent its reaching head of ditch. See note on general subject to *Tate v. Ohio R. R. Co.*, 71 Am. Dec. 315; also in note to *Masterson v. R. R. Co.*, 38 Am. Rep. 515; and *Mississippi Company v. Smith*, 30 Am. St. Rep. 555.

#### 57 Cal. 65-68. LORD v. SAWYER.

**Adverse Possession.**—Grantor of land may subsequently acquire title to land by adverse possession, p. 67.

Cited in *Silveria v. Iverson*, 128 Cal. 187, noted under *Franklin v. Dorland*, 28 Cal. 180; note to *Franklin v. Dorland*, 87 Am. Dec. 115.

**Adverse Possession** may be asserted as to every person except the government, though subordination to government is conceded, p. 67.

Cited in *Altschul v. O'Neil*, 35 Or. 216-222, noted under *Page v. Fowler*, 28 Cal. 605; *Altschul v. Clark*, 39 Or. 318, one who enters upon and continues in occupation of land and attempts to pre-empt it cannot claim against holder of government title that proceedings before land department were not recognition of original title.

#### 57 Cal. 68-70. MONTGOMERY v. DONNELLY.

**Bill of Exceptiona.**—Statement that certain evidence was offered that it was objected to and objection overruled, is equivalent to statement that certain evidence was admitted in evidence, p. 69.

Cited in *Clark v. Fowler*, 57 Cal. 143.

#### 57 Cal. 70-77. LANGENOUR v. SHANKLIN.

**State Lands—Contest.**—New parties cannot come in to prevent the enforcement of judgment, p. 77.

Cited to same effect in Cunningham v. Shanklin, 60 Cal. 125; Wrinkle v. Wright, 136 Cal. 496, construing statutes of 1893, page 341; Owens v. Colgan, 97 Cal. 455, intervention cannot be allowed after final judgment; Baines v. West Coast Lumber Co., 104 Cal. 6.

The state or its officers are estopped from questioning the judgment of the court in land contest proceedings, p. 76.

Distinguished in Byrd v. Reichert, 74 Cal. 581, holding further as to contest affecting different portions of land. Approved in Youle v. Thomas, 146 Cal. 544, after reference of contest of right to purchase state land to courts, and after action begun, and before its determination, surveyor-general cannot receive application of another to purchase land involved in contest; People v. Morris, 77 Cal. 207, and the evidence upon which the judgment was based cannot be called in question. Distinguished, Urton v. Wilson, 65 Cal. 15, holding further as to when validity of a certificate of purchase will be adjudicated; also in Manley v. Cunningham, 72 Cal. 242. Approved in Laugenour v. Hennagin, 59 Cal. 626, holding the certificate of purchase issued in pursuance of a judgment of the court is conclusive as to right to purchase.

#### 57 Cal. 78-80. GRIDLEY v. DORN. 40 Am. Rep. 110.

**Contract—Wager.**—Either party to a wagering contract may repudiate it before the wager is decided, and recover his money from the stakeholder, p. 79.

Approved in Wise v. Rose, 110 Cal. 162.

**Same.**—A wager on a horserace is against good morals, and will not be enforced, p. 80.

Approved in Hankins v. Ottinger, 115 Cal. 456, holding, further, the purse offered by an association to the winner of a race does not come within the rule against bets. See note to Hoit v. Hodge, 25 Am. Dec. 452; Shaffner v. Pinchback, 23 Am. St. Rep. 626; and extended note to Bernard v. Taylor, 37 Am. St. Rep. 699, 701.

#### 57 Cal. 80-81. HALL v. LONKEY.

**Pleading—Prayer.**—Under a prayer for general relief, plaintiff is entitled to any relief consistent with the facts pleaded, p. 80.

Approved in Bank of Napa v. Godfrey, 77 Cal. 616.

#### 57 Cal. 81-82. ESTATE OF KELLY.

**Administration.**—One who has no right to administer has no power to nominate another to act in such capacity, p. 82.

Cited to same effect in Estate of Hyde, 64 Cal. 228; also in Estate of Muersing, 103 Cal. 587, holding further as to the rights of the public administrator.

**57 Cal. 83-85. PEOPLE v. CARLTON. 40 Am. Rep. 112.**

In a trial for homicide, where the killing is admitted, testimony as to statements of deceased before his meeting with defendant, is inadmissible, p. 85.

Cited to same effect in People v. Irwin, 77 Cal. 500, 502; also in People v. Gress, 107 Cal. 463. Cited in People v. Landis, 139 Cal. 431, and State v. Shafer, 22 Mont. 20, holding evidence of such statements improperly admitted.

**57 Cal. 86-88. PEOPLE v. SWINFORD.**

Larceny.—Possession of stolen property, shortly after it left owner's possession, is not sufficient evidence to justify a conviction of larceny, p. 87.

Cited to same effect in People v. Hurley, 60 Cal. 78, S. C. 44 Am. Rep. 58, holding further as to presumptions arising from such possession; People v. Vidal, 121 Cal. 221, but holding such evidence sufficiently corroborated. Note on general subject to Hunt v. Commonwealth, 70 Am. Dec. 450.

**57 Cal. 88-91. PEOPLE v. CUMMINGS.**

Variance in spelling a word in an indictment for forgery will not exclude the instrument from the jury, p. 89.

Cited in People v. Oreileus, 79 Cal. 180, holding further as to variance in names.

Instructions.—The jury may take written instructions to the jury-room with them, p. 90.

Cited to this effect in Scoville v. Salt Lake City, 11 Utah, 67.

**57 Cal. 92-93. EX PARTE AH TOY.**

Municipal Ordinance requiring peddlers to pay a license tax, is a proper police regulation under the laws of the state, p. 93.

Cited to same effect in Ex parte Pfirrmann, 134 Cal. 147, construing "license tax" as used in section 3368, Political Code; In re Stuart, 61 Cal. 375, as to license to sell liquor; also In re Guerrero, 69 Cal. 92, on same point; Ex parte Campbell, 74 Cal. 26, S. C. 5 Am. St. Rep. 423, holding further, that an ordinance prohibiting the sale or giving away of spirituous liquors is within the power of a municipality, and not contrary to the constitution of the United States, or any general laws of the state.

**57 Cal. 94-96. EX PARTE WOLFF.**

Murder.—Admission to bail after indictment, p. 95.

See extended note on subject to People v. Pinder, 81 Am. Dec. 88.

**57 Cal. 96-101. PEOPLE v. GILBERT.**

**Verdict.**—Failure to record verdict before discharge of jury is not error that will warrant new trial, p. 98.

Cited to same effect in *Territory v. Harper*, 1 Ariz. 400, holding further, verdict is perfect and complete, on declaration by jury in presence of court that the verdict read by clerk is their verdict; *Walker v. State*, 13 Tex. App. 642, verdicts should receive a reasonable construction. Approved in *People v. Beck*, 58 Cal. 212; *People v. Smith*, 59 Cal. 603, 604; *People v. De Cleer*, 60 Cal. 383, holding, a verdict "guilty as charged in the indictment" is sufficiently clear; *People v. Murback*, 64 Cal. 372, holding further as to clerical mistake in entry of judgment; *People v. Smalling*, 94 Cal. 119, but stating the only court procedure is to adhere strictly to the statute; *State v. Depositor*, 21 Nev. 118. Distinguished in *People v. Cummings*, 117 Cal. 500, holding further, as to what a verdict must contain.

**57 Cal. 102-104. PEOPLE v. CAR SOY.**

**Juror—Examination.**—It is proper to question a juror to discover whether he is biased against the defendant, p. 103.

Followed in *Han Tin*, 57 Cal. 142. Cited in *People v. Plyler*, 126 Cal. 381, sustaining question asked on voir dire examination; *People v. Hamilton*, 62 Cal. 382, where the dicta in *People v. Car Soy*, to the effect that a juror may be questioned for the purpose of determining whether he shall be peremptorily challenged, is disapproved. Approved in *Pinder v. State*, 27 Fla. 376, S. C. 28 Am. St. Rep. 78, holding it is proper to ask juror, "Can you give defendant [a negro] as fair and impartial a trial as you could a white man?" Approved in *Basye v. State*, 45 Neb. 271, 272, on the question of examination in order to challenge peremptorily.

**57 Cal. 104-107. PEOPLE v. TISDALE.**

**Criminal Law—Construction of Statutes.**—Penal statutes should be strictly construed and all doubts resolved in favor of the accused, p. 107.

Cited to same effect in *Ex parte Kohler*, 74 Cal. 44.

**Same.**—Proceeding by Information cannot be sustained for offense committed before repeal of an act requiring an indictment, p. 106.

Distinguished in *People v. McNulty*, 93 Cal. 440, holding further as to section 329 of the Political Code. Approved in *McCarty v. State*, 1 Wash. 380, S. C. 22 Am. St. Rep. 153. Distinguished in *In re Wright*, 3 Wyo. 485, S. C. 31 Am. St. Rep. 101, holding, unless prohibited by constitution, the legislature may change modes of procedure at will.

**Same—Construction of Statute.**—Section 329, Political Code, p. 106.

Cited in *Spears v. County of Modoc*, 101 Cal. 307, holding, further, section 329 of the Political Code does not apply to municipal ordinances.

Cited in *Huffman v. Hall*, 102 Cal. 31, as to the effect of the re-enactment of a statute on the old statute. See note to *Wharton v. State*, 94 Am. Dec. 218.

57 Cal. 108-111. **PEOPLE v. WILLIAMS.**

**Criminal Law—Larceny.**—Evidence necessary to convict, p. 109.

Cited in *State v. Cardelli*, 19 Nev. 324; note to *Hunt v. Commonwealth*, 70 Am. Dec. 450.

57 Cal. 111-115. **PEOPLE v. JAMARILLO.** See *Palmer v. State*, 9 Wyo. 46.

**Criminal Law—Accessory.**—p. 111.

Note on subject to *State v. Hildreth*, 51 Am. Dec. 373.

57 Cal. 115-130. **PEOPLE v. IAMS.**

**Criminal Law—Threats.**—A previous threat alone, will not justify a homicide, p. 127.

Cited to this effect in *People v. Westlake*, 62 Cal. 306. See lengthy note on subject to *Campbell v. People*, 61 Am. Dec. 53.

**Jury.**—Manner of selecting explained. p. 124.

Cited with approval in *People v. Riley*, 65 Cal. 108.

**Instruction as to self-defense**, p. 126.

Approved and adopted in *People v. Guidice*, 73 Cal. 228. Cited in *People v. Williams*, 73 Cal. 535. Approved in *People v. Glover*, 141 Cal. 237; *People v. Powell*, 87 Cal. 364; also in *People v. Bruggy*, 93 Cal. 483, 484, where a number of cases bearing on the subject are discussed. Cited in *People v. Lewis*, 117 Cal. 191; S. C. 59 Am. St. Rep. 170, disapproving that part of the instruction relating to the duty of one attacked to retreat; *State v. Wong Fun*, 22 Nev. 341. Cited in *People v. Newcomer*, 118 Cal. 272, which case follows *People v. Lewis*, supra; note to *People v. Pearl*, 15 Am. St. Rep. 308.

57 Cal. 130-132. **PEOPLE v. SMITH.**

**Instructions** will not be held erroneous unless erroneous under every conceivable state of facts, p. 131.

Cited to same effect in *Carpenter v. Ewing*, 76 Cal. 488; also in *People v. Donguli*, 92 Cal. 609; *State v. Mason*, 24 Mont. 344, noted under *People v. Levison*, 16 Cal. 98; *Walker v. Superior Court*, 135 Cal. 374, noted under *People v. Donohue*, 45 Cal. 321. See note to *People v. Levison*, 76 Am. Dec. 507, also to *People v. King*, 87 Am. Dec. 102.

**Insanity—Presumption.**—An unqualified instruction as to presump-

tion of continuance of insanity, where temporary insanity is proved, is erroneous, p. 132.

Cited with approval in *People v. Schmidt*, 106 Cal. 54.

**57 Cal. 137. TREADWAY v. JAMES.**

**Damages.**—Nonsuit should not be granted where nominal damages are shown, p. 137.

Cited in *Pacific etc. Co. v. W. U. Tel. Co.*, 123 Cal. 431, noted under *Parks v. Alta etc. Co.*, 13 Cal. 422.

**57 Cal. 138-139. SMITH v. KENFIELD.**

**Constitutional Law.**—Writ of mandamus will not be granted to compel the allowance of a greater salary than is fixed by the constitution, p. 138.

Distinguished in *Smith v. Dunn*, 64 Cal. 165.

**57 Cal. 140. MEEKER v. HOFFER.**

**Appeal—Transcript.**—Certificate of clerk approved, p. 140.

Cited in *Downing v. Rademacher*, 136 Cal. 675, approving similar certificate as to filing of bond.

**57 Cal. 141. GRANT v. WHITE.**

**Deed of Married Woman.**—Notary's certificate is conclusive as to facts stated in it, p. 141.

Cited to this effect in *De Arnaz v. Escandon*, 59 Cal. 489; also in *Banning v. Banning*, 80 Cal. 274, S. C. 13 Am. St. Rep. 158; but may be impeached for fraud.

**57 Cal. 144-145. EVERSON v. MAYHEW.**

Complaint contains necessary averments to an action in ejectment (case is not fully reported), p. 144.

Cited in *Everson v. Mayhew*, 85 Cal. 6; also in *Watson v. Sutro*, 86 Cal. 527, to the effect that equitable estates descend.

**57 Cal. 145-147. PEOPLE v. HURLEY.**

**Criminal Law—Instructions.**—An instruction containing a hypothetical suggestion of defendant's guilt is erroneous, p. 146.

Cited to this effect in *People v. Lanagan*, 81 Cal. 144; *People v. Matthai*, 135 Cal. 448, noted under *People v. Williams*, 17 Cal. 142. Note to *Sharp v. State*, 14 Am. St. Rep. 40.

**57 Cal. 147. PEOPLE v. SPRAGUE.**

**Remittitur.**—When a remittitur has regularly issued, without inadvertence, it cannot be recalled, p. 147.

Cited to same effect in *People v. McDermott*, 97 Cal. 248, holding the jurisdiction of the supreme court is at an end; also in *In re Levinson*, 108 Cal. 459, stating the exceptions. See extended note on subject to *Legg v. Overbach*, 21 Am. Dec. 119.

**57 Cal. 150-151. BROWNELL v. FISHER.**

**Trespass—Agency.**—Fact that defendant was acting for another, who had no rights on the premises, does not excuse a trespass, p. 151.

Cited in *Burnett v. Fisher*, 57 Cal. 152.

**57 Cal. 152. BURNETT v. FISHER.**

**Agency.**—Manner of proving, p. 152.

Cited in *Puget Sound Lumber Co. v. King*, 89 Cal. 243, to the effect that agency may be proved by circumstantial evidence; also, to same effect, in *Bergtholdt v. Porter Bros. Co.*, 114 Cal. 688.

**57 Cal. 153. PEOPLE v. McCUNE (not reported).**

**Constitutional Law.**—The legislature has no power to validate a void assessment.

Cited to this effect in *Fanning v. Schammel*, 68 Cal. 430. Cited in *Simpson v. Kansas City*, 46 Kan. 448, on the subject of assessments and taxing districts; note to *People v. Seymour*, 76 Am. Dec. 529.

**57 Cal. 154. PEOPLE v. GUANCE.**

**Criminal Law—Instructions—Murder.**—The instructions in this case held to be erroneous—no reasons given, p. 154.

Cited in *State v. Wong Fun*, 22 Nev. 341, holding, further, as to when a killing must be wilful, deliberate, and premeditated, in order to constitute murder in the first degree.

**57 Cal. 157-160. SMITH v. FARGO.**

**Bonds.**—The recitals in bonds are conclusive of the facts stated, p. 159.

Cited to same effect in *Pierce v. Whiting*, 63 Cal. 540, as to parties to the undertaking; also in *Ogden v. Davis*, 116 Cal. 37, and such recitals need not be averred in the complaint. Distinguished in *Murphy v. Montandon*, 2 Idaho, 1051 S. C. 35 Am. St. Rep. 281. Approved in *Easton v. Driscoll*, 18 R. I. 321.

**Attachment—Undertaking.**—Section 552 of the Code of Civil Pro-

cedure does not apply to undertakings not given in pursuance to sections 540 or 555 of the code, p. 159.

Cited in *Brownlee v. Riffenburg*, 95 Cal. 449, holding further as to procedure, when undertaking is given under sections 540 and 555 of the Code of Civil Procedure.

A bond is not void for not conforming to the form of the statute, provided the statute does not forbid any other form, p. 159.

Cited with approval in *Easton v. Driscoll*, 18 R. I. 321. *Johnson v. Dun*, 75 Minn. 540, holding bond for release of attachment, enforceable as common-law bond.

#### 57 Cal. 160-179. OMNIBUS RAILROAD COMPANY v. BALDWIN.

**Constitutional Law.**—A general law must have a uniform operation, p. 165.

Approved in *Miller v. Kister*, 68 Cal. 145. Distinguished in *People v. Henshaw*, 76 Cal. 445, holding an act is not unconstitutional because, under peculiar facts, it takes effect in different localities at different times. Approved in *People v. Central Pacific Ry.*, 83 Cal. 414, holding further as to amendments to general laws; *Ex parte Clancy*, 90 Cal. 558, holding the clause in Insolvency Act permitting appeal from an order adjudging a person guilty of contempt is invalid; *Home for Inebriates v. Reis*, 95 Cal. 150; *Henderson v. State*, 137 Ind. 579, dissenting opinion of McCabe, J.

**Franchise—Construction of Statute.**—Under section 499 of the Civil Code but one corporation can be granted a franchise to lay track on any particular street, p. 178.

Cited with approval in *Pacific Ry. Co. v. Wade*, 91 Cal. 454, S. C. 25 Am. St. Rep. 205, holding, further, as to rights of different companies to use the same track; note on "Right of one street railway company to use track of another," to *Western v. Street R. R. Co.*, 25 Am. St. Rep. 478.

**Same.—Forfeiture.**—Statute relating to, construed, p. 169.

Cited in *Commercial Electric Company v. Tacoma*, 17 Wash. 670, where the subject is discussed at considerable length; note to *Atchison Street Ry. Co. v. Nave*, 5 Am. St. Rep. 807.

#### 57 Cal. 180-184. PACKARD v. JOHNSON.

**Adverse Possession—Ouster.**—Findings of probative facts is not a sufficient finding of ouster, p. 183.

Cited to same effect in *Oneto v. Restano*, 78 Cal. 376; also in *Gage v. Downey*, 79 Cal. 159.

**Cotenants—Ouster.**—What constitutes ouster of one tenant by his cotenant, p. 183.

Cited in *Gage v. Downey*, 94 Cal. 253, holding, further, as to constructive notice of ouster; *Fuller v. Swensberg*, 106 Mich. 316, 317; S. C. 58 Am. St. Rep. 486, 487, holding an entry under a quitclaim deed given by one tenant may operate to oust his cotenants, and holding further on the general subject; note to *Carpentier v. Mendenhall*, 87 Am. Dec. 138.

57 Cal. 184-189. **HIDDEN v. JORDAN.** S. C. 21 Cal. 92; 28 Cal. 301; 32 Cal. 397; 39 Cal. 61; 51 Cal. 138.

57 Cal. 193-197. **EARLY v. REDWOOD CITY.**

**Attachment—Garnishment.**—It is essential to the attachment of property or garnishment of credit, that the property or credit exist, p. 195.

Cited to same effect in *Maier v. Freeman*, 112 Cal. 13. S. C. 53 Am. St. Rep. 154, holding, further, as to rights of garnishee and attaching creditor in same property; *Marble Falls Ferry Co. v. Spitler*, 7 Tex. Civ. App. 85, and credit may be garnisheed, if the debt is certain, although not yet due.

57 Cal. 197-201. **SEATTLE COAL ETC. CO. v. THOMAS.**

**State Insolvency Act** may be passed while federal act is in force but is suspended by the latter, p. 200.

Cited in *Byrne v. Drain*, 127 Cal. 667, discussing effect of general laws on city charters under constitution.

**Constitutional Law—Insolvency Act** passed during the existence of the federal statute on that subject was not void, but remained inoperative until repeal of federal statute, p. 200.

Approved in *Smith v. Creditors*, 59 Cal. 268, holding further, the act applies to debts contracted during its suspension.

57 Cal. 201-204. **COBURN v. AMES.**

**Receiver.**—Order of court to receiver held erroneous, p. 204.

Cited in *Coburn v. Goodall*, 72 Cal. 503, S. C. 1 Am. St. Rep. 77, to show facts in the case; also, to same effect, in *Coburn v. Ames*, 80 Cal. 244.

57 Cal. 205-208. **HARNEY v. APPELGATE.**

**Street Assessment—Pleading.**—In an action to enforce a street assessment it is necessary to make all the joint owners of a lot parties to the action, p. 207.

Cited to same effect in *Driscoll v. Howard*, 63 Cal. 440, and a decree to foreclose the lien cannot be entered unless all the parties are before-

the court; also in *Robinson v. Merrill*, 87 Cal. 13. Distinguished in *Parker v. Altschul*, 60 Cal. 381, holding where the record shows no objection to the omission of certain owners as defendants, it will be presumed that the action was dismissed as to them with consent of defendants named.

**57 Cal. 208-210. WOOD v. CURRY.**

**Limitation.**—"Liability" defined, p. 209.

Cited in *Miller v. Kern etc. Co.*, 134 Cal. 588, applying definition under section 16, article 12 of constitution.

**Torts.**—Statute of limitation begins to run from time of the alleged breach of duty, p. 210.

Cited with approval in *Taylor v. Bidwell*, 65 Cal. 491; also in *Raynor v. Mintzer*, 72 Cal. 590; *McKusker v. Walker*, 77 Cal. 212, and period of limitation is two years; *Latin v. Gillette*, 95 Cal. 319; S. C. 29 Am. St. Rep. 117; *Yore v. Murphy*, 18 Mont. 346, holding, further, as to when the statute begins to run, where knowledge of the breach of duty is an element in the case.

**Same.**—Damages which result from a tort do not constitute separate causes of action, p. 210.

Cited to same effect in *Hawthorne v. Siegel*, 88 Cal. 166; S. C. 22 Am. St. Rep. 296.

**57 Cal. 211. APPEL v. HIS CREDITORS.**

**Insolvency.**—Construction of statute, p. 211.

Distinguished in *Frankel & Co. v. Creditors*, 20 Nev. 56.

**57 Cal. 215-220. THOMAS v. MOODY.**

**Agency.**—Facts sufficient to constitute agency, p. 219.

Cited with approval in similar case in *Dashaway Association v. Rogers*, 79 Cal. 212, 213. Cited in *Bogart v. Crosby*, 80 Cal. 197.

**Same.**—Fact that vendor in dealing with agent knew nothing about the existence of agency, does not release the principal from liability, p. 219.

Cited to same effect in *Puget Sound Lumber Co. v. Krug*, 89 Cal. 244.

**57 Cal. 221-224. ZIMMLER v. SAN LUIS WATER COMPANY.**

**Water.**—Grant of right of way to conduct water over grantor's land does not convey right to divert water on grantor's land, p. 322.

Cited in *Smith v. Denniff*, 24 Mont. 26, discussing effect of appropriation.

**Estoppel.**—Admissions in a deed must be clear and certain in order to estop a grantor from denying them, p. 223.

Cited on this point in *Lux v. Haggins*, 69 Cal. 359.

#### 57 Cal. 224-226. GONZALES v. BROAD.

**Broker** may recover commission where prospective purchaser's only ground of refusal is seller's failure to give good title, p. 225.

Cited to same effect in *Maxon v. Jones*, 128 Cal. 81, noted under *Phelan v. Gardner*, 43 Cal. 306; *Birmington Land Co. v. Thompson*, 86 Ala. 150, holding broker has fully performed his part of the transaction, when he has secured a purchaser able and willing to buy; *Peet v. Sherwood*, 43 Minn. 449, loan broker, holding further as to implied conditions; *Love v. Owens*, 31 Mo. App. 510, and the case appears to hold, further, the broker may recover even if vendee is the cause of failure to consummate the sale; *Cheatham v. Yarbrough*, 90 Tenn. 79; *Smith v. Schiele*, 93 Cal. 150; *Gunn v. Bank of California*, 99 Cal. 352; *Oullahan v. Baldwin*, 100 Cal. 660; *Martin v. Ede*, 103 Cal. 161, and note to *Walker v. Osgood*, 93 Am. Dec. 176.

#### 57 Cal. 226-232. O'NEIL v. DONAHUE.

Cost-bill filed more than five days after prevailing party has received notice of decision is too late, p. 231.

Cited with approval and followed in *Mallory v. See*, 129 Cal. 359, discussing waiver of service of notice of decision; *Mullally v. Benevolent Society*, 69 Cal. 561, although in this case no notice of the decision was served by adverse party; also in *Dow v. Ross*, 90 Cal. 563, but intimating that relief will be granted for excusable neglect. Cited in *Forni v. Yoell*, 99 Cal. 178, on the question of waiver of notice. Approved in *Cantwell v. McPherson*, 2 Idaho, 1047.

#### 57 Cal. 232-233. LADD v. PARRELL.

**Sureties—Constitutional Law.**—Section 942 of the Code of Civil Procedure is not unconstitutional, p. 233.

Cited to same effect in *Meredith v. S. C. M. A. of Baltimore*, 60 Cal. 620, holding, further, sureties are not entitled to notice of application for judgment against them. Cited in *Davis v. Heimbach*, 75 Cal. 263, holding, further, as to notice necessary when surety seeks contribution from his cosureties.

#### 57 Cal. 234-237. DYER v. BROGAN.

**Street Assessment—Demand.**—The affidavit of demand, in an action to foreclose a street assessment, is competent evidence to prove the demand, p. 237.

Cited to same effect in *Deady v. Townsend*, 57 Cal. 299; also in *Buckman v. Landers*, 111 Cal. 349.

**Appeal.**—The supreme court will not find facts from the evidence, p. 238.

Approved in *Ede v. Knight*, 93 Cal. 166, holding where evidence does not support the findings, the case must be remanded for new trial.

#### 57 Cal. 238-242. ESTATE OF PAGE.

The administrator has no power to make a contract with an attorney to give him a portion of the property of the estate for services performed in behalf of the estate, p. 241.

Cited in *Tucker v. Grace*, 61 Ark. 412, holding, further, an attorney employed by an administrator has no claim against the estate; *Briggs v. Breen*, 123 Cal. 659, on point that administrator is personally liable for his attorney's fees; *Estate of Willard*, 139 Cal. 505, but holding administrator entitled to allowance for broker's commissions on sale of estate property; *Rickel v. Chicago etc. Co.*, 112 Iowa, 153, holding void an administrator's contract for contingent fee; note to *Fletcher v. American etc. Co.*, 78 Am. St. Rep. 202, on general subject; dissenting opinion of McKee, J., in *Cole v. Superior Court*, 63 Cal. 95, to the effect that a guardian cannot make a contract with an attorney which will be binding on the estate of his wards. See note to *Ellicott v. Chamberlin*, 48 Am. Rep. 333; also, to *Schlicker v. Hemenway*, 52 Am. St. Rep. 122.

**Contract.**—Any contract made by administrator for the sale or transfer of property of the estate, not authorized by the court, is ultra vires and void, p. 241.

Approved in *Estate of Moore*, 72 Cal. 342, holding claims for unnecessary expenditures should not be allowed; also, in *Maddock v. Russell*, 109 Cal. 424, and administrator has no power, without authority of the court, to extend the time for payment of a debt owed the estate; *Moffet v. Rosencrans*, 136 Cal. 418, noted under *Dwinelle v. Henriquez*, 1 Cal. 392; *Thomas v. Moore*, 52 Ohio St. 205, "the executor has no power to create a liability not founded upon a contract or obligation of the testator."

**Judgment-roll**, in proceedings to settle account of administrator, defined, p. 240.

Cited to this point in *Miller v. Lux*, 100 Cal. 612.

**Appeal—Exceptions.**—Manner of taking exceptions where action is tried without jury, and court refuses to adopt a principle of law suggested by counsel, p. 239.

Cited in *Lamb v. Harbaugh*, 105 Cal. 693, where the suggestion is not approved.

**Same.**—Where exception is taken on ground of insufficiency of evidence, the particulars in which it is insufficient should be stated, p. 239. Distinguished in *In re Levinson*, 108 Cal. 455.

**57 Cal. 242-244. NASH v. HARRIS.**

**Appeal.**—Presumption of appellate court is that the decision in the court below was correct, p. 242.

Cited to this effect in *Skinner v. Horn*, 144 Cal. 280, presuming regularity of new trial order as to papers upon which it was based in absence of showing contra; *Strathern v. Dakin*, 63 Cal. 479, in absence of record of proceedings below, this presumption is conclusive; *Larkin v. Larkin*, 76 Cal. 324; *McKay v. Farr*, 15 Utah, 265.

**Bill of Exceptions.**—Where party excepts to a decision he must by bill of exceptions, or some other equivalent judicial authentication, show the matters upon which the decision was made, p. 243.

Cited to this effect in *Barber v. Briscoe*, 8 Mont. 224; *Kleinschmidt v. McDermott*, 12 Mont. 312, holding, further, as to when bill of exceptions may be dispensed with; *Ferrel v. Oregon Gold Co.*, 31 Or. 474; *Guthrie v. Phelan*, 2 Idaho, 92, holding the rule applies as well where party is deemed in law to have accepted. Cited in *Mining Co. v. Weinstein*, 7 Mont. 352, holding that decisions which are excepted to in law do not always require a bill of exceptions.

**Unauthenticated Papers**, in absence of bill of exceptions, cannot be considered on appeal, p. 244.

Cited to this effect in *Fish v. Benson*, 71 Cal. 432, as to unauthenticated affidavits; dissenting opinion of Temple, J., in *Heffron v. Bowers*, 72 Cal. 275. Cited in *Herlich v. McDonald*, 80 Cal. 476, where it was held, that papers on appeal can only be authenticated in the way prescribed by statute; and *Somers v. Somers*, 81 Cal. 609, which follows *Herlich v. McDonald*, *supra*. Cited in *Fitzpatrick v. Fitch and Pickering*, 83 Cal. 491, holding the certificate of the clerk appended to the transcript is not a sufficient authentication. Approved in *Mining Co. v. Weinstein*, 7 Mont. 352, but holding further as to when a bill of exceptions is not required. Approved in *McKay v. Farr*, 15 Utah, 265, as to affidavits not identified as having been used on motion for new trial; note to *Lanfear v. Mestier*, 89 Am. Dec. 688. Cited in *Hawley v. Kocher*, 123 Cal. 80, as to order striking out part of pleading. Distinguished in *Simmons etc. Co. v. Alturas Com. Co.*, 4 Idaho, 390, attorneys of record may certify that transcript on appeal contains correct copies of all papers used on hearing of motion below.

**57 Cal. 247-250. AVERY v. SUPERIOR COURT.**

**Mandamus** lies to compel a court to proceed, after an invalid order staying proceedings from which no appeal lies, p. 249.

Cited with approval in *Dunphy v. Belden*, 57 Cal. 429, holding the superior court has no power of discretion to refuse to try an action until judgment in another action in another court of the state; *Morrison, C. J., and Thornton, J., dissent, and hold Avery v. Superior Court to be not in point*. Cited in *Town of Hayward v. Pimental*, 107 Cal. 390, holding mandamus is the proper proceeding to compel a recorder to perform a ministerial duty. Approved in *Hughan v. Grimes*, 62 Kan. 263, noted under *Rhodes v. Craig*, 21 Cal. 419; *State v. Hart*, 19 Utah, 444 (quoted in *Crooks v. District Court*, 21 Utah, 108), granting writ to compel impanelment of legal jury; *Bank v. Superior Court*, 14 Wash. 698, where the proceedings were stayed for an indefinite period; note to *Caperton v. Schmidt*, 85 Am. Dec. 211.

**57 Cal. 251-254. LECK v. ANDERSON.** 40 Am. Rep. 115.

**Constitutional Law.—Confiscations without a judicial hearing and judgment are void**, p. 254.

Cited in *Newman v. People*, 23 Colo. 307, holding an act authorizing sheriffs to seize property used for gambling, without giving notice to the owner, is valid. Approved in *Loesch v. Koehler*, 144 Ind. 281, as to an act authorizing agents of a humane society to kill abandoned or injured animals running at large. Distinguished in *Craig v. Werthmueller*, 78 Iowa, 605, holding a statute authorizing the destruction of liquors found in a place adjudged to be a nuisance is constitutional. Disapproved in *Lawton v. Steele*, 152 U. S. 143, a case similar to *Leck v. Anderson*. Cited in *In re Grice*, 79 Fed. Rep. 640, where the subject of "police regulations" is discussed; *Alabama etc. R. Co. v. Arnold*, 80 Ala. 605. See note on constitutional guaranty of "due process of law," to *Flint Steamboat Co. v. Foster*, 48 Am. Dec. 271, and, *idem*, p. 275, note on "summary seizure of property used in violation of law."

**57 Cal. 254-256. RAVENTAS v. GEEN.**

**Attachment.—Growing Crop is personal property not capable of manual delivery, but is subject to attachment**, p. 256.

Cited in *Rudolph v. Saunders*, 111 Cal. 235, holding, further, as to how the attachment must be made in order to be a valid levy; also in *McClellan v. Krall*, 43 Kan. 218, holding the purchaser of a growing crop under an attachment and execution sale is entitled to ingress and egress for the purpose of harvesting the crop, and incurs no liability to the owner of the land for use and occupation; *Wilson v. Harris*, 21 Mont. 388, 397, construing local statutes on garnishment; note to *Davis v. McFarlane*, 99 Am. Dec. 344.

**57 Cal. 257-260. ESTATE OF HOLBERT.**

**Estoppel.—Verdict or findings cannot operate as res adjudicata in absence of judgment**, p. 260.

Note to *Lea v. Lea*, 96 Am. Dec. 783.

Notes Cal. Rep.—181.

**Separate Property.**—Subject discussed, p. 259.

Cited in *Schuyler v. Broughton*, 70 Cal. 285, holding, further, as to property purchased by a married woman in her own name.

**57 Cal. 261-267. DOLAN v. SCANLAN.**

**Real Estate Broker** must find a purchaser ready and willing to complete the purchase on the terms agreed on, in order to entitle him to his commission, p. 266.

Cited with approval in *Waterman v. Boltinghouse*, 82 Cal. 659, where it is held a broker has no claim for commissions where owner makes the sale himself, although broker was given exclusive right to sell; also in *Fiske v. Soule*, 87 Cal. 321, holding, further, broker may recover his commission though vendor refuse to consummate the sale; *Smith v. Schiele*, 93 Cal. 149, but if failure to consummate sale is chargeable to purchaser, broker is not entitled to commission; *Oullahan v. Baldwin*, 100 Cal. 661, and broker is entitled to commission if he find party willing and able to purchase, although owner sells to some other party; *Plant v. Thompson*, 42 Kan. 667; S. C. 16 Am. St. Rep. 513; *Hill v. Jebb*, 55 Ark. 576, holding, further, the owner always reserves the right to make a sale in person; *Mullen v. Bower*, 22 Ind. App. 302, holding agent not entitled under facts stated; *Scott v. Clark*, 3 S. Dak. 491. See note to *Walker v. Osgood*, 93 Am. Dec. 176.

**57 Cal. 269. LE CONTE v. BERKELEY.**

**Prohibition.**—Writ of does not run to ministerial officer, p. 269.

Cited to same effect in *Hull v. Superior Court*, 63 Cal. 179, and further, "not to set aside judicial acts already done"; also in *Hobart v. Tillson*, 66 Cal. 212; *Coronado v. San Diego*, 97 Cal. 442, holding the only purpose of the writ is to restrain threatened judicial acts.

**57 Cal. 270-272. URTON v. PRICE.**

A release of one tort feasor releases all, p. 272.

Cited to same effect in *Tompkins v. Clay Street Ry.*, 66 Cal. 166; *Aigeltinger v. Whelan*, 133 Cal. 113, but holding release of sureties on attachment bond not to affect liability of sureties on sheriff's bond for his acts in the levy; *Donaldson v. Carmichael*, 102 Ga. 43, holding joint tort-feasor so released; *Dawson v. Schloss*, 93 Cal. 199, holding, further, as to effect of new trial and judgment as to one defendant; *Butler v. Ashworth*, 110 Cal. 619, holding where injured party sues and recovers against one joint tort feasor his remedy is at an end; *Chetwood v. California National Bank*, 113 Cal. 427. Approved in *Wardell v. McConnell*, 25 Neb. 560, but holding, the discharge of a party not shown to be a wrongdoer will not operate as a release of other defendants; *Bryant v. Reed*, 34 Neb. 722. Cited in extended note on general subject to *Seither v. Philadelphia Traction Co.*, 11 Am. St. Rep. 907, 908.

**57 Cal. 273-274. ESTATE OF POST.**

Guardian is responsible for funds of his ward loaned without proper security, p. 274.

Cited with approval in *Line v. Lawder*, 122 Ind. 551, holding further as to what circumstances will exonerate a guardian from loss on account of insolvent securities; also in *Coleman v. Peckham*, 136 Ind. 205.

**57 Cal. 274-280. ESTATE OF GHARKY.**

Contest of Will.—The facts relied upon to show conclusions of law which would be grounds for setting aside a will, must be pleaded, p. 279.

Cited in *Estate of Gregory*, 133 Cal. 137, on point that burden of proof is on contestant; *Goodwin v. Goodwin*, 59 Cal. 561, although the case is decided on other grounds. Approved in *In re Burrell*, 77 Cal. 481.

Conflict in instructions, which could not operate injuriously to appellant, is not ground for reversal, p. 280.

Cited to this effect in *Dennison v. Chapman*, 105 Cal. 458. Cited in *Estate of Dalrymple*, 67 Cal. 445, 446, but the decision is so obscure that it is difficult to tell to what point.

**57 Cal. 282-283. ESTATE OF KIDDER.**

Will, Lost or Destroyed.—Necessary allegations for probate of, p. 283.

Cited with approval in *Estate of Harris*, 10 Wash. 557, holding an allegation that "deceased left a will" is equivalent to an allegation that a will was in existence at time of death of deceased; note to *Tynan v. Paschal*, 84 Am. Dec. 630.

**57 Cal. 284. DYER v. CHASE.**

Findings.—Judgment not based on findings is error, p. 284.

Approved in *Oakland Paving Co. v. Bagge*, 79 Cal. 441, holding further, judgment will be awarded without a new trial, when a correct conclusion of law upon the findings will justify such course.

**57 Cal. 285-292. GREENBAUM v. TURRILL.**

A verified answer setting up a substantial defense, cannot be stricken out as sham, p. 292.

Cited to same effect in *Lybecker v. Murray*, 58 Cal. 188; also, in *Loranger v. Big Missouri Mining Co.*, 6 S. Dak. 481, and an answer equivalent to a general denial, though not so in form, is subject to the same rule; *Continental Bldg. & Loan Assn. v. Boggess*, 145 Cal. 34, applying rule in foreclosure of mortgage; *King v. Waite*, 10 S. Dak. 5, noted under *Fay v. Cobb*, 51 Cal. 315; *Stokes v. Farnsworth*, 99 Fed.

838, noted under *Piercy v. Sabin*, 10 Cal. 22, 70 Am. Dec. 698; *People v. McCumber*, 72 Am. Dec. 524.

**57 Cal. 293-297. O'CONNOR v. FLYNN.**

**Executor—Trustee.**—Executor purchasing property from bidder prior to confirmation and report of sale, must account to heirs as trustee, p. 296.

Cited to this effect in *Wingerter v. Wingerter*, 71 Cal. 110; *Golson v. Dunlap*, 73 Cal. 159, holding, further, such sale is voidable at the election of the cestui que trust without reference to the question of the adequacy of the price.

**Supreme Court.—Power to Modify Judgment**, p. 294.

Cited in *Niles v. Edwards*, 95 Cal. 46, as authority for power of supreme court in department to modify a judgment rendered in department.

**Objections to assessment cannot be first raised on appeal**, p. 298.

Cited in *Lambert v. Marcuse*, 137 Cal. 47, as to objections not raised on motion for new trial; *Mutual L. Ins. Co. v. McGrew*, 188 U. S. 309, federal question first raised on petition for rehearing in highest state court is too late to confer jurisdiction on supreme court of United States.

**57 Cal. 298-300. DEADY v. TOWNSEND.**

**Street Assessment—Incidental Expenses.**—An objection to incidental expenses cannot be made for first time in the supreme court, p. 299.

Cited to same effect in *Williams v. McDonald*, 58 Cal. 529.

**Same—Demand.**—The affidavit of demand, provided in the act of April 1, 1872, is sufficient proof of demand, p. 299.

Cited in *Ede v. Knight*, 93 Cal. 164, holding, the verified return of the contractor is *prima facie* evidence of the facts stated therein.

**Street Assessment.**—Resolution of intention held sufficient as to description of work, p. 299.

Criticised in *Schwiesau v. Mahon*, 128 Cal. 118, holding resolution insufficient and not aided by later specifications.

**57 Cal. 301. CORDOR v. MORSE.**

**New Trial.**—Court may make its order granting a new trial conditional, p. 301.

Cited to this effect in *Garoutte v. Haley*, 104 Cal. 501; also in *Brooks v. S. F. & N. P. Ry. Co.*, 110 Cal. 176.

**57 Cal. 309-310. AYRES v. PALMER.**

Power of Attorney to mortgage held sufficient to include agent's acts thereunder, p. 310.

Distinguished in *Arlington etc. Bank v. Paulsen*, 57 Neb. 736, 737, discussing executor's power to mortgage under terms of will and facts stated.

**57 Cal. 316-317. PEOPLE v. JACKSON.****Criminal Law.—Instructions.**

Cited, but not in point, in *People v. Beck*, 58 Cal. 214; *People v. Griffith*, 146 Cal. 346, where at request of jury in prosecution for assault with intent to murder, court instructs correctly as to penalty for assault with deadly weapon, it is not ground for reversal of conviction for lesser crime; *Boggs v. United States*, 10 Okla. 433.

**57 Cal. 320-322. PANCOAST v. PANCOAST.****Community Property.**

Cited in note on subject to *Cooke v. Bremond*, 86 Am. Dec. 635.

**57 Cal. 323-325. McNEIL v. POLK.**

The possession of one who does not hold in hostility to the title about to be conveyed, does not put the purchaser on his inquiry concerning unknown equities against such title, p. 324.

Cited to this effect in *McNeil v. Congregational Society*, 66 Cal. 110; *Schumacher v. Truman*, 134 Cal. 433, and *Ellison v. Torpin*, 44 W. Va. 432, noted under *Smith v. Yule*, 31 Cal. 180.

**57 Cal. 325-326. McDONALD v. McCONKEY.**

Practice.—Where there is an appeal from a judgment, and from an order dismissing a motion for a new trial, an affirmance of the former and reversal of the latter does not prevent the court below from setting aside the judgment and granting a new trial, p. 326.

Cited in *Sharon v. Sharon*, 79 Cal. 655, holding where there are two appeals in the same case, the whole case is under the control of the supreme court until the whole is disposed of. Approved in *Sharon v. Sharon*, 79 Cal. 691. Cited in *Lee Doon v. Tesh*, 131 Cal. 408, on point that order dismissing motion for new trial is appealable; *Knowles v. Thompson*, 133 Cal. 247, and *Brooks v. Syndicate*, 24 Nev. 322; noted under *Towdy v. Ellis*, 22 Cal. 659; *Carter v. Lothian*, 133 Cal. 455, noted under *Spanagel v. Dellinger*, 38 Cal. 284; *Fuller v. United States*, 182 U. S. 573, noted under *Carpentier v. Williamson*, 25 Cal. 154.

Conversion.—An allegation of attorney's fees as an element of damages will be regarded as surplusage, p. 326.

Cited in *Greenbaum v. Martinez*, 86 Cal. 462, holding, in an allegation that "one hundred dollars was expended as attorney's fees in the pursuit of the property," the words "attorney's fees" will be treated as surplusage, leaving an allegation of the expenditure of the stated amount in pursuit of the property; *Hays v. Windsor*, 130 Cal. 236, quoting *Spooner v. Cady* (Cal.) 44 Pac. 1018; *Bank v. Pacific Postal etc. Co.*, 103 Fed. 848, allowing attorney's fees under Civil Code, section 3336; but cf. S. C., 109 Fed. 378, ruling aliter.

#### 57 Cal. 327-330. KELLOG v. PACIFIC BOX FACTORY.

**Promissory Note—Protest.**—What constitutes sufficient notice of protest to parties interested, p. 330.

Approved in *Stanley v. McElrath*, 86 Cal. 456, where notice was given to person acting for party to be notified; note on subject to *Tate v. Sullivan*, 96 Am. Dec. 611.

#### 57 Cal. 333-334. HERNANDEZ v. HIS CREDITORS.

**Insolvency—Notice.**—Affidavit of publication must show that the notice to creditors was published at least once a week for four consecutive weeks, p. 334.

Approved in *Godfrey v. Valentine*, 39 Minn. 337, S. C. 12 Am. St. Rep. 658, holding proof of publication "for six consecutive weeks" is insufficient to show publication "once a week" for period named; *Raunn v. Leach*, 53 Minn. 86, but the publications need not be exactly seven days apart; once in each period of seven days is sufficient. See note on "Legal Notice," to *Maddox v. Sullivan*, 44 Am. Dec. 239.

#### 57 Cal. 335-336. HACKETT v. BANK OF CALIFORNIA.

**Pleading—Amendment.**—Plaintiff will not be permitted to amend his complaint so as to change the proceedings from an action *ex delicto* to one *ex contractu*, p. 336.

Cited with apparent approval in *Wheeler v. West*, 78 Cal. 96, holding, further, as to the manner of taking objection to such error; note to *Flanders v. Cobb*, 51 Am. St. Rep. 432. Distinguished in *Frost v. Witter*, 132 Cal. 427, 84 Am. St. Rep. 59, noted under *Ramirez v. Murray*, 5 Cal. 222.

#### 57 Cal. 337-344. MOULTON v. HOLMES.

Trustee has power to compound and discharge debts due to the estate intrusted to his care, p. 344.

Cited in *Hartigan v. Southern Pac. Co.*, 86 Cal. 144, holding executor has such authority with the approval of the court. Approved in *Siddall v. Clark*, 89 Cal. 323, as to executors and administrators; also in *Mul-*

ville v. P. M. L. Ins. Co., 19 Mont. 101; and Trotter v. M. R. F. Assn., 9 S. Dak. 802, dissenting opinion of Fuller, J.; note to Fletcher v. American Ins. Co., 78 Am. St. Rep. 188, on executors.

**Administrators.**—Section 1588 of the Code of Civil Procedure is not restrictive of the common-law powers of administrators and executors, p. 344.

Cited in Maddock v. Russell, 109 Cal. 422, holding the conduct of administrators and executors is not regulated solely by statute.

#### 57 Cal. 345-347. PEOPLE v. FURTADO.

**Witness—Impeachment.**—Where it is sought to impeach the testimony of a witness on the ground of contradiction, it must be shown that the supposed contradiction is relevant to the issue being tried, p. 346.

Cited with approval in People v. Webb, 70 Cal. 121; also in People v. Dye, 75 Cal. 112, and Faulkner v. Rondoni, 104 Cal. 148; Taussig v. Schields, 26 Mo. App. 527.

**Witness for Prosecution in Murder Case** may be asked on cross-examination whether he had agreed to be present and to aid deceased in expulsion of defendant while attempt was made to expel him from premises claimed by deceased, p. 346.

Approved in State v. McCann, 43 Or. 158, though prosecuting witness had testified in chief that he was not armed with pocket-knife. not error to exclude cross-question as to whether he had afterward made statements as to what he would have done had he had a gun instead of a knife.

**Evidence.**—Errors in rulings on, are presumed prejudicial to defendant, p. 347.

Cited in People v. Richards, 136 Cal. 129, noted under People v. Murphy, 47 Cal. 105.

#### 57 Cal. 348. BYRNE v. BYRNE.

**Change of Place of Trial.**—Statute requires a demand in writing, p. 348.

Cited to same effect in Pennie v. Visher, 94 Cal. 326; also in dissenting opinion of Beatty, C. J., to Warner v. Warner, 100 Cal. 17, and in Elam v. Griffin, 19 Nev. 443.

#### 57 Cal. 353-355. ALDERMAN v. KIRKPATRICK.

**Costa.**—Liability of state for, p. 354.

Distinguished in Woods v. Varnum, 85 Cal. 643, case goes off on another point.

**57 Cal. 355. MAYNARD v. MACCRELISH.**

**Summons.**—Where service of summons is by person other than the sheriff, the affidavit of service must state that the person serving was over the age of eighteen years, p. 355.

Cited to same effect in Howard v. Galloway, 60 Cal. 11, and an affidavit which fails to make this statement is insufficient to prove service; also in Weil v. Bent, 60 Cal. 604; Doerfier v. Schmidt, 64 Cal. 265; Lyons v. Cunningham, 66 Cal. 43; Barney v. Vigoureaux, 75 Cal. 377; Horton v. Gallardo, 88 Cal. 582.

**57 Cal. 356-357. MIX v. MILLER.**

**Judgment—Interest.**—In action upon quantum meruit, judgment for plaintiff entitles him to interest from the day his demand became due, p. 357.

Doubted in Cox v. McLaughlin, 76 Cal. 71, S. C. 9 Am. St. Rep. 172, holding, where damages are unliquidated and uncertain, plaintiff is not entitled to interest prior to verdict. Cited in Easterbrook v. Farquharson, 110 Cal. 317, which case follows Cox v. McLaughlin, *supra*.

**57 Cal. 361-363. BAUM v. RAPHAEL.**

**Insolvency.**—Statute dissolving attachment levied within two months of filing of petition is constitutional, p. 362.

Cited in Dennis v. Bank, 127 Cal. 456, 78 Am. St. Rep. 80, sustaining exemption of national banks from state attachments.

**Constitutional Law.**—A subsequent act, which in effect changes or modifies an existing law, is not unconstitutional, p. 363.

Cited in Churchill v. Hill, 59 Ark. 65, to the effect that when a later act is in conflict with a former, it to that extent repeals the former, although no mention is made of it. Cited to the same effect in St. Louis I. M. & S. R. Co. v. St. Paul, 64 Ark. 95; State v. Hocker, 36 Fla. 369, holding the constitutional inhibition against the repeal or amendment of statutes by their titles only does not apply to amendments that are affected by implication. Approved in Warren v. Crosby, 24 Oreg. 568; Snyder v. Compton, 87 Tex. 378.

**General Citation.**—Pace v. J. S. Merrill Drug Co., 2 Ind. Ter. 225.

**57 Cal. 365-366. HUNTER v. MARTIN.**

**Partnership.**—In an action for breach of contract, the complaint alleging the defendants were partners, a denial of partnership raises an immaterial issue, p. 366.

Cited to same effect in Wallace v. Baisley, 22 Oreg. 573; Marx v. Culpepper, 40 Fla. 325, holding immaterial issues tendered under similar pleadings.

**57 Cal. 366-368. CARROLL v. STORCK.**

**Evidence—Book of Account**, p. 366.

Cited in *White v. Whitney*, 82 Cal. 166, to the effect that a tradesman's book of original entry is *prima facie* proof, when supported by his oath.

**57 Cal. 368-389. JANES v. THROCKMORTON.**

**Trust—Statute of Limitations**.—Rule as to when statute begins to run between trustee and cestui que trust, p. 388.

Approved in *McClure v. Colyear*, 80 Cal. 380; also in *Roach v. Caraffa*, 85 Cal. 446; *Fox v. Tay*, 89 Cal. 349; S. C. 23 Am. St. Rep. 479; *Luco v. De Toro*, 91 Cal. 417; *Page v. Garver*, 146 Cal. 579, action by heir of deceased person to cancel deed obtained by him in lifetime by fraud and to recover interest in realty so fraudulently obtained is barred in five years under Code Civil Procedure, section 318; *Raymond v. Flaver*, 27 Oreg. 235, holding, further, that the trustee may give the cestui que trust constructive notice of his repudiation of trust relations; *Anderson v. Northrop*, 30 Fla. 663; note to *Miles v. Thorne*, 99 Am. Dec. 390, 392. Cited in *Anderson v. Northrop*, 30 Fla. 637, to the effect that the doctrine of laches depends on circumstances of each case.

**Administrator** has no power to bring a suit to enforce a trust or to compel a conveyance of land to himself, p. 387.

Cited to this effect in *Field v. Andrada*, 106 Cal. 108; *Hofman v. Tucker*, 58 Neb. 462, but held not involved in questions discussed. Distinguished in *Collins v. O'Laverty*, 136 Cal. 33, as decided prior to amendment of section 1582, Code of Civil Procedure; *Robertson v. Burrell*, 110 Cal. 575. Cited in *Sayward v. Houghton*, 119 Cal. 550, holding, further, as to when an administrator may maintain an action to enforce a trust.

**Estate of Deceased Person**.—Title to real property passes to heirs or devisees, subject to lien of administrator for administration purposes, p. 387.

Cited to this effect in *Elder v. Horseshoe Mining Co.*, 9 S. Dak. 642, holding further as to failure of heirs to make improvements on mining claims as required by statute; note on "How title may be transferred," to *Townsend v. Tallant*, 91 Am. Dec. 623.

**Trustees**.—Disabilities of, stated, p. 389.

Cited in *Savings etc. Soc. v. Davidson*, 97 Fed. 713, noted under *Page v. Naglee*, 6 Cal. 241; *Keogh v. Noble*, 136 Cal. 155, holding trust created under facts stated; *Hamilton v. Dooley*, 15 Utah, 303, to the effect that, generally, one who occupies the position of trustee is incapable of purchasing the trust property.

Action—Heirs.—Power to maintain action for the recovery of real property discussed, p. 388.

Cited on this point in *Blythe v. Hinckley*, 84 Fed. Rep. 256.

General References.—Cited in note on “Peculiarities of laws of some estates with respect to sale of equitable estates,” to *McIlvaine v. Smith*, 97 Am. Dec. 314; note to *Ford v. Ford*, 5 Am. St. Rep. 144, on “Conversion of real estate into personal property.” Cited in *Adams v. Lambard*, 80 Cal. 435, to show under what circumstances a court will enforce a trust.

#### 57 Cal. 389-393. JUDAH v. FREDERICKS.

Pleading—Jurisdictional Facts—Executor.—Necessary allegations in complaint to show right to sue, p. 393.

Cited in *C. B. U. P. Ry. Co. v. Andrews*, 34 Kan. 568, holding further as to necessary allegations, when action is revived in the name of personal representative of the deceased plaintiff; *Willits v. Walter*, 32 Or. 415, noted under *Young v. Wright*, 52 Cal. 407; distinguished in *Collins v. O'Laverty*, 136 Cal. 33, as inapplicable to appointees of present probate courts; and cf. *San Francisco etc. Co. v. Hartung*, 138 Cal. 230, citing last case. Approved in *Wise v. Hogan*, 77 Cal. 189. Cited in *Harmon v. Comstock Horse and Cattle Co.*, 9 Mont. 248; *Knight v. Le Bean*, 19 Mont. 226, 227, holding further as to a complaint which fails to show any capacity to sue, and one which defectively sets forth the capacity or right.

#### 57 Cal. 394-395. CARR v. QUIGLEY.

Public Land—Patent.—The validity of a patent to lands which the officers of the government have no authority to convey may be controverted in any action, directly or collaterally, p. 395.

Cited with approval in *McLaughlin v. Heid*, 63 Cal. 211. Disapproved in dissenting opinions of Ross and McKee, JJ., same case, pp. 216, 218. Approved in *S. P. R. R. Co. v. Garcia*, 64 Cal. 517, holding lands within the exterior boundaries of a Mexican grant are not the subject of conveyance by the United States; also in *Foss v. Hinkell*, 78 Cal. 161. Distinguished in *Gale v. Best*, 78 Cal. 240, 241, S. C. 12 Am. St. Rep. 48, holding further, a determination by the officers of the government that certain lands are agricultural is conclusive of the subject. Approved in *Carr v. Quigley*, 79 Cal. 131, 132, as to invalidity of patent to lands within a Mexican grant; also, dissenting opinion of Murphy, C. J., in *South End Mining Co. v. Tinney*, 22 Nev. 45.

#### 57 Cal. 396-398. CALIFORNIA SUGAR COMPANY v. SCHAFER.

Corporation—Subscription to Stock.—In an agreement to purchase stock, after incorporation, and to pay for it in installments at regular

intervals, in case it is required, the agreement will be treated as an agreement to pay assessments, p. 398.

Distinguished in *Marysville Co. v. Johnson*, 93 Cal. 550, S. C. 27 Am. St. Rep. 220, holding a subscription to stock before incorporation, and agreement to pay for same when the company becomes incorporated, is an inchoate contract which becomes complete when the corporation is formed.

Same.—To enforce agreement in subscription to stock, it must be shown that the corporation organized is the corporation contemplated at the time of the agreement, p. 398.

Cited to same effect in *Marysville E. L. & P. Co. v. Johnson*, 109 Cal. 195, S. C. 50 Am. St. Rep. 35. Cited in note to *Reynolds v. Harris*, 76 Am. Dec. 467, but does not appear to be in point.

**57 Cal. 399-406. DONALD v. BEALS.**

Notice to agent or attorney is constructive notice to principal, p. 405.

Cited to same effect in *Watson v. Sutro*, 86 Cal. 517, also in *Wittenbrock v. Parker*, 102 Cal. 101, S. C. 41 Am. St. Rep. 176; *Whittle v. Vanderbilt Mining Co.*, 83 Fed. Rep. 53, affirms the general rule, but notes exceptions. See note to *Fairfield Savings Bank v. Shase*, 39 Am. Rep. 326.

A mortgage is deemed in law to be recorded when deposited for record with the recorder, p. 401.

Cited in *Rollings v. Wright*, 93 Cal. 399, holding, where a duty is imposed on recorder to file papers, they are deemed to have been filed as soon as presented to him. Cited in *Cady v. Purser*, 131 Cal. 555, noted under *Chamberlain v. Bell*, 7 Cal. 292.

Power of court of equity to correct mistakes in mortgage affirmed, p. 405.

Approved in *Parker v. Starr*, 21 Neb. 684. Cited in *Busey v. Moraga*, 130 Cal. 588, noted under *Quivey v. Baker*, 37 Cal. 465; *Marks v. Taylor*, 23 Utah, 163, in action to reform written instrument for mistake equity will also reform all subsequent instruments which have perpetuated the mistake.

**57 Cal. 406-407. McVERRY v. BOYD.**

Nonjudicial Day.—The 22d of February is not a nonjudicial day, p. 496.

Cited in *Stewart v. Brown*, 112 Mo. 182, where it was held that any business may be transacted on a general holiday which is not prohibited by statute.

**57 Cal. 407-408. ESTATE OF KIBBE.**

Pledge.—Pledgee is not obliged to present his claim to the adminis-

trator or pledgor, unless he seeks recourse against other property, p. 408.

Cited with approval in *In re Galland*, 92 Cal. 294.

**57 Cal. 409-412. KENTFIELD v. HAYES.**

**Ejectment.**—Equitable Defense should contain, in substance, the elements of a bill in equity, p. 411.

Cited with approval in *Arguello v. Bours*, 67 Cal. 450, holding, further, he may rely upon his equitable defense, although by lapse of time, he has lost his right to an equitable decree; *Tully v. Tully*, 71 Cal. 343; *Dorris v. Sullivan*, 90 Cal. 286; *Dorn v. Baker*, 96 Cal. 209, "legal title will prevail against an equitable one, if no equitable defense is pleaded"; *Ming v. Foote*, 9 Mont. 223. Approved in *McClory v. Ricks*, 11 N. Dak. 42, where in action for possession of land defendants answer jointly and alleged ownership in one of them, and that other held as his tenant, but alleged no equitable title evidence pertinent to title in one defendant cannot be resorted to to sustain equitable right of possession.

**Patent—Contest.**—In a suit in equity by the unsuccessful claimant, he must allege and prove that he occupies such a status as gives him the right to control the legal title, p. 411.

Cited to this effect in *Plummer v. Brown*, 70 Cal. 546; *Cucamonga Land Co. v. Moir*, 83 Cal. 109, holding contestant must connect himself with the original source of title; *Dreyfus v. Badger*, 108 Cal. 63.

**Title.**—The rejection by the state of an application to purchase land does not connect applicant with the title of the state, p. 411.

Cited to the same effect in *Burling v. Thompkins*, 77 Cal. 261; *Goule v. Thomas*, 146 Cal. 543, where contest was instituted by settler on half section as fit for cultivation against holder of certificate of purchase by prior claimant of whole section as unfit for cultivation, another settler on same half section whose application pending contest was rejected cannot intervene; *Dreyfus v. Badger*, 108 Cal. 63, 64, holding, further, as to failure of claimant to prosecute his claim with diligence.

**Pleading.—Amended Answer** supersedes the original, p. 411.

Approved in *Collins v. Scott*, 100 Cal. 454, but original may serve as evidence to show at what date the suit was brought. Cited in *Pfister v. Wade*, 69 Cal. 138, but not in point.

**General Citation.**—*Boncher v. Clark Pub. Co.*, 14 S. D. 78.

**57 Cal. 412-414. ROBINSON v. BLACK DIAMOND COAL COMPANY.**  
40 Am. Rep. 118.

**Mining Debris.**—Throwing mining debris into a natural stream, by

which it is carried and deposited on the land of another, to his damage, constitutes a legal injury, p. 414.

Cited with approval in Hobbs v. Amador Co., 66 Cal. 163. See note on general subject to Columbus v. Tucker, 29 Am. St. Rep. 539; Fitzpatrick v. Montgomery, 20 Mont. 188, 63 Am. St. Rep. 626, noted under Esmond v. Chew, 15 Cal. 137; Carson v. Hayes, 39 Or. 106, mine owner cannot acquire right to deposit debris on another's land with consent, either by directly depositing it thereon or by allowing it to be washed there by stream; exhaustive note to Mississippi Co. v. Smith, 30 Am. St. Rep. 552.

**57 Cal. 415-417. SHARP v. MILLER.**

Sureties are released from an undertaking by tendering to the creditor the amount for which they are bound, p. 417.

Approved in O'Connor v. Braly, 112 Cal. 36, S. C. 53 Am. St. Rep. 158, holding, further, the same rule applies to sureties on a note. See note to Howell v. Alma Milling Co., 38 Am. St. Rep. 713.

**57 Cal. 417-421. ROBINSON v. PITTSBURG RAILROAD COMPANY.**

Ejectment.—Findings in case are beyond the issues, p. 417.

Cited in J. T. & K. W. Ry. Co. v. Adams, 27 Fla. 452, as authority for the proposition that ejectment may be maintained against a railroad company to recover possession of a roadbed, where the same has been taken without consent of the owner or by authority of law. The case does not appear to support the citation.

**57 Cal. 424-427. NEIL v. McNEAR.**

Possessory Rights—Construction of Statute.—Act of March 1, 1867, operates to perpetuate existing possessory rights, p. 426.

The reasoning of the case is approved in Watkins v. Lynch, 71 Cal. 25.

**57 Cal. 427-430. DUNPHY v. BELDEN.**

Mandamus lies to compel a court to proceed with the trial of a case which it has legally indefinitely postponed, p. 429, Thornton, J., and Morrison, C. J., dissenting.

Approved in State v. Superior Court, 14 Wash. 698, Dunbar, J., dissenting.

**57 Cal. 431. SHARP v. MILLER.**

Statute of Limitations begins to run against a claim for damages for a malicious attachment at the time of the levy of the attachment, p. 431.

Cited with approval in *McCusker v. Walker*, 77 Cal. 212, holding, further, as to malicious prosecution. Distinguished in *Berson v. Ewing*, 84 Cal. 93, where the attachment issued out of a malicious prosecution of a civil suit.

**57 Cal. 435-436. WOODS v. MERRILL.**

**Findinga.**—Where an error has been made in findings as to an amount of money due one of the litigants, the court will consider the error and modify the judgment accordingly, p. 436.

Cited in *Fox v. Hale etc. Co.*, 122 Cal. 222, noted under *De Costa v. Mining Co.*, 17 Cal. 613; *Eames v. Haver*, 111 Cal. 405, holding, further, as to error in instructions to jury as to measure of damages.

**57 Cal. 437-446. ESTATE OF MOORE.**

The right to a probate homestead is not an estate either at law or in equity, p. 444.

Cited to same effect in *Estate of Burton*, 63 Cal. 38, holding, further, as to questions arising at time of probate regarding title to property out of which homestead is set apart. Cited in *McDonald v. Burton*, 68 Cal. 454, holding a judgment in ejectment is no bar to subsequent proceedings for setting aside a homestead from the same property. Approved in *In re Vance*, 100 Cal. 428, holding a conveyance by a widow of all her interest in an estate as heir at law does not estop her from claiming a probate homestead. Approved generally in *Estate of Moore*, 57 Cal. 447.

**Estate of Deceased Person—Rights of Heir.**—Quitclaim deed from heir conveys such interest only as remains after satisfying the objects of administration, p. 442.

Cited to same effect in *Wood v. Curran*, 99 Cal. 141, also in *Phelan v. Smith*, 100 Cal. 164, 165, holding further as to objects of administration.

**Same.—Objects of Administration** defined, p. 442.

Cited on this point in *Estate of Smith*, 118 Cal. 465.

**Homestead.**—Setting apart the homestead is a probate proceeding, p. 442.

Cited to same effect in *Estate of Adams*, 128 Cal. 387, quoting *Keyes v. Cyrus*, 100 Cal. 326, 38 Am. St. Rep. 299, holding further as to liability of homesteads for debts of either husband or wife; *In re Still*, 117 Cal. 515, holding further as to effect of homestead on community property.

**57 Cal. 446-447. ESTATE OF MOORE.**

**Estate of Deceased Person.—Conveyance by widow of whatever in-**

terest she might take as heir at law does not prevent the probate court from setting aside property from the estate for the use of the family of the deceased, p. 447.

Cited with approval in *Phelan v. Smith*, 100 Cal. 165.

**57 Cal. 447-461. THELLER v. SUCH.**

Probate Court has no power, generally, to determine disputes between the heirs or representatives of the deceased and third persons, p. 459.

Cited with approval in *Mobley v. Andrews*, 55 Ark. 224; also in *Bath v. Valdez*, 70 Cal. 360; *Bernard v. Wilson*, 74 Cal. 517; *Chever v. Ching Hong Poy*, 82 Cal. 72; *Wright v. Wright*, 11 Colo. App. 475, as to determination of existence of disputed partnership; *Marshall v. Marshall*, 11 Colo. App. 510, as to enforcement of trust against property in decedent's possession at time of death; *In re Breslin*, 135 Cal. 22, as to settlement of claim against ward's estate. Distinguished in *In re Burton*, 93 Cal. 464, holding, under section 1664 of the Code of Civil Procedure, court is authorized to determine the claims of assignee of heirs or devisees; in *In re Burdick*, 112 Cal. 397. Approved in *Stewart v. Lohr*, 1 Wash. 343; S. C. 22 Am. St. Rep. 151.

On the death of one partner, the possession and power of control and the disposition of the partnership property vests in the surviving partner or partners, p. 459.

Cited to this effect in *McGorray v. O'Connor*, 87 Fed. 589, noted under *Allen v. Hill*, 16 Cal. 113; *Wilson v. Meyer*, 23 Utah, 537, where court ordered sold by decedent's executors property of deceased partner which was in possession of survivor, and constituted part of firm property, it was not error to refuse to confirm sale; *McGorray v. O'Connor*, 79 Fed. Rep. 864, holding further as to power of heirs of deceased partner to redeem partnership property from a sale under a mortgage. *Andrade v. Superior Court*, 75 Cal. 462, holding further as to the power of probate court to settle the accounts of the surviving partner; *Krueger v. Speith*, 8 Mont. 489, surviving partner is not the personal representative of the deceased.

Where all the members of a partnership die, the property of the partnership does not become confused with the estate of the last survivor, p. 461.

Cited in *In re Allgier*, 65 Cal. 230, holding, further, as to property involved in a personal trust on death of trustee. See note to *Buckley v. Superior Court*, 41 Am. St. Rep. 143.

**Involuntary Trustee** holds property under the same terms and is liable in the same manner as original trustee, p. 461.

Cited to this effect in *Gray v. Farmers' Bank*, 105 Cal. 65; *Elizalde v. Elizalde*, 137 Cal. 642, noted under *Lathrop v. Bampton*, 31 Cal. 17.

**Equity.**—Jurisdiction of district courts over settling estates, discussed, p. 480.

Approved in dissenting opinion of Myrick, J., in Rosenberg v. Frank, 58 Cal. 419. See note to Deck v. Gerke, 73 Am. Dec. 580.

**57 Cal. 467-472. DINGLEY v. BANK OF VENTURA.**

**Lien.**—A contract by which the vendee of land agrees that the title to the land shall remain in the vendor until all the purchase money is paid creates a lien in the nature of a mortgage, p. 472.

Cited in Longmaid v. Coulter, 123 Cal. 215, quoting Gessner v. Palmateer, 89 Cal. 93; Higgins v. Manson, 126 Cal. 469, 77 Am. St. Rep. 193, noted under Hill v. Eldred, 49 Cal. 398; Gessner v. Palmateer, 89 Cal. 93, holding, further, the assignee of notes given for the purchase money is entitled to the benefit of the security; also in McKeown v. Collins, 38 Fla. 288, holding such a lien is not a vendor's lien, but the security in the nature of a mortgage; Bever v. Bever, 144 Ind. 163, where the court says: "Such a lien is equivalent to a mortgage . . . . and gives the purchaser the right of redemption"; Moran v. Wheeler, 78 Tex. 183. See note on general subject to Schnebly v. Ragan, 28 Am. Dec. 200; also, note to Massey v. Gorton, 90 Am. Dec. 301; and Hutzler Bros. v. Phillips, 4 Am. St. Rep. 706.

**57 Cal. 476-479. CALLAHAN v. STANLEY.**

Where words in a contract have a special meaning given them by usage, the meaning should be shown and followed, p. 479.

Cited to same effect in Berry v. Kowalsky, 95 Cal. 138, 29 Am. St. Rep. 104, and the meaning of such words need not be set out in pleading; Brewer v. Horst, 127 Cal. 646, as to use of figures and abbreviations.

**57 Cal. 480-483. BATEMAN v. BURR.**

**Deed of Trust** to secure debt of grantor to a third party, with power to grantee to sell is not a mortgage requiring foreclosure, p. 482.

Approved in Durkin v. Burr, 60 Cal. 361. Cited in National Bank v. Bell et al., 8 Mont. 45, where the court holds an instrument similar to the one in Bateman v. Burr to be a mortgage with power of sale, and not a deed of trust; Bell Mining Co. v. Bank, 156 U. S. 477, holding a conveyance by the trustees in accordance with the terms of such an instrument, passes a good title to purchaser; note to Tyler v. Herring, 19 Am. St. Rep. 275. Cited in Sacramento Bank v. Alcorn, 121 Cal. 382, 383 (quoted in note 73 Am. St. Rep. 100), holding such deed not void as restraining alienation; Camp v. Land, 122 Cal. 170, noted under Grant v. Burr, 54 Cal. 300; Etna Coal etc. Co. v. Marting Iron etc. Co., 127 Fed. 36, upholding provision in deed of

trust that instrument might be foreclosed without judicial proceeding, and that trustees could, after advertisement and without appraisement, sell property. Distinguished in *Brown v. Bryan*, 6 Idaho, 16, 19, trust deed executed to secure given debt payable at specified time is a mortgage and cannot be foreclosed by notice and sale under power of sale in such deed.

**Deed of Trust conveys the legal title, p. 483.**

Cited to this effect in *Partridge v. Shephard*, 71 Cal. 478; also in *Moore v. Calkins*, 95 Cal. 438; S. C. 29 Am. St. Rep. 129; *Hazen v. Nicholls*, 126 Cal. 329, discussing right to redeem from such deed; *Savings & Loan Society v. Burnett*, 106 Cal. 528, holding, further, when given as security for a debt, the grantor is entitled to reconveyance upon payment of debt.

**'57 Cal. 484-493. ESTATE OF WARDELL.**

**Illegitimate Children inherit from the mother in like manner as legitimate, p. 492.**

Cited in note on general subject to *Simmons v. Bull*, 56 Am. Dec. 263; note to *In re Ingram*, 12 Am. St. Rep. 102.

**Succession.**—The word "children," as used in the code, includes all children upon whom the law has conferred the power of inheriting, p. 491.

Cited in *Estate of Newman*, 75 Cal. 219, S. C. 7 Am. St. Rep. 149, where it is held that an adopted child may inherit the estate of the adopting parent; dissenting opinion of Works, J., Beatty, C. J., and Patterson, J., also, dissenting, in *Estate of Jessup*, 81 Cal. 447, where the statute relating to adoption of illegitimate children is discussed at great length. Cited in *Estate of Winchester*, 140 Cal. 469, 470, holding legacies in trust for children of adopted daughter of decedent excepted from collateral inheritance tax. Distinguished in *Johnstone v. Taliaferro*, 107 Ga. 27, but holding "child" and "issue" in a deed not to include a subsequent illegitimate; *Bray v. Miles*, 23 Ind. App. 438, holding "child" in statute to include adopted child; *Fosburgh v. Rogers*, 114 Mo. 133, as to adopted children. Extended note on subject to *In re Ingram*, 12 Am. St. Rep. 98.

**Wills—Failure to Provide for Child.**—A child unintentionally omitted from its parent's will inherits the same as though parent had died intestate p. 489.

Cited to this effect in *Estate of Grider*, 81 Cal. 575. Cited in *Estate of Smith*, 145 Cal. 123, fact that testatrix was soon to give birth to child when will made is sufficient proof of obvious intention that legacy of annuity given to mother should not contribute to legal inheritance of post testamentary child; *Estate of Stevens*, 83 Cal. 329, S. C. 17 Am. St. Rep. 257, and reaffirming that the intention to omit from Notes Cal. Rep.—182.

the will must be made to appear from the words of the will. Approved in *Smith v. Olmstead*, 88 Cal. 585, S. C. 22 Am. St. Rep. 338. Cited in *Adams v. Adams*, 154 Mass. 298, holding further that children of a void marriage are not entitled to set up claim to competition with legitimate children under a Massachusetts will.

**57 Cal. 493-500. ROBINS v. HOPE.**

**Deed—Consideration.**—Where adequate motive for making a deed is apparent, want of consideration will not militate against the bona fides of the transaction, p. 499.

Cited with approval in *Cook v. Cockins*, 117 Cal. 152, where such a transfer was attacked on ground of defraud of creditors.

**Confidential relation.**

Note on subject to *Richmond's Appeal*, 21 Am. St. Rep. 101.

A person is conclusively presumed to know the state of his own title to real property, p. 495.

Approved in *Parsons v. Weis*, 144 Cal. 420, discussing falsity of averments of complaint in action to quiet title; *Cobb v. Wright*, 43 Minn. 85, holding grantor is not entitled to recover for fraudulent representations as to title on part of grantee, where means of information was open equally to both.

**General Citation.**—*Wells v. Houston*, 23 Tex. Civ. App. 649.

**57 Cal. 501-507. TREGAMBO v. COMANCHE MINING COMPANY.**

**Bill of Exceptions**, to any decision whenever made, may be settled at any time within thirty days after the entry of judgment, p. 504.

Cited with approval in *Pfister v. Wade*, 59 Cal. 273. Cited in *Wheeler v. Karnes*, 125 Cal. 53, and *Estate of Cruger*, 130 Cal. 625, noted under *Higgins v. Mahoney*, 50 Cal. 445; *Redington v. Cornwell*, 90 Cal. 62, to the effect that a bill of exceptions is allowable upon the trial of an issue of law. Approved in *Flagg v. Puterbaugh*, 98 Cal. 136, as to decision on appealable order; also in *Turner v. Hearst*, 115 Cal. 399, holding the exceptions may be settled at time of ruling.

Default will be set aside for surprise or excusable neglect, p. 506.

Distinguished in *Boyd v. Burrel*, 60 Cal. 283, holding failure to have papers filed on time, because of nonpayment of clerk's fees these having been demanded at time of presentation of papers—is inexcusable neglect.

**Mandatory Statute** must be strictly followed, p. 503.

Cited to same effect in *Connor v. Southern Cal. M. R. Co.*, 101 Cal. 431, as to failure to settle bill of exceptions within time required by statute; on same point, *Henry v. Maguire*, 106 Cal. 148.

**Trial defined**, p. 505.

Definition followed in *Finn v. Spagnoli*, 67 Cal. 332. Cited in *Goldtree v. Spreckels*, 135 Cal. 669, 670, as to right to dismiss "before trial"; *Burns v. Napton*, 26 Mont. 364, where proposed bill of exceptions and amendments thereto proposed, but not adopted, were not presented to judge within ten days after amendments served, court properly refused to settle bill; *Hilts v. Hilts*, 43 Or. 164, transcript not filed until fee paid, though delivered into possession of clerk.

A paper is filed when delivered to the clerk for that purpose, and his fees paid, if demanded, p. 508.

Cited to this effect in *Smith v. Biscailuz*, 83 Cal. 358, and indorsement as to time of filing is not a part of the filing; also in *Howell v. Slaison*, 83 Cal. 545, nothing is said concerning payment of fees; *Edwards v. Grand*, 121 Cal. 256, holding declaration of homestead not filed for record; *Thomasson v. Carroll*, 132 Cal. 152, holding protest under street act properly filed; *Hoyt v. Stark*, 134 Cal. 180, 86 Am. St. Rep. 248, holding appeal bond not filed by delivery to clerk outside of his office; *Rollings v. Wright*, 93 Cal. 399, holding, where no fees are required, papers are deemed to be filed when left with clerk or recorder; *Dewar's Estate*, 10 Mont. 436. Cited in *Mutual Life Ins. Co. v. Phinney*, 76 Fed. Rep. 620, holding the indorsement by the clerk is essential to the filing of a writ of error in the trial court, Gilbert, J., dissenting. Extended note on subject to *Beebe v. Morrell*, 15 Am. St. Rep. 296.

#### 57 Cal. 507-515. **SHERMAN v. McCARTHY.**

**Mortgage.**—Where mortgage purports to convey in fee, any title afterward acquired by mortgagor inures to the benefit of the mortgagée, p. 514.

Cited to this effect in *Orr v. Stewart*, 67 Cal. 277, where property was homestead with title in United States at time of mortgage; note to *Clark v. Baker*, 76 Am. Dec. 458.

**Constructive Notice.**—Facts set out held to constitute, p. 514.

Cited with approval in *McDonald v. Burton*, 68 Cal. 454, holding the record of proceedings to acquire patent gives notice of patentee's interest.

**Patents to Administrators**, p. 507.

Note on general subject to 83 Am. Dec. 469.

#### 57 Cal. 515-520. **WHITING v. TOWNSEND.**

**Street Work.**—Resolution of intention held sufficient, p. 517.

Cited in *Cohen v. Alameda*, 124 Cal. 508, sustaining description of land to be taken for extending street; *Brown v. Drain*, 112 Fed. 591, noted under *Harney v. Heller*, 47 Cal. 15.

**Street Assessment.**—Under act of April 1, 1872, the question as to

whether the lot sought to be charged was benefitted is immaterial, p. 519.

Cited with approval in *Duncan v. Ramish*, 142 Cal. 691, holding objection not assertable collaterally; *Jennings v. Le Breton*, 80 Cal. 16, holding further as to constitutionality of the act; note to *Burnett v. Mayor*, 73 Am. Dec. 522.

**Same—Pleading.**—What the complaint shall contain is a proper matter for legislative control, p. 518.

Approved in *Robinson v. Merrill*, 87 Cal. 13, 14, holding further as to necessary parties in action to foreclose lien.

**Same—Agency—Demand.**—Statement in affidavit by the party making demand that he is the agent of contractor, is *prima facie* evidence of the fact, p. 519.

Cited to same effect in *Foley v. Bullard*, 99 Cal. 518.

**Pleading—Judicial Notice.**—The courts will take judicial notice of general statutes, p. 518.

Cited to same effect in *Mullan v. State*, 114 Cal. 582, where the same rule is affirmed of private acts of the legislature, executive, and judicial departments of state; note on general subject to *Lanfear v. Mestier*, 89 Am. Dec. 665.

**57 Cal. 520-525. PACIFIC BANK v. ROBINSON. 40 Am. Rep. 20.**

**Supplementary Proceedings** to execution are intended to take the place of a creditor's bill, p. 522.

Cited to same effect in *Habenicht v. Lissak*, 78 Cal. 357, S. C. 12 Am. St. Rep. 68, affirming an order appointing a receiver and directing an execution debtor to assign to him a seat in a stock exchange. Cited in *Herrlich v. Kaufman*, 99 Cal. 275, 277, S. C. 37 Am. St. Rep. 53, 55, holding such proceedings supplant proceedings in equity, unless some special reasons exist on which to invoke the power of equity; *Barber v. Briscoe*, 9 Mont. 348, holding further as to necessary averments to give jurisdiction; *Bates v. International Co.*, 84 Fed. Rep. 524; *Erie Wringer Manufacturing Co. v. National Co.*, 63 Fed. Rep. 249, holding further as to special execution process. See note on creditor's bill to *Massey v. Gorton*, 90 Am. Dec. 294-297; *Lathrop v. Clapp*, 100 Am. Dec. 501; *Halenicht v. Lissak*, 12 Am. St. Rep. 69; and *State v. Brewer*, 37 Am. St. Rep. 760.

Creditor's Bill is intended to reach property that cannot be reached by execution, p. 522.

Cited in *Matteson etc. Co. v. Conley*, 144 Cal. 485, 486, noted under *Adams v. Hackett*, 7 Cal. 201, and holding complaint insufficient; *Mears v. Lamona*, 17 Wash. 156, but denying right to reach interest, not vested.

**Patent Right** is not tangible property, p. 523.

Cited to same effect in Lowenberg v. Greenebaum, 99 Cal. 106, S. C. 37 Am. St. Rep. 44, where the court holds the same of a seat in a stock exchange; also in Peterson v. Sheriff of San Francisco, 115 Cal. 213, and is not subject to levy; In re McDonnell, 101 Fed. 239, denying right of trustee of bankrupt to patent issued after the adjudication; Vail v. Hammond, 60 Conn. 383, S. C. 25 Am. St. Rep. 335, 336, holding, further, patent right is property which is subject to claim of creditors, and may be reached by proceedings in equity; same rule in Rehfuss v. Moore, 134 Pa. St. 471.

Court of equity may compel the assignment of patent right, p. 525.

Cited to this effect in Wilson v. Martin-Wilson Co., 151 Mass. 519, Allen and Field, JJ., dissenting, p. 530, expressing the opinion that such a transfer need not be recognized outside of the state decreeing it; also in Ager v. Murray, 105 U. S. 131; note to Bank v. Robinson, 40 Am. Rep. 125.

#### 57 Cal. 525-528. SHINN v. YOUNG.

**Res Judicata.**—Judgment in ejectment is bar to another action which puts in issue the same matters previously adjudicated, p. 528.

Distinguished as to the facts in Thrift v. Delaney, 69 Cal. 194; also distinguished as to facts in Merriam v. Bachioni, 112 Cal. 196. Cited in note on "Conclusiveness of judgment in ejectment," to Caperton v. Schmidt, 85 Am. Dec. 209.

#### 57 Cal. 529-532. ESTATE OF JOHNSON.

**Unsound Mind.**—Drunkenness is not *prima facie* proof of, p. 530.

Cited to same effect in Estate of Lang, 65 Cal. 20, holding no presumption arises as to soundness of mind from proof of drunkenness.

**Will.**—Proof of unsoundness of mind is *prima facie* evidence of incapacity to make a will, p. 531.

Cited with approval in Stevens v. Stevens, 127 Ind. 567, holding, further, as to what proponents of will must show; also, Estate of Fenton, 97 Iowa, 195.

#### 57 Cal. 532-534. PEOPLE v. PFISTER.

**Corporation.**—Effect of codes on corporations organized prior to their adoption, p. 533.

Cited in main and dissenting opinions in People v. Auburn etc. Co., 122 Cal. 340, 341, sustaining right of turnpike company to collect tolls during period of extended existence under code sections. Distinguished in People v. Stanford, 77 Cal. 368, where the disputed point was a question in pleading.

**57 Cal. 535-541. PORTER v. WOODWARD.**

**Findings.**—Judgment will not be reversed for failure to find on material issue, when such failure could not prejudice appellant, p. 540.

Cited to this effect in Murphy v. Bennett, 68 Cal. 530, 535; also in Quinn v. Anderson, 70 Cal. 457, material issue may become immaterial; Malone v. County of Del Norte, 77 Cal. 218, if findings support judgment they are sufficient; Windhaus v. Bootz, 92 Cal. 623; Chambers v. Emery, 13 Utah, 405, similar in facts to Porter v. Woodward.

**Same.**—The duty of finding facts rests with the court, p. 538.

Cited with approval in Edgar v. Stevenson, 70 Cal. 287, holding party cannot dictate terms of finding; Barnhart v. Fulkerth, 73 Cal. 530.

**57 Cal. 541-542. SHAY v. SUPERIOR COURT.**

Superior Court succeeded to the powers and jurisdiction of municipal criminal court, p. 542.

Cited to same effect in Ex parte Williams, 87 Cal. 83.

**Justice's Court Appeal.**—Insufficiency of notice cannot be first attacked on certiorari to review judgment of superior court, p. 542.

Distinguished in People v. Reclamation Dist., 130 Cal. 612; noted under Howard v. Harmon, 5 Cal. 78.

**57 Cal. 543-546. DAVIS v. SPRING VALLEY WATER WORKS.****Counterclaim.**

Note on "What not pleadable as," to Woodruff v. Garner, 89 Am. Dec. 491—case not in point.

**57 Cal. 550-554. CAMRON v. KENFIELD.**

**Writ of Prohibition** cannot be made to apply to ministerial functions, p. 554.

Cited to same effect in Farmers' Union v. Thresher, 62 Cal. 410, as to petition to restrain tax collector from selling property; also in similar case, Hobart v. Tillson, 66 Cal. 211; Gunderson v. Superior Court, 13 Wash. 228, holding further, as to purpose of writ; State v. Hogan, 24 Mont. 383, noted under People v. Board, 54 Cal. 404; Winsor v. Bridges, 24 Wash. 544; quoting Williams v. Lewis, 6 Idaho, 187, 54 Pac. 619, prohibition lies to restrain Secretary of State from certifying to county auditors a ticket for election not entitled to be certified; State v. Superior Court, 15 Wash. 674, 55 Am. St. Rep. 911, where the purpose of the writ is discussed at length.

**Law of the Case.**—Decision on a point in a case, though unnecessary to its disposition, is not dictum, p. 553.

Cited to this effect in Gwinn v. Hamilton, 75 Cal. 266.

**57 Cal. 559-562. PEOPLE v. CARLTON.**

Criminal Law.—Prosecution may be either by indictment or information, p. 561.

Cited in *In re Dolph*, 17 Colo. 39, where constitutionality of prosecution by information is discussed.

Previous Conviction.—If defendant pleads guilty to, no trial of question is required, p. 562.

Cited in *People v. Meyer*, 73 Cal. 549, holding the admission of evidence to prove such fact, after defendant has pleaded guilty, is error.

**57 Cal. 566-567. PEOPLE v. AH LOY.**

Instructions.—Fact that portion of was without meaning not ground for reversal of judgment, p. 566.

Cited in *People v. Winters*, 93 Cal. 282, holding defendant should have asked for more satisfactory instruction.

**57 Cal. 567-569. PEOPLE v. CHUNG AH CHUE.**

Criminal Practice—Evidence.—Reporter's notes of testimony of witness given at former trial for same offense, witness shown to be out of state, cannot be read in evidence, p. 568.

Cited to same effect in *People v. Qurise*, 59 Cal. 344. Distinguished in *Reid v. Reid*, 73 Cal. 207, as to facts. Approved in *People v. Gardner*, 98 Cal. 132, holding the recollections of persons present at previous trial, as to what witness said, are inadmissible; also in *People v. Gordon*, 99 Cal. 233, holding such evidence is objectionable as incompetent. Cited in *Simmons v. Spratt*, 26 Fla. 463, where it is held the evidence set forth in bill of exceptions is not admissible of itself to prove testimony of a deceased witness. Qualified in *Mattox v. United States*, 156 U. S. 241, holding, under some circumstances, such notes may be admitted in evidence. See note on "Evidence of absent witnesses," to *Cline v. State*, 61 Am. St. Rep. 889.

Same.—Rule as to deposition of witness, p. 568.

Cited in *People v. Mitchell*, 64 Cal. 87, holding any real departure from course prescribed is error.

**57 Cal. 571-574. PEOPLE v. JOHNSON.**

Defendant who takes stand in his own behalf is subject to cross-examination as to all matters upon which he was examined in chief, p. 573.

Cited to same effect in *People v. Rozelle*, 78 Cal. 94.

Defendant, as witness, may be asked whether he has ever been convicted of felony for purpose of determining his credibility, p. 574.

Cited with approval in *People v. Crowley*, 100 Cal. 482, 483, holding

fact defendant has confessed previous conviction in his plea, is immaterial. Note to *Allen v. State*, 73 Am. Dec. 775, and *State v. Duncan*, 38 Am. St. Rep. 897. Overruled in *People v. Arrighini*, 122 Cal. 128, as decided without considering section 13, article 1, of constitution.

**57 Cal. 575-576. PEOPLE v. MESSERSMITH.**

**Criminal Law—Insanity as a Defense.**—Burden of proof, p. 575.

Incorrectly cited in *Ford v. State*, 71 Ala. 394, but arrives at the same conclusion.

**57 Cal. 576-578. DE WITT v. WRIGHT.**

**Libel—Pleading.**—Complaint must aver that person who read writing knew plaintiff was meant, p. 578.

Distinguished in *Rhodes v. Naglee*, 66 Cal. 680, holding, in case of slander, allegation that words were spoken in plaintiff's presence concerning him is sufficient. Denied in *Harris v. Zanone*, 93 Cal. 66, 67, holding where words are libelous per se such allegation is not necessary; the opinion of Paterson, J., same case, pp. 72, 73, approves the principal case. Approved in *Cole v. Neustadter*, 22 Oreg. 199, but note the publication complained of was not libelous per se.

**57 Cal. 579-587. PEOPLE v. HAGGIN.**

**Swamp Land District—Assessment.**—Action to collect must be brought in name of district, p. 587.

Distinguished in *Swamp District v. Haggin*, 64 Cal. 210, holding action brought under act of 1868 must be brought in name of the people. Cited in *Reclamation District v. Goldman*, 65 Cal. 636, decides nothing on this question, since the case goes off on another point. Approved in *Reclamation District v. Hagar*, 66 Cal. 57-59, holding further judgment will not be reversed merely because action was brought in name of district instead of people; also, in *Reclamation District v. Parvin*, 67 Cal. 502.

**57 Cal. 588-594. COLTON LAND AND WATER COMPANY v. RAYNOR.**

New matter set up in answer is deemed to be denied, p. 589.

Cited to this effect in *Rankin v. Sisters of Mercy*, 82 Cal. 95, and may be met by competent proof; also, to same effect in *Williams v. Dennison*, 94 Cal. 543; and *Sterling v. Smith*, 97 Cal. 346; *Moore v. Copp*, 119 Cal. 433, where the cases on the subject are discussed and exceptions to the rule noted; *Brooks v. Johnson*, 122 Cal. 571, allowing plaintiff to prove want of consideration of written instrument, set up in answer; and *Whitney v. Richards*, 17 Utah, 231, applying rule to defense of fraud thereto; and *Steed v. Harvey*, 18 Utah, 378, 72 Am. St. Rep. 794, to defense based on statute of frauds; *Alspaugh v. Reid*, 6 Idaho, 225, where

foreign statute of limitations is set up in answer, court cannot dismiss without trial.

**Cross-complaint.**—New parties may be brought in on, when necessary to complete determination of matter, p. 592.

Cited in *Mackenzie v. Hodgkin*, 126 Cal. 595, 77 Am. St. Rep. 212, sustaining cross-complaint accordingly.

**General Reference.**—Cited and reviewed generally in *Raynor v. Mintzer*, 67 Cal. 159-163; also in *Raynor v. Mintzer*, 72 Cal. 587.

#### 57 Cal. 594-604. **BURKE v. BADLAM.**

**Corporate Property.**—What may be taxed, p. 602.

Cited with general approval in *Spring Valley Water Works v. Schottler*, 62 Cal. 112-117, where the subject is carefully considered; *Security Savings Bank v. Hinton*, 97 Cal. 222, where section 3617 of the Political Code is construed; *People v. National Bank*, 123 Cal. 60, 69 Am. St. Rep. 37, sustaining taxation of stock of national bank, but not its assets; *Bank v. San Francisco*, 142 Cal. 282, sustaining taxation of corporate franchise, and method of assessment there adopted; dissenting opinion in *Bacon v. Board*, 126 Mich. 32, discussing taxation of shares of foreign corporations, under local statutes; *Minneapolis Ins. Co. v. Traill Co.*, 9 N. Dak. 220, noted under *People v. Lardner*, 30 Cal. 243; *Nevada Nat. Bank v. Dodge*, 119 Fed. 61, California Political Code, section 3609, taxing property instead of shares of domestic corporations does not violate United States Revised Statutes, section 5219.

Constitution forbids double taxation, p. 600.

Cited to same effect in *San Francisco v. Anderson*, 103 Cal. 71, S. C. 42 Am. St. Rep. 99, holding taxation of a seat in stock exchange, in addition to a tax levied on all property of the stock board, is illegal; *San Francisco v. Fry*, 63 Cal. 471, holding, where tangible property of corporation is situated in another state, shares of stock held by residents of this state may be assessed, without regard to taxation in other state; *Germania Trust Co. v. San Francisco*, 128 Cal. 594, 595, noted under *People v. Bank*, 51 Cal. 243; *Lewiston etc. Co. v. Asotin Co.*, 24 Wash. 375, denying right under local statute to tax corporate stock where all invested in its property; *Hyland v. Central Iron Co.*, 129 Ind. 70, holding, further, where capital stock exceeds in value tangible corporation property, excess may be taxed; and to the same effect in *Ryan v. Leavenworth County*, 30 Kan. 190. Approved in *Railroad v. Commissioners*, 91 N. C. 450, holding taxation of both shares of stock and corporate property is illegal; *San Francisco v. Mackay*, 10 Saw. 302, 21 Fed. Rep. 540; also, same case, 10 Saw. 434, 22 Fed. Rep. 604, holding, further, the situs of stock for purposes of taxation is the residence of the owner. Cited in *McHenry v. Downer*, 116 Cal. 28, where section 3608 of the Political Code is discussed.

**Debtor and Creditor.**—Relation does not exist between bank and depositor, p. 602.

Cited to this effect in *State v. Carson Bank*, 17 Nev. 153, but holding the relation does exist in that state.

**General Citation.**—*Dodge v. Nevada Nat. Bank*, 109 Fed. 727.

**57 Cal. 604-612. MATTER OF MAGUIRE.** 40 Am. Rep. 125.

Municipal ordinance prohibiting engagement in a lawful business on account of sex is void, p. 608.

Distinguished in *Adams v. Cronin*, 29 Colo. 499, upholding provisions of Denver charter and ordinances thereunder prohibiting saloon-keeper from keeping room where women may enter to get liquor; *Ex parte Chin Yan*, 60 Cal. 82, where the subject "reasonable exercise of power by municipal legislative bodies" is discussed. Approved in *Ex parte Felchin*, 96 Cal. 362, 31 Am. St. Rep. 224, holding, further, an ordinance requiring a license tax from dramshops which employ females is a valid police regulation.

**57 Cal. 612-614. UNIVERSITY OF CALIFORNIA v. BERNARD.**

An act should not be declared unconstitutional unless clearly repugnant to the constitution, p. 613.

Cited with approval in *Dusy v. Helm*, 59 Cal. 191; dissenting opinion, *Tucker v. Barnum*, 144 Cal. 271, as to constitutionality of sections of County Government Act; *People v. Cobb*, 133 Cal 77, holding act valid; *Hellman v. Shoulters*, 114 Cal. 153, holding section 24, article IV, of the constitution does not apply to amendments by implication. See note to *Corwin v. Ward*, 95 Am. Dec. 95.

**57 Cal. 614-617. SAN JOSE GAS COMPANY v. JANUARY.**

The right of laying down and maintaining pipes in a street is franchise, p. 616.

Cited to same effect in *Spring Valley Water Co. v. Schottler*, 62 Cal. 108. Cited in *People v. City of Oakland*, 92 Cal. 614, holding, further, as to what constitutes a franchise. Approved in *Northwestern etc. Min. Co. v. Lewis etc. Co.*, 28 Mont. 501, upholding validity of part of Civil Code, section 681, relating to taxation of insurance companies.

**Same.**—Franchise is property subject to taxation, p. 616.

Approved in *S. V. W. W. v. Schottler*, 62 Cal. 112, 114. Cited in *S. V. W. W. v. Barber*, 99 Cal. 38, holding where company has paid tax on its franchise in county where it has its principal place of business, it cannot be compelled to pay on its "franchise" in another county for merely laying its pipes in such county.

**Assessment.**—Method of arriving at value of property is left to assessor, p. 616.

Cited to same effect in *S. V. W. W. v. Schottler*, 62 Cal. 117; also in *Ballerino v. Mason*, 83 Cal. 449, and for error in judgment, appeal lies to board of equalization; *Bank v. San Francisco*, 142 Cal. 287, 288, noted under *People v. Badlam*, 57 Cal. 594; *Danforth v. Livingston*, 23 Mont. 563, sustaining assessment made by assessor and board of equalization when not fraudulent or grossly oppressive; *Railway Co. v. Board of Public Works*, 28 W. Va. 270, holding the supreme court has no appellate jurisdiction from decisions of officers of matters purely administrative in nature; *Bailey v. Berkey*, 81 Fed. Rep. 740, holding, further, as to when assessor is liable for excessive assessments. Note on "Acts of quasi judicial officers" to *Flournoy v. City of Jeffersonville*, 79 Am. Dec. 474.

If any part of tax complained of be legal, that must be paid before appellant, is not ground for reversal of judgment, p. 618.

Cited to same effect in *Quint v. Hoffman*, 103 Cal. 508; *Couts v. Cornell*, 147 Cal. 562, complaint to restrain execution of tax deed to state on account of defective description of law in assessment of taxes which does not offer to pay plaintiff's just proportion of taxes, is insufficient.

#### 57 Cal. 617-620. McCOURTNEY v. FORTUNE.

**Findings.**—Failure to find on a particular point, if not prejudicial to appellant, is not ground for reversal of judgment, p. 618.

Cited to same effect in *People v. Center*, 66 Cal. 564; also, in *Murphy v. Bennett*, 68 Cal. 530; *Estate of Learned*, 70 Cal. 142, holding, further, as to failure to find that a will is valid as holographic, when findings on all issues raised are against contestants; *Quinn v. Anderson*, 70 Cal. 457, material issue may become immaterial by reason of findings on other issues: *Louvall v. Gridley*, 70 Cal. 511; *Malone v. County of Del Norte*, 77 Cal. 218; *Daly v. Sorocco*, 80 Cal. 368; *Demartin v. Demartin*, 85 Cal. 75, holding, further, as to failure to make findings of fact when findings, if made, must have been against appellant; *Hooker v. Thomas*, 86 Cal. 178; *Brison v. Brison*, 90 Cal. 328; *Windhaus v. Bootz*, 92 Cal. 623, holding, further, as to failure to find on all material issues, when finding is made on issue which must control judgment: *Diefendorff v. Hopkins*, 95 Cal. 348.

#### 57 Cal. 620-623. PEOPLE v. TAYLOR.

**Vacancy in Office** occurs when party elected thereto fails to qualify within time required by statute, p. 622.

Cited to same effect in *Hull v. Superior Court*, 63 Cal. 176; also, in *French v. County of Santa Clara*, 69 Cal. 520, holding, further, as to right of incumbent to hold over; *Adams v. Doyle*, 139 Cal. 680, and *Minnick v. State*, 154 Ind. 389, sustaining appointment or election of successor after such failure to qualify; *People v. Perkins*, 85 Cal. 511, 512, holding, further, as to what constitutes notice of election. Approved

in well-considered opinion in *State v. Lansing*, 46 Neb. 527, holding the execution and filing of bond is a condition precedent to right to be inducted into office, Nowall, C. J., and Ragan, C., dissenting, p. 535. Cited in *People v. Ward*, 107 Cal. 240, 241, holding a vacancy occurs where party elected dies between time of qualification and installation into office; *State v. Ruff*, 4 Wash. 239, holds failure to qualify within time required by statute does not work a forfeiture of office, Dunbar and Scott, JJ., dissenting. See note on subject to *State v. Allen*, 83 Am. Dec. 373.

**57 Cal. 623-624. SOCIETY FRANCAISE v. SELHEIMER.**

**Equity—Jury.**—In equity proceedings, the granting or refusing of jury trial is within discretion of the court, p. 624.

Cited to same effect in *Curnow v. Blue Gravel Co.*, 68 Cal. 264; also, in *Fish v. Benson*, 71 Cal. 435; *Downing v. Le Du*, 82 Cal. 472, holding, further, as to legal issues in equitable action; and in *Loftus v. Fischer*, 113 Cal. 288.

**57 Cal. 625-626. COMSTOCK MINING COMPANY v. SUPERIOR COURT.**

A cause is not concluded until findings and decision are filed with the clerk, p. 626.

Cited with approval in *Walter v. Merced etc. Assn.*, 126 Cal. 586, and *Matheson v. Ward*, 24 Wash. 412, 85 Am. St. Rep. 958, sustaining right of trial judge to sign decision and decree in another county; *Connolly v. Ashworth*, 98 Cal. 206, holding, further, the fact that findings are signed by a judge and ordered by his successor to be filed is insufficient to support judgment; also, in *Northern Trust v. Hender*, 12 Wash. 562.

**57 Cal. 626-627. GROSS v. KENFIELD.**

**Constitutional Law.**—Constitutional provision against altering compensation of officers applies to those officers elected at first election after adoption of constitution, p. 627.

Cited in *Lloyd v. Silver Bow County*, 11 Mont. 415, holding, further, as to officers whose compensation is not fixed by the constitution.

**57 Cal. 628-629. PEOPLE v. MALASPINA.**

**Evidence.**—Instruction as to weight, p. 629.

Note on general subject to *State v. Whit*, 72 Am. Dec. 546.

**57 Cal. 629-636. CLARK v. CRANE.**

Order extending time in which to give notice of motion for new trial, made after time for giving such notice has expired, is void, p. 633.

Cited to same effect in *Cooney v. Furlong*, 68 Cal. 522; *Freese v.*

Freese, 134 Cal. 49, applying rule to order extending time to file statement on new trial.

**Appeal from order after judgment rendered, p. 634.**

Cited in Mining Co. v. Weinstein, 7 Mont. 348, holding, further, as to special orders.

**Appeal may be taken from order denying motion to settle statement on motion for new trial, p. 633.**

Cited with approval in Empire Co. v. Bonanza Co., 67 Cal. 410, 411, holding order on motion to tax cost-bill can be reviewed only on direct appeal therefrom. Cited in Wood v. Strother, 76 Cal. 550, 9 Am. St. Rep. 254, holding, further, as to when mandamus will lie to compel judge to sign bill of exceptions. Approved in Stonesifer v. Kilburn, 94 Cal. 42; Beach v. Spokane etc. Co., 21 Mont. 8, noted under Calderwood v. Peyser, 42 Cal. 110; Sutton v. Symonds, 100 Cal. 577, but no appeal lies from an order refusing to vacate an appealable order; Symon v. Bunnell, 101 Cal. 223. Cited in Kearne v. Murphy, 19 Nev. 94.

**Mandamus.—Query, whether mandamus will lie to compel judge to settle statement on motion for new trial, p. 635.**

Cited in dissenting opinion of Thornton, J., in Williard v. Superior Court, 82 Cal. 470, where the use of writ of mandamus is further considered; Gay v. Torrence, 145 Cal. 147, refusing mandamus to compel settlement of bill of exceptions on appeal from order striking from files affidavit assailing judge for misconduct based solely on information and belief; State v. Cox, 155 Ind. 597, denying writ to compel settlement of bill that would be useless to applicant. See extended note to Dane v. Derby, 89 Am. Dec. 731, 740.

**Appeal taken after expiration of time in which law requires it should be taken will be dismissed, p. 635.**

Cited to same effect in Sutton v. Symonds, 97 Cal. 476. Distinguished in Emeric v. Alvarado, 64 Cal. 541, holding, further, as to when time commences to run in order extending time.

**General Citation.—Casteel v. State, 9 Wyo. 275.**

#### 57 Cal. 637. CLARK v. HIS CREDITORS.

**Verdict.—Affidavit of juror cannot impeach, p. 637.**

Cited in People v. Flynn, 7 Utah, 384, as to averment that they misunderstood the instructions.

#### 57 Cal. 640-641. DEAN v. BASSETT.

**Agency.—Ratification of unauthorized act of agent, to bind principal, must be with full knowledge of material facts, p. 641.**

Cited with approval in Halsey v. Monteiro, 92 Va. 587; Oxford etc. Line v. Bank, 40 Fla. 359, holding ratification not established under facts

stated; *Shull v. New Birdsall Co.*, 15 S. Dak. 17, determining question of ratification of acts of agent in accepting old outfit in part payment of threshing outfit.

**57 Cal. 641-643. JONES v. GARDNER.**

**Jury.**—In equity proceedings defendant is not entitled, of right, to trial by jury, p. 643.

Cited to this effect in *Fish v. Benson*, 71 Cal. 435.

**Reference in Equity Cases.**

Note to *Grim v. Norris*, 79 Am. Dec. 207.

**Mortgage Foreclosure.**—Court is not bound to ascertain whether it would be "to the advantage" of defendant to have lots sold separately, p. 643.

Cited in *Solicitors' Co. v. Washington R. R. Co.*, 11 Wash. 687, holding exceptions to the rule.

**57 Cal. 645. BUELL v. DODGE.**

**Venue.**—Defendant's right to change must be determined by conditions existing at time he first appears in action, p. 645.

Cited with approval in *Ah Fong v. Sternes*, 79 Cal. 33, holding plaintiff may not deprive defendant of this right by adding something to the complaint, and *Brady v. Times-Mirror Co.*, 106 Cal. 60; *Wallace v. Owsley*, 11 Mont. 221. Cited in *Savings Bank v. National Bank*, 101 Iowa, 537, where statute is construed.

**57 Cal. 646-647. JEFFREYS v. HANCOCK.**

Counterclaim must be mature at time action was commenced, p. 647.

Cited to this effect in *McGuire v. Edsall*, 14 Mont. 360.

## VOLUME LVIII.

By C. H. SQUIRE.

Revised to include citations to Volume 147, by CHARLES L. THOMPSON.

### 58 Cal. 1-2. WILSON v. MADISON.

**Judgment Lien.**—Judgment does not become a lien upon homestead existing when docketed, or when abstract is filed or recorded, p. 2.

Cited to same effect in Beaton v. Reid, 111 Cal. 486, where execution was issued prior to declaration of homestead. Cited, also, in note to Blue v. Blue, 87 Am. Dec. 273.

### 58 Cal. 2-4. STEWART v. WHITLOCK.

**Mistake.**—Uncommunicated intention cannot control the plain letter of a contract, p. 4.

Cited and approved in Crane v. McCormick, 92 Cal. 181; Schultz v. McLean, 93 Cal. 357, holding that a grantor cannot question his own conveyance upon the ground that a third party practiced a fraud upon him not known to or participated in by the grantee.

### 58 Cal. 4-5. LATAILLADE v. SANTA BARBARA GAS COMPANY.

**Pleading—Justice Court.**—It is sufficient to state claim in such a way that a person of common understanding may know what is intended, p. 5.

Cited in note to Stuart v. Lander, 76 Am. Dec. 539.

### 58 Cal. 6-7. BRODRIBB v. TIBBETS.

**Mortgage.**—Foreclosure cannot be brought before mortgage debt is due, unless it is so provided by the terms of the note or mortgage, p. 7.

Doubted in Odell v. Buttrick, 126 Cal. 550, 551, permitting foreclosure on default of payment of interest under terms of the mortgage; Yoakam v. White, 97 Cal. 288, where it is held that a mortgagor may foreclose for default in payment of interest where it is agreed that he may foreclose in case of default of the payment of the note by its terms; Van Loo v. Van Aken, 104 Cal. 270, "where a mortgage contains no provision for the collection of the note, or for the foreclosure of the mortgage before the maturity of the note, the mortgagor has no right to fore-

close until its maturity." Denied in *Scheige v. Kennedy*, 64 Wis. 568, where it is held that a mortgage may be foreclosed for the breach of a condition thereof by a failure to pay interest on the debt secured, although the mortgage itself does not provide for such foreclosure.

#### 58 Cal. 8-11. **MORA v. LEROY.**

Pleading—Demurrer.—Want of capacity to sue cannot be urged on general demurrer, p. 11.

Cited to same effect in *Phillips v. Goldtree*, 74 Cal. 155; also in *Knight v. Le Beau*, 19 Mont. 226.

#### 58 Cal. 11-16. **MABURY v. RUIZ.**

Homestead.—In an action to foreclose mortgage on, the wife is a necessary party, p. 14.

Cited to same effect in *Fitzgerald v. Fernandez*, 71 Cal. 508, where the mortgage was executed by the husband alone; also, in *Booth v. Hoskins*, 75 Cal. 276, which seems to hold that a mortgage executed by the husband alone is void only as to the homestead value.

Presumption.—A fee simple is presumed to pass by grant, p. 15.

Cited to same effect in *Klumpke v. Baker*, 68 Cal. 561; also, in *Logan v. Rose*, 88 Cal. 267.

Homestead is not lost by joint deed intended as a mortgage, except as against innocent purchasers, p. 16.

Cited in note to *Taylor v. Hargous*, 60 Am. Dec. 614.

#### 58 Cal. 16-19. **CITY OF LOS ANGELES v. MELLUS.**

Pleading—Demurrer.—Final judgment entered upon general demurrer to the complaint is a bar to another action on the same cause, p. 19.

Approved in *City of Los Angeles v. Mullus*, 59 Cal. 455, holding, further, that this does not prevent presenting complaint so amended as to be no longer vulnerable to the attack made in former suit; *Hardy v. Hardy*, 97 Cal. 131; also, in *Bomar v. Parker*, 68 Tex. 439.

#### 58 Cal. 21-39. **AGUIRRE v. ALEXANDER.**

Instructions conflicting on material point is ground for reversal, p. 26.

Cited to same effect in *Haight v. Vallet*, 89 Cal. 249, 23 Am. St. Rep. 468; *People v. Hancock*, 7 Utah, 181, reversing judgment accordingly.

Special Verdict will govern when in conflict with general verdict, p. 29.

Cited in *McAulay v. Moody*, 128 Cal. 208, noted under *Leese v. Clark*, 20 Cal. 426.

Possession.—A tenant in common has a right to assume that the pos-

session of his cotenant is his possession until informed to the contrary, p. 29.

Approved in *Gage v. Downey*, 94 Cal. 253, holding one cotenant out of actual possession cannot rely for adverse possession as against another cotenant out of possession, upon the possession of a third cotenant. On general subject, in *Watts v. Owens*, 62 Wis. 524.

Verdict of a jury, in disobedience to the instructions of the court, even though the instructions be not correct in point of law, is a verdict "against law," p. 30.

Cited as authority in *Mattingly v. Pennie*, 105 Cal. 517. S. C. 45 Am. St. Rep. 89. Approved in *Murray v. Heinze*, 17 Mont. 364; also, in *Pepperall v. City Park Transit Co.*, 15 Wash. 181.

#### 58 Cal. 39-41. MATTER OF HOTCHKISS.

**Pleading.**—Verification of a pleading by an attorney, which shows no inability of the party to make the verification, must state directly that the facts verified are within the knowledge of the attorney, p. 41.

Cited to same effect in *Silcox v. Lang*, 78 Cal. 123; also, in *In re Hudson*, 102 Cal. 468, holding that in disbarment proceedings the verification must be made by one having knowledge of the facts set out in the accusation; *In re Weed*, 26 Mont. 251, under Code of Civil Procedure, section 420, relating to verification of accusation in disbarment proceedings, charges verified upon information and belief will not be considered. Note to *State v. Kirk*, 95 Am. Dec. 345. Distinguished in *In re Collins*, 147 Cal. 10, accusation for disbarment of attorney presented by committee of Bar Association and verified by some other person stating positively in statutory language that charges stated therein are true, is sufficient.

#### 58 Cal. 42-50. COMMERCIAL BANK v. MITCHELL.

**Partnership debts have priority over individual debts**, p. 50.

Approved in *Whelan v. Shain*, 115 Cal. 329, holding, further, that the rule is not affected by the time of filing attachment liens. Distinguished in *Blumaur etc. Drug Co. v. Branstetter*, 4 Idaho, 566, upon facts.

#### 58 Cal. 56-59. BLACK v. GERICHEN.

Judgment for deficiency, after the sale of the mortgaged premises under a judgment of foreclosure, is not a lien upon the premises sold if they are purchased by any person other than the mortgage debtor, p. 58.

Approved in *Horn v. National Bank*, 125 Ind. 394, 21 Am. St. Rep. 241, holding, further, that a judgment creditor cannot redeem from his own sale; cited in *Camp v. Land*, 122 Cal. 170, discussing remedies of junior mortgagee where action brought to foreclose senior mortgage; *San Jose etc. Co. v. Lyndon*, 124 Cal. 519, denying right of junior mortgagee to Notes Cal. Rep.—183.

redeem under facts stated; Stockton etc. Soc. v. Harrold, 127 Cal. 619, discussing relief obtainable by mortgagee in foreclosure suit; notes to Flanders v. Aumack, 67 Am. St. Rep. 514; Frink v. Murphy, 81 Am. Dec. 151, and Filley v. Duncan, 93 Am. Dec. 357.

**58 Cal. 63-73. WEISENBERG v. TRUMAN.**

**Trusts.**—Unrecorded deed of trust of land for a cemetery is a valid dedication of such land and passes the title to trustees. Trust remains in force until all bodies are removed from the cemetery, p. 67.

Approved in Schlessinger v. Mallard, 70 Cal. 328. 334; also, in Campbell v. City of Kansas, 102 Mo. 346, holding, further, that if land is entirely abandoned for the purpose for which it was dedicated, it reverts to donee or his heirs.

**58 Cal. 73-80. FELIZ v. CITY OF LOS ANGELES.**

**Water Rights—Prescription.**—Use of water by permission prevents the acquisition of title by prescription, p. 79.

Cited to same effect in Ball v. Kehl, 95 Cal. 613; also, in Wimer v. Simmons, 27 Oreg. 19; 50 Am. St. Rep. 697.

**Water Rights.**—City having exclusive right to water of river for city purposes cannot dispose of water outside its limits to injury of riparian proprietors, p. 80.

Approved in Vernon Irrigation Co. v. Los Angeles, 106 Cal. 250. Cited in Platte Water Co. v. Irrigation Co., 12 Colo. 533, where it is distinguished, the case being decided on statutory grounds.

**58 Cal. 81-83. SAN FERNANDO HOMESTEAD ASSOCIATION v. PORTER.**

**Motion for New Trial.**—Where parties consent to the judgment as entered it is not necessary to notify them of the judgment in order to impose upon them the obligation to move for a new trial within ten days after judgment, p. 83.

Cited in Waddingham v. Tubbs, 95 Cal. 251, where it is stated that the cases are not harmonious on the point, but decides nothing. Approved in Forni v. Yoell, 99 Cal. 178, holding, further, that notice may be waived by action in court showing knowledge of judgment.

**58 Cal. 88-91. GURNEE v. SUPERIOR COURT.**

**Jurisdiction.**—Superior court succeeded to jurisdiction of district court of same county, p. 91.

Cited to same effect in Savings Union v. Abbott, 59 Cal. 400. Approved in Watt v. Wright, 66 Cal. 204, holding, further, that the constitutional provision requiring all actions for the recovery of the possession of,

quieting title to, or for the enforcement of liens upon real estate, to be commenced in the county in which the real estate is situated, does not apply to actions pending when the constitution went into effect. Cited in Konold v. Rio Grande etc. Co., 16 Utah, 160, on point that want of jurisdiction cannot be waived. Dissenting opinion in Gibbs v. Gibbs, 26 Utah, 427, majority holding district court of county in which plaintiff in divorce suit resided had jurisdiction of subject matter of action on ground of adultery committed in another county; Urton v. Woolsey, 87 Cal. 39; approval in Jungk v. Holbrook, 15 Utah, 211, holding a constitutional provision should not be construed with a retrospective operation, unless that is the unmistakable intention of the words used.

#### 58 Cal. 91-95. McGARY v. PEDRORENA.

**Amendment of Complaint.**—Under section 432 of the Code of Civil Procedure, prior to the amendment of March 9, 1880, service of the amendment was not required unless ordered by the court, p. 94.

Distinguished in Thompson v. Johnson, 60 Cal. 295, where it is decided that if the plaintiff amends in matter of substance, he must serve his amended pleading upon the parties, including defaulting defendants. Cited in Martin v. Carter, 48 Fed. Rep. 597, where defendant waived service by demurring to amended complaint.

#### 58 Cal. 95-98. BARRON v. DELEVAL.

Notice is waived where a party or his attorney has actual knowledge of matters, to which he is entitled to notice, and acts upon such knowledge, p. 98.

Cited in Biagi v. Howes, 66 Cal. 472, where it is held that a party intending to move for a new trial has a right to a notice in writing of the decision from the adverse party, although he is present in court when the decision is rendered, and waives findings, and asks for a stay of proceedings on the judgment, p. 471; Mullally v. Benevolent Society, 69 Cal. 562; Kelleher v. Creciat, 89 Cal. 41, holding that service of a copy of the findings and judgment upon the attorneys of the defeated party after entry of the judgment is a sufficient notice of the entry of the judgment; Waddingham v. Tubbs, 95 Cal. 251; Wall v. Heald, 95 Cal. 367, holding, further, written notice of the overruling of a demurrer is waived by the presence in court of the attorney for the demurring party at the time of the ruling, and the time to amend or answer runs from the time when the ruling is made; Mallory v. See, 129 Cal. 359, noted under O'Neil v. Donahue, 57 Cal. 231; McCord etc. Co. v. Glen, 6 Utah, 142, applying rule to notice of decision on demurrer. Approved in Forni v. Yoell, 99 Cal. 176, 178.

**Demurrer.**—Upon the overruling of a demurrer, the time to answer is a matter within the discretion of the court, p. 97.

Approved in McDonald v. Hope Mining Co., 48 Fed. Rep. 594.

**General Citation.**—In *Lang v. Superior Court*, 71 Cal. 492, case was cited to show clerk's duty to enter judgment.

**58 Cal. 99-101. THOMAS v. ANDERSON.**

Superior Court has no jurisdiction of action on agreement of several persons to pay less than three hundred dollars each, p. 100.

Cited in *Miller v. Carlisle*, 127 Cal. 329, denying jurisdiction in like action to enforce mechanics' liens, where only personal judgments are obtainable.

**58 Cal. 101-102. DE LA OSSA HALPIN v. OXARART.**

**Judgment in Ejectment** against the administrator, concludes the heirs, although not parties to the action, p. 102.

Cited to same effect in *Bayle v. Muehe*, 65 Cal. 349; also in *Finger v. McCaughey*, 119 Cal. 61, holding, in an action to foreclose a mortgage, heirs of the mortgagor are not necessary parties to the action; *Bell v. Mills*, 123 Fed. 27, under California Civil Code, sections 3001, 3002, in case of death of pledgor, pledgee may sell on demand made on executors of pledgor and notice to them of sale; *Hearfield v. Bridges*, 75 Fed. Rep. 51, which holds that the title derived under such a sale is valid and conclusive as against such heirs, in a collateral proceeding in a federal court, without regard to the question whether the heirs would be necessary parties to a suit in the federal court for the foreclosure of the mortgage.

**58 Cal. 102-104. PEOPLE v. GARCIA.**

Indictment charging same offense in different forms in different counts, must show matters set forth in different counts are description of one and same offense, pp. 103-104.

Approved in *People v. Jailles*, 146 Cal. 304, applying rule to information for rape on girl under sixteen years of age.

**58 Cal. 104-105. PEOPLE v. NELSON.**

Indictment to state an offense must charge a particular felony, p. 106.

Cited in *People v. Smith*, 86 Cal. 240, which holds, further, that the degree of offense need not be stated; *People v. Mooney*, 127 Cal. 341, holding charge of arson insufficiently pleaded; *People v. Goldsworthy*, 130 Cal. 602, but sustaining indictment for entry with intent to commit arson; *Barnhart v. State*, 154 Ind. 178, and *State v. Buchanan*, 75 Miss. 351, holding burglary indictments insufficient.

**58 Cal. 111-115. FREEMAN v. RAHM.**

A decree of distribution of an estate, after due notice by the probate

court, is conclusive upon a person who might have claimed that a share of the estate belonged to him, p. 115.

Cited in *Barnard v. Wilson*, 74 Cal. 515, 516, which holds that if the probate court has no jurisdiction to pass on the claim, as the interest of a mortgagee in an estate, then the claimant will not be prejudiced by failing to appear and ask for distribution to himself. The rule seems to be disapproved in *Chever v. Ching Hong Poy*, 82 Cal. 72, but again approved in *Crew v. Pratt*, 119 Cal. 149. Approved in *Snyder v. Murdock*, 26 Utah, 240, probate decree by which interest of certain heirs in estate of father was distributed to one of judgment creditors of heirs was conclusive where no appeal taken, on assignee for creditors of heirs. Note on general subject to *Green v. Creighton*, 48 Am. Dec. 746; *Buckley v. Superior Court*, 41 Am. St. Rep. 144.

**Probate Claim.**—One claiming rights under contract with decedent is barred by decree distributing the property to another, on failure to present claim, p. 115.

Overruled in *Martinovich v. Marsicano*, 137 Cal. 359, holding judgment lienor not compelled to present claim. And see *Estate of Ryder*, 141 Cal. 369, where opinions are stated not to be harmonious on the subject.

#### 58 Cal. 115-124. **GREINER v. GREINER.**

**Husband and Wife—Community Property.**—Husband has entire control during his life, p. 119.

Cited to same effect in *Tibbetts v. Fore*, 70 Cal. 245; also, in *People v. Swalm*, 80 Cal. 49, 13 Am. St. Rep. 98, the wife's interest being a mere expectancy; also in *Fallbrook Irrigation Dist. v. Abila*, holding, further, that the wife is not the owner of community property in any legal sense; *Valensin v. Valensin*, 12 Saw. 99; 28 Fed. Rep. 602. Distinguished and explained in *Taylor v. Kelly*, 103 Cal. 183, 184.

**Same.**—Probable wife may maintain action during coverture to restrain the husband from carrying out a fraudulent transfer which would result in loss to her, p. 123.

Cited for this point in note to *Thayer v. Thayer*, 39 Am. Dec. 220; *Smith v. Smith*, 73 Am. Dec. 537; *Lines v. Lines*, 24 Am. St. Rep. 493.

#### 58 Cal. 124-126. **RECLAMATION DISTRICT v. KENNEDY.**

**Reclamation District.**—If not originally formed under Political Code, nor reorganized thereunder, provisions of the code have no application, p. 126.

Cited to same effect in *Swamp Dist. No. 121 v. Haggan*, 64 Cal. 206; also, in *People v. Parvin*, 74 Cal. 554, holding, further, that the act of April 15, 1880, does not authorize the setting apart of a new and independent reclamation district within the limits of a district formed or organized prior to the adoption of the Political Code, and which has not

reorganized under the Political Code; *San Francisco Sav. Union v. Reclamation Dist.*, 144 Cal. 644, holding section 3478, Political Code, inapplicable to corporations organized under act of 1868; *Swamp Dist. v. Haggin*, 64 Cal. 207, to the effect that the right to proceed under any particular act is jurisdictional, and must be pleaded. General reference: *Swamp Dist. v. Haggin*, 64 Cal. 209.

58 Cal. 126-133. **FRATT v. WHITTIER.** 41 Am. Rep. 251.

**Fixtures—Appurtenances.**—Whatever is accessory to a building, for the more convenient use and improvement of it, is considered to pass by a deed of the premises, p. 130.

Cited and approved in *Standart v. Round Valley Water Co.*, 77 Cal. 403.

What is a fixture is determined by the manner of annexation and intent of the person making it, p. 131.

Approved in *Jordan v. Myres*, 126 Cal. 569, noted under *Hendy v. Dinkerhoff*, 57 Cal. 3; *Cook v. Condon*, 6 Kan. App. 585, holding mill machinery to have become part of the realty; *Lavenson v. Standard Soap Co.*, 80 Cal. 250, 13 Am. St. Rep. 151, holding certain machines made and used for soap making, permanently attached to a building which was used for that purpose, are fixtures. Cited and affirmed in *Buchanan v. Cole*, 57 Mo. App. 17.

**Fixtures.**—By express agreement parties may fix upon chattels annexed to realty any character they may agree upon, p. 132.

Cited to this point in *Bank v. North*, 160 Pa. St. 311. General subject, note to *Hubbel v. Savings Bank*, 42 Am. Rep. 447, 449; also, in *Johnson v. Wiseman*, 83 Am. Dec. 480.

58 Cal. 133-142. **MILLER v. HEILBRON.**

**Constitutional Law.**—Taxation of national bank shares at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens of the state, is a violation of United States statute, section 5219, and the assessment is void, p. 141.

Cited with approval in *McHenry v. Downer*, 116 Cal. 27, 28, 30, holding, further, that national bank shares may not be assessed as other personal property, since the machinery provided therefor works a discrimination in favor of state banks. Cited in *Dutton v. Bank of Concordia*, 53 Kan. 459, 460, where it is apparently overruled, holding that national bank stocks are not credits.

**Constitutional Law.**—Where the taxing laws of a state discriminate against national bank stock, they are to that extent void, p. 138.

Cited to same effect in *Wasson v. National Bank*, 107 Ind. 217. Approved in *Bank of Albia v. City Council*, 86 Iowa, 37, holding, further,

that shares of stock in national banks are credits within the meaning of a code section, entitling a taxpayer to deduct from the gross amount of his credits listed for taxation all debts owing by him in good faith. Also approved in Bressler v. Wayne County, 25 Neb. 473. Disapproved in Dutton v. Bank of Concordia, 53 Kan. 459, 460. Notes to Commonwealth v. Bank, 96 Am. Dec. 295, and to People v. National Bank, 69 Am. St. Rep. 41.

**58 Cal. 142-144. FARLEY v. SPRING VALLEY COMPANY.**

Water Rights acquired by appropriation after the passage of the act of 1866 are valid, and will be protected against one who subsequently obtains title to the land from the government, p. 144.

Cited to same effect in South Yuba Water Co. v. Rosa, 80 Cal. 337; also in Nechochea v. Curtis, 80 Cal. 407, holding, further, that this right will be protected, notwithstanding the failure of the prior appropriator to comply with the Civil Code as to the posting and record of a notice of appropriation of the water right. Approved in Ellis v. Pomeroy Improvement Co., 1 Wash. 576.

Public Lands belong to the United States until the pre-emptor has proved up his claim and paid for the land, p. 143.

Cited to this point in Southern Pacific Co. v. Burr, 86 Cal. 282, holding that the government may withdraw lands from sale, though in the possession of qualified pre-emptors, if they have not paid for the land, or may sell or grant it to others, as it pleases. Cited in McGuire v. Brown, 106 Cal. 667, 671, where the principal case is doubted; this case holding that the homestead settler who has made entry has an equitable interest in the land, subject to the performance of certain conditions, and, until forfeited by failure to perform the conditions, it must prevail not only against individuals, but against the government. Cited in Scott v. Toomey, 8 S. Dak. 650, where its authority is questioned.

**58 Cal. 144-146. PEOPLE v. DONNELLY.**

Taxation.—Possessory rights and imperfect interest acquired by purchase from the state prior to acquisition of patent, is taxable, p. 146.

Cited in note on general subject to Commissioners v. Ottawa, 33 Am. St. Rep. 402.

**58 Cal. 147-152. JEFFERS v. COOK.**

Mortgage Foreclosure.—Grantees of mortgagor may plead statute where not made parties until after claim was barred, p. 150.

Cited in Commercial v. Hornberger, 140 Cal. 19, but holding rule inapplicable in action to foreclose pledge under facts stated.

**Statute of Limitations.**—Failure to bring suit to foreclose a mortgage within the time required by the statute after the mortgage becomes due extinguishes the mortgage lien, p. 151.

Cited to same effect in opinion of McKee, J.; in *Henderson v. Grammar*, 66 Cal. 336.

**Statute of Limitations.**—New parties cannot be brought in after the statute has become a bar, p. 151.

Approved in *Grier v. Assurance Co.*, 183 Pa. St. 352, holding the same as to new subject matter. Cited in *Spaulding v. Howard*, 121 Cal. 198, holding action barred as to new parties.

**Pleading.**—An amendment for the purpose of bringing in new parties must, upon a question of jurisdiction, be considered, as to such parties, an original proceeding, p. 151.

Cited to same effect in *Trapier v. Waldo*, 16 S. C. 289.

**General Citation.**—Note to *Goodenow v. Ewer*, 76 Am. Dec. 550; also, *McCarthy v. White*, 82 Am. Dec. 758.

#### 58 Cal. 152-159. DAVIS v. DREW.

**Findings** may refer to pleadings for facts found, provided reference is intelligible and facts sufficiently stated, p. 157.

Disapproved in *Bard v. Kleeb*, 1 Wash. 373.

**Evidence.**—Declarations of vendor before transfer of possession are admissible against vendee to show fraud in sale, p. 158.

Cited in note to *People v. Vernon*, 95 Am. Dec. 54, to same effect.

#### 58 Cal. 159-163. CAREY v. RAE.

**Right of Way.**—Judgment in partition, by which a way was established for the benefit of the owners of the ranch, is binding and conclusive on all parties to it, their heirs or assigns, and is not the subject of collateral impeachment, p. 163.

Cited and distinguished in *Myers v. Daubenbiss*, 84 Cal. 5, in which case the court had no authority to establish the way in question.

**Right of Way.**—When established road is impassable, temporary right is conferred to pass over the land of another, p. 162.

Cited to this point in note to *Campbell v. Race*, 54 Am. Dec. 732.

**Way of Necessity** must be supported by necessity, p. 162.

Cited in note to *Pettingill v. Porter*, 85 Am. Dec. 676; *Welch v. Wilcox*, 100 Am. Dec. 117; *Feeffees v. Proprietors*, 174 Mass. 574, holding such right of way established under facts stated. Distinguished in *City of Santa Ana v. Brunner*, 132 Cal. 236, and held inapplicable to proceedings by city to condemn land for public street.

**58 Cal. 163-168. MORAN v. ABBEY. S. C. 63 Cal. 57.**

**Payment.**—A transaction which amounts to payment of a note cannot be transformed into a transfer of it by a subsequent indorsement, p. 167.

Cited to this point in Wright v. Mix, 76 Cal. 468.

**58 Cal. 168-177. HUNGARIAN MINING COMPANY v. MOSES.**

**Water Rights.**—New ditch and reservoir constructed to employ to better advantage water rights covered by a mortgage will pass by foreclosure sale, p. 176.

Discussed and distinguished in Mitchell v. Canal Co., 75 Cal. 490, 492, which case holds that a decree foreclosing a mortgage on a water ditch particularly described as lying between given termini does not operate to pass title to a new and independent ditch, along a different course, between different termini, constructed for and being used in place of the mortgaged ditch, where the new ditch is not an appurtenance of nor an improvement on the new ditch. Cited and affirmed in McShane v. Carter, 86 Cal. 316, holding, further, that the term "mining ground" as used in the statute includes appurtenances.

**Quieting Title.**—Defendant is not entitled to affirmative relief where his answer is merely a defense, p. 176.

Distinguished in Islais etc. Co. v. Allen, 132 Cal. 437, holding such relief prayed for.

**58 Cal. 177-180. COKER v. SUPERIOR COURT.**

**Justice's Court—Appeal.**—Filing and serving of notice, and filing undertaking within thirty days, are jurisdictional prerequisites. Order is immaterial, p. 178.

Cited to same effect in Dalzell v. Superior Court, 67 Cal. 454. Approved in Hall v. Superior Court, 68 Cal. 25, S. C. 71 Cal. 551, reaffirming that order is immaterial. Cited in Matthews v. Superior Court, 70 Cal. 528, which case holds further that the party upon whom the law requires notice to be served may voluntarily appear and submit to the jurisdiction of the court, and if he does so appear, notice is waived. Cited in Havemeyer v. Superior Court, 84 Cal. 393, 18 Am. St. Rep. 235, where it is held to be not in point. Approved in Dutertre v. Superior Court, 84 Cal. 536, holding, further, that where the undertaking is filed more than five days before the service of notice of appeal, and no separate notice is given of the filing of the undertaking, the notice of appeal is notice that an undertaking has been or will be filed within the thirty days allowed by statute, and gives proper opportunity to except to the sufficiency of the sureties; McCracken v. Superior Court, 86 Cal. 75, 77, holding, further, that the superior court has no authority to extend the time in which sureties may justify after exception has

been taken to their sufficiency. Approved in *McKeon v. Noughton*, 88 Cal. 465; also, in *Moffat v. Greenwalt*, 90 Cal. 372, holding, further, that exception to the sufficiency of sureties does not, ipso facto, vacate the appeal. Affirmed in *Salt Lake Brewing Co. v. Gilman*, 2 Idaho, 183; also in *Rudolph v. Herman*, 2 S. Dak. 404, and in *Barber v. Johnson*, 4 S. Dak. 531, holding, further, that if sureties do not justify as required by law, the appeal, on motion of respondents, should be dismissed.

#### 58 Cal. 180-186. **CAREY v. BROWN.**

**Findings.**—General finding that the material allegations are true is sufficient, p. 184.

Cited to same effect in *Moore v. Clear Lake Water Works*, 68 Cal. 151; also, *Osment v. McElrath*, 68 Cal. 469; *Gwinn v. Hamilton*, 75 Cal. 268, holding, further, that if the complaint is sufficient, a finding by reference to it is sufficient. Approved in *Dam v. Zink*, 112 Cal. 93, holding, further, that if facts are stated in the findings in the same way in which they are stated in the pleadings, they are sufficient. Cited in *Bard v. Kleeb*, 1 Wash. 373.

**Intervention.** will not be allowed after final judgment, p. 184.

Cited to same point in *Owens v. Colgan*, 97 Cal. 455; *Baines v. Lumber Co.*, 104 Cal. 6.

A stipulation that an appeal has been duly perfected is conclusive on the supreme court, p. 185.

Approved in *Forni v. Yoell*, 99 Cal. 174; *Springer v. Springer*, 126 Cal. 453, applying rule to stipulation as to sufficiency of bond; *Ward v. Insurance Co.*, 12 Wash. 632, which holds, further, that the transcript sent to the supreme court on appeal cannot be corrected in that tribunal by affidavits or other extrinsic evidence.

**Complaint.**—Where plaintiff seeks to sue on behalf of others as well as himself, and does not allege the facts necessary to entitle them to participate in the action, his allegations in this behalf are redundant, p. 182.

Cited in *Baines v. West Coast Co.*, 104 Cal. 7, 8.

**Mexican Grant.**—Claimants under a grant cannot be permitted, while the patent stands, to aver that the claim comprised other or different lands from those mentioned in the patent, p. 185.

Approved in *Guyer v. Banning*, 167 U. S. 743, holding that it is a conclusive presumption that the patent correctly locates the lands covered by the confirmed grant.

#### 58 Cal. 186-190. **LYBECKER v. MURRAY.**

Answer containing denials of material allegations is not sham, p. 188.

Cited in *King v. Waite*, 10 S. Dak. 6, noted under *Fay v. Cobb*, 51 Cal. 315.

**Discretion to do justice is not arbitrary, but is governed by legal rules or analogies of law, p. 189.**

Cited in *Buell v. Beckwith*, 59 Cal. 482, to effect that it is within the discretion of the court to allow the verification of an answer any time before trial. Note on general subject to *People v. McCumber*, 72 Am. Dec. 524.

**58 Cal. 190-192. HENDRICKS v. SPRING VALLEY COMPANY. S. C. 41 Am. Rep. 257.**

**Mines—Lateral Support.**—The doctrine of lateral support does not apply to hydraulic mining claims, p. 192.

Cited in note on general subject in *Larson v. Street Ry. Co.*, 33 Am. St. Rep. 447, 450.

**58 Cal. 193-197. STEPHENS v. HALLSTEAD.**

In an action of replevin where the plaintiff alleges ownership generally, and right of possession, without disclosing the origin of title, the defendant may traverse the allegations of the complaint, and under the issues thus formed may prove plaintiff's title is founded in fraud, p. 196.

Approved in *Jones v. McQueen*, 13 Utah, 185. Cited in *Gallick v. Bordeaux*, 22 Mont. 476, admitting evidence of fraud accordingly.

**Claim and Delivery** is the proper action to bring against a sheriff who wrongfully seizes the property of plaintiff under a writ of attachment, p. 197.

Cited to same effect in *Wilde v. Rawles*, 13 Colo. 585.

**General Citation.**—*Walters v. Ratliff*, 10 Okla. 275.

**58 Cal. 198-212. PRESTON v. CULBERTSON.**

**Election Contests.**—Mere irregularities which do not affect the final result should be disregarded, p. 209.

Approved in *Kellog v. Hickman*, 12 Colo. 264; also, in *Bowers v. Smith*, 111 Mo. 63, S. C. 33 Am. St. Rep. 502, holding, further, that when an election law specifies a particular irregularity to be fatal, courts will follow that command irrespective of their own views; also, in *Heyfron v. Mahoney*, 9 Mont. 504, S. C. 18 Am. St. Rep. 760, but holding the election three miles from the place designated by the commissioners invalidates it; *People v. Lodi etc. Dist.*, 124 Cal. 703, noted under *Sprague v. Norway*, 31 Cal. 174. Note to *People v. Pease*, 84 Am. Dec. 269.

**Residence.**—Temporarily leaving real residence for the purpose of

visiting homestead in another precinct, in order to comply with the homestead laws, does not work forfeiture of residence for voting purposes, p. 210.

Cited with approval in *Lankford v. Gebhart*, 130 Mo. 632, S. C. 51 Am. St. Rep. 589, holding that "intent" must control and not mere physical stay in any particular place.

**General Reference.**—Note to *Berry v. Wilcox*, 48 Am. St. Rep. 715.

**58 Cal. 212-214. PEOPLE v. BECK.**

**Reputation.**—If defendant offers himself as a witness, he is subject to same rules as to impeachment as are other witnesses, p. 214.

Cited and affirmed in *Cline v. State*, 51 Ark. 144, but evidence of want of chastity is not admissible to impeach the credibility of a witness. Approved in *People v. O'Brien*, 66 Cal. 604; also, *People v. Rozelle*, 78 Cal. 94; *People v. Crowley*, 100 Cal. 481, holding, further, that prosecution may show that witness has been convicted of a felony; *State v. Schnepel*, 23 Mont. 526, admitting evidence to impeach reputation. Cited with approval in *People v. Hickman*, 113 Cal. 87; also, in *People v. Prather*, 120 Cal. 666.

**58 Cal. 214-218. PEOPLE v. BRILLIANT.**

**Perjury—Indictment.**—Averment of materiality of the oath is sufficient, unless contrary appears from other averments, p. 218.

Cited to same effect in *People v. Ah Bean*, 77 Cal. 15. Cited in *Thompson v. People*, 26 Colo. 601, sustaining information. Distinguished in *People v. Lem You*, 97 Cal. 229, which holds that on a trial for perjury, it is the duty of the court to instruct the jury as to what facts would show material testimony. Approved in *People v. Ross*, 103 Cal. 426; also, in *Gandy v. State*, 23 Neb. 442.

**General Reference.**—*State v. Shupe*, 85 Am. Dec. 498, note.

**58 Cal. 218-225. PEOPLE v. FEILEN.** 41 Am. Rep. 258.

**Presumption.**—A status once shown to exist is presumed to continue until contrary appears, p. 224.

Cited to same effect in *Kidder v. Stevens*, 60 Cal. 419. Approved in *Freyschlag v. Stone*, 80 Mo. App. 407, holding, further, that where the mortgage permits the mortgagor, as agent of the mortgagee, to sell the mortgaged goods in the usual course of business, a court will not presume, after a lapse of three months, that all the mortgaged goods, as well as stone fixtures, have been sold.

**Conflict of Presumptions.**—Presumption of innocence of a person accused of bigamy will prevail over and neutralize presumption of continuance of life of first wife, p. 222.

Cited to this point in *White v. White*, 82 Cal. 448.

**Bigamy.**—Evidence to convict, p. 218.

**General Reference** in note to *Hiler v. People*, 47 Am. St. Rep. 232; note to *Johnson v. Commonwealth*, 9 Am. St. Rep. 269; note to *State v. Johnson*, 93 Am. Dec. 256.

**Pleading—Demurrer.**—The objection that an information does not comply with certain sections of the code should be raised by special demurrer, and is waived by failure to do so, p. 225.

Cited to same effect in *People v. Hill*, 3 Utah, 354.

#### 58 Cal. 226-228. **PEOPLE v. DALTON.**

Charging with disinterring and removing a dead body of a human being, not a friend or relation, states an offense, p. 228.

Cited in *State v. Crook*, 18 Utah, 218, noted under *People v. Phipps*, 39 Cal. 326; note to *Keyes v. Konkel*, 75 Am. St. Rep. 426, on dead bodies; note on general subject to *Wynkoop v. Wynkoop*, 82 Am. Dec. 515.

#### 58 Cal. 231-234. **HOGABOOM v. EHRHARDT.**

**Swamp Land.**—Grant by act of September 28, 1850, construed, p. 233.

Cited in *Fredericks v. Zumwalt*, 134 Cal. 47, noted under *Robinson v. Forrest*, 29 Cal. 324.

#### 58 Cal. 234-237. **BANK OF WOODLAND v. HIATT.**

**Misrepresentations** as to the subject matter of a contract entitle the deceived party to a rescission, p. 237.

Cited to same effect in *Senter v. Senter*, 70 Cal. 622, holding, further, that where plaintiff had a right to rely on representations of defendant the latter cannot escape responsibility by showing that plaintiff's attorney might have ascertained that such representations were true; *Willey v. Clements*, 146 Cal. 99, where plaintiff induced by fraud to consent to exchange of land subsequently ratified knew of shortage of acreage, but was still imposed upon by other false representations as to character and condition of property which could not be disclosed by mere examination of property, he could rescind whole transaction on ascertaining falsity; *Calmon v. Sarraille*, 142 Cal. 642, holding principal justified in relying upon representation made by agent. Approved in *Loaiza v. Superior Court*, 85 Cal. 30; S. C. 20 Am. St. Rep. 207. Approved in *Groppengiesser v. Lake*, 103 Cal. 42, holding, further, that it does not matter that defendant did not know that what he stated was untrue; also, in *Bank of Dakota v. Taylor*, 5 S. Dak. 106, holding, further, that one who deceives another to his prejudice cannot complain that the sufferer has not been vigilant in finding it out. Affirmed in

Henderson v. Henshall, 54 Fed. Rep. 329; also, Morris v. Courtney, 120 Cal. 65.

**General Reference** as to time within which party should exercise right to rescind, Commonwealth v. Hays, 74 Am. Dec. 662, note.

**58 Cal. 237-239. WILLIAMS v. SACRAMENTO CO.**

**Reclamation District.**—Publication of petition must be made according to terms of the statute, p. 239.

Cited in People v. Reclamation Dist., 121 Cal. 527, holding publication insufficiently made.

**58 Cal. 239-240. COULTHURST v. COULTHURST.**

**Pleading.**—Cross-complaint must state facts sufficient to entitle the pleader to affirmative relief, p. 240.

Cite to same effect in Harrison v. McCormick, 69 Cal. 618, holding, further, parties named in must be parties to the original action. Cited in Wadsworth v. Wadsworth, 81 Cal. 188, S. C. 15 Am. St. Rep. 43; also, Mott v. Mott, 82 Cal. 418, holding, further, that in divorce proceedings property rights may be settled under cross-complaint; Ferry v. Ferry, 9 Wash. 241, holding, further, that a decree of divorce will not be set aside on the ground that the court had no jurisdiction of the action because of the nonresidence of the plaintiff as the appearance of defendant in the cause, and her filing a cross-complaint thereon upon which she obtained a decree in her favor.

**58 Cal. 241-243. FAIRBANKS v. WILLIAMS.**

**Conversion—Damages.**—Plaintiff is entitled to a fair compensation for time and money properly spent in pursuit of property, p. 243.

Cited in Glaspey v. Northern Pacific R. Co., 43 Fed. Rep. 905.

**58 Cal. 245-247. PEOPLE v. FUQUA.**

**Deadly Weapon** is one likely to produce great bodily harm, p. 247.

Cited to same effect in People v. Franklin, 70 Cal. 643; also, People v. Leyba, 74 Cal. 408; People v. Valliere, 123 Cal. 578, 579, admitting evidence as to nature and character of weapon used and manner of use.

**58 Cal. 249-254. PEOPLE v. FLAHAVE.**

**Instructions—Self-defense.**—It is error to instruct the jury that to justify the killing the defendant must determine that it was absolutely necessary to kill the deceased in order to save his own life, p. 251.

Cited to same effect in People v. Simons, 60 Cal. 73; also, People v. Gray, 61 Cal. 180, 181; also, in People v. Morine, 61 Cal. 369, holding,

further, that if such instruction is qualified and explained, the whole charge will be considered, and if, as a whole, it correctly presents the law applicable to the case, the judgment will not be reversed, p. 370. Cited in *People v. Westlake*, 62 Cal. 306, which case holds that an instruction "that the killing must be done under a well-founded belief that it was absolutely necessary" is correct. Cited in *People v. De Witt*, 68 Cal. 587; *People v. Guidice*, 73 Cal. 228; *People v. Dye*, 75 Cal. 113. Disapproved in *People v. Bruggy*, 93 Cal. 483, holding that "danger must appear to the defendant," and "not to the jury."

Same.—The charge given by the court of its own motion forms no part of the judgment-roll, p. 253.

Cited to same effect in *People v. January*, 77 Cal. 181, holding, further, that they do become a part of the record by being indorsed by the judge, or by being embodied in the bill of exceptions. Approved in *People v. Berlin*, 10 Utah, 47, dissenting opinion of Bartch, J.; also, *People v. Hart*, 10 Utah, 205, 206, holding, further, that a general exception to the entire charge is insufficient to warrant its review, p. 207.

#### 58 Cal. 254-256. BOOTH v. GALT.

Declaration of Homestead by wife must state that husband has not declared and that she acts for joint benefit, p. 255.

Cited in *Cunha v. Hughes*, 122 Cal. 114, 68 Am. St. Rep. 30, and *Reid v. Englehart etc. Co.*, 126 Cal. 529, 77 Am. St. Rep. 208, holding declarations insufficient.

#### 58 Cal. 256-259. CHRISTY v. FISHER.

One who is under a moral or legal obligation to pay the taxes acquires no right or title in the property by purchase at a sale for taxes, p. 258.

Cited in *Ward v. Matthews*, 80 Cal. 347. Approved in *Gates v. Lindley*, 104 Cal. 454; also, *Burns v. Lewis*, 86 Ga. 604, holding, further, that one cannot strengthen his title by purchasing at such sale; *Clark v. Lindsey*, 47 Ohio St. 446, holding that such purchase by one of several tenants in common of a remainder in fee will inure to the benefit of all; *Nickum v. Gaston*, 24 Oreg. 385, showing the application of the rule to a mortgagor in possession; also, *Hall v. Westcott*, 15 R. I. 380, which holds that a mortgagor either in or out of possession, is not entitled to purchase the property at a tax sale and set up tax title as against the mortgagor or other mortgagees; *State v. Eddy*, 41 W. Va. 114; note to *Cone v. Wood*, 75 Am. St. Rep. 229, 250, on general subject; *Finlayson v. Peterson*, 11 N. Dak. 53, following rule.

Strengthening title by purchase at tax sale, p. 259.

Note to *Coxe v. Gibson*, 67 Am. Dec. 455.

**Patent to person named as administrator or executor vests title in him personally, which may be conveyed by deed without order of court, p. 258.**

Cited in McDonald v. McCoy, 121 Cal. 66, noted under Hartley v. Brown, 46 Cal. 202. Note on general subject to Cobb v. Stewart, 83 Am. Dec. 469.

#### 58 Cal. 260-262. RAMSEY v. FLOURNOY.

**Pleading—Contest of Right to Purchase Swamp Land.—Mere denial of plaintiff's right without allegation of defendant's right will not raise a contest, p. 261.**

Cited to same effect in Dillon v. Saloude, 68 Cal. 269, 270; Cushing v. Keslar, 68 Cal. 477; Anthony v. Jillson, 83 Cal. 300.

#### 58 Cal. 262-270. PEOPLE v. MORTIER.

**Instructions.—Court may read sections of the code and designate them by numbers only, p. 269.**

Approved in People v. Brown, 59 Cal. 354, 357; also, in People v. Lewis, 64 Cal. 404, holding, further, that sections may be designated otherwise than by numbers.

#### Admissibility of Confessions.

See note to Daniels v. State, 6 Am. St. Rep. 242.

Failure of court to inform defendant that if he wished to challenge an individual juror he must do so before the juror is sworn is immaterial error, p. 266.

Approved in People v. Goldenson, 76 Cal. 347; also, People v. O'Brien, 88 Cal. 489 (in each case the court was of opinion the defendant was not prejudiced by the error complained of). Affirmed in People v. Ellsworth, 92 Cal. 596, holding, further, defendant is not prejudiced when represented by counsel. Cited in People v. Moore, 103 Cal. 511, which holds if defendant is not represented by counsel, and the record does not show that he was not prejudiced, such error is prejudicial.

**Juror.—Objection that juror was not on assessment-roll is waived if not taken at trial, p. 267.**

Cited in People v. Evans, 124 Cal. 210, noted under People v. Chung Lit, 17 Cal. 320; People v. McFarlane, 138 Cal. 490, ruling similarly as to objections that juror was not a resident of trial county.

#### 58 Cal. 270-274. MONTGOMERY v. HARRINGTON.

**Pendency of Another Action.—Sufficiency of same evidence to support judgments is test, p. 274.**

Cited in Smith v. Smith, 134 Cal. 119, noted under Felch v. Beaudry, 40 Cal. 439.

**58 Cal. 274-279. COSNER v. BOARD OF SUPERVISORS.**

**Control of Discretion.**—Where officer has been invested with the option to sanction or disapprove acts submitted to him, courts have no power to control this discretion, p. 277.

Approved in dissenting opinion of Thornton, J., in *Raisch v. Board of Education*, 81 Cal. 550. Distinguished in *California etc. Co. v. Whitson*, 129 Cal. 380, granting mandamus for payment of moneys out of swamp land fund on division of county.

**58 Cal. 281-283. REESE v. HOECKEL.**

**Specific Performance.**—Where upon sufficient consideration one party has agreed to convey certain lands courts will enforce, p. 282.

Approved in *McAlpine v. Union Pac. Ry.*, 23 Fed. Rep. 171.

**58 Cal. 287-289. NEAL v. NEAL.**

**Cross-examination.**—Witness may be asked any question which tends to test his accuracy, veracity, or credibility on, p. 288.

Cited with approval in *Watrous v. Cunningham*, 71 Cal. 32; also, *People v. Ebanks*, 117 Cal. 665; *Estate of Kasson*, 127 Cal. 500, noted under *People v. Benson*, 52 Cal. 380; *Smitson v. S. P. Co.*, 37 Or. 89, holding cross-examination proper.

**58 Cal. 289-303. ELLIS v. TONE.**

Evidence to show what would be the result if certain conditions existed is competent, p. 302.

Approved in *Carron v. Wood*, 10 Mont. 508, holding, further, that witness may be questioned in detail as to whether or not all conditions and circumstances have been considered by him. Note on general subject to *Hammond v. Woodman*, 66 Am. Dec. 244.

**58 Cal. 303-304. LEWIS v. KELTON.**

**Acknowledgment of Deed** is implied from a finding that the deed conveyed the premises, p. 304.

Cited in *Yoakam v. Kingery*, 128 Cal. 33, noted under *McDonald v. Mission etc. Assn.*, 51 Cal. 210.

**58 Cal. 304-306. LOUIS v. TRISCONY.**

**Joint Promissory Note.**—The allowance of a joint note, as a claim against an estate, does not release the co-obligors, p. 306.

Cited in *Holt Mfg. Co. v. Ewing*, 109 Cal. 357.

**58 Cal. 306-309. IRVING v. CUNNINGHAM.**

**Deed** construed, p. 307.

Notes Cal. Rep.—184.

Cited in *Miller v. Grunsky*, 141 Cal. 448, admitting certain evidence in construing state patent.

**New Trial.**—Where the decision is against the weight of the evidence it is the duty of the trial court to grant, p. 309.

Cited to same effect in *Green v. Soule*, 145 Cal. 102, applying rule in action against contractor for personal injuries sustained by dangerous obstructions in street; *Reclamation Co. v. Cunningham*, 71 Cal. 222, holding, further, that it is a matter of discretion with trial judge; also, in *Bennett v. Hobro*, 72 Cal. 179; *Sharp v. Hoffman*, 79 Cal. 407; holding, further, that the supreme court will not interfere with trial judge's discretion except in extreme cases; *Curtis v. Starr*, 85 Cal. 377; *Bjorman v. Fort Bragg Redwood Co.*, 92 Cal. 501; *Domico v. Casassa*, 101 Cal. 414; *In re Carriger*, 104 Cal. 83, holding, further, that where new trial is granted and trial court does not state grounds for allowing it, it will be sustained on appeal if it can be justified on the ground of insufficiency of evidence.

#### 58 Cal. 310-314. ERKINS v. AYER.

**Pleading.**—Answer will not be treated on appeal as cross-complaint when not so presented in court below, p. 313.

Cited to same effect in *Meeker v. Dalton*, 75 Cal. 156.

#### 58 Cal. 314-315. FAIRBANK v. HUGHSON.

**Evidence—Expert.**—Whether one is qualified to testify as an expert is a question for the court, to be determined preliminary to his testifying, p. 314.

Approved in *Neal v. Neal*, 58 Cal. 289.

#### 58 Cal. 315-328. NORTH BLOOMFIELD MINING COMPANY v. KEYSER.

**Disqualification.**—Judge cannot act in a proceeding in which he has a direct and immediate interest, p. 322.

Approved in *Milton Mining Co. v. Keyser*, 58 Cal. 328; *Blue Tent Co. v. Keyser*, 58 Cal. 329; *Scadden etc. Co. v. Scadden*, 121 Cal. 37; *Higgins v. City*, 126 Cal. 308, and *Bank v. McGuire*, 12 S. Dak. 231, 76 Am. St. Rep. 601, but holding judge not disqualified under facts stated; *Meyer v. City*, 121 Cal. 106, 110, 66 Am. St. Rep. 26. 30 (quoted in *State v. Noyes*, 25 Nev. 50); *Adams v. Minor*, 121 Cal. 374, and *Crook v. Newborg*, 124 Ala. 483, holding judge disqualified; *Howell v. Budd*, 91 Cal. 253, holding that he cannot act if related by consanguinity or affinity within the third degree to any party to the record, which includes all persons whose interests are represented by parties to the record; *Oakland v. Oakland Water Front Co.*, 118 Cal. 252, holding, further, that the

interest of a taxpayer is not such an interest as will disqualify. Cited in *Medlin v. Taylor*, 101 Ala. 242. Approved in *Casey and Swasey v. Kinsey*, 5 Tex. Civ. App. 5. Cited in the *Mining Debris* case, 9 Saw. 526; S. C. 18 Fed. Rep. 796.

**Appeal.**—Not an adequate remedy from decision of judge who has not jurisdiction, p. 315.

Approved in *People v. Spiers*, 4 Utah, 397.

**58 Cal. 330-334. BRANNAN v. PATY.**

Averment, to constitute counterclaim, must be denominated as such, p. 333.

Cited to same effect in *Carpenter v. Hewel*, 67 Cal. 590. Cited in *Cohn v. Kelly*, 132 Cal. 468, and *Babcock v. Maxwell*, 21 Mont. 515, noted under *Doyle v. Franklin*, 40 Cal. 106; *Harrison v. McCormick*, 69 Cal. 620, holding, further, that where a pleading is improperly designated the court will look to its real nature. Approved in *Shain v. Belvin*, 79 Cal. 263. Cited in *Tombstone Min. Co. v. Way Up Min. Co.*, 1 Ariz. Ter. 460.

**58 Cal. 337-338. PEOPLE v. HARVEY.**

An election held without authority of law gives no title to office, p. 338.

Cited to same effect in *Page v. Board of Supervisors*, 85 Cal. 55. Cited in *People v. Stewart*, 132 Cal. 284, noted under *People v. Mathewson*, 47 Cal. 442.

**58 Cal. 339-341. KENNEDY v. DUNN.**

**Trust.**—Sale made in conformity to power, cannot be vacated, p. 339.

Cited in note to *Hoffman v. Anthony*, 75 Am. Dec. 704.

**Same.**—Trustee may sell by auctioneer, p. 339.

Cited in *Tyler v. Herring*, note, 19 Am. St. Rep. 277.

**Same.**—Where trustee is a beneficiary expressly authorized to purchase, sale may be made to trustee's attorney for benefit of beneficiaries, p. 339.

Note to *Tyler v. Herring*, 19 Am. St. Rep. 289.

**58 Cal. 341-344. METROVICH v. JOVOVICH.**

**Undertaking to Release Attached Property.**—Measure of damages, for breach of, is full value of property, p. 343.

Cited to same effect in *Hammond v. Starr*, 79 Cal. 560. Distinguished in *Pierce v. Whiting*, 63 Cal. 543. Approved in *Chapline v. Robertson*, 44 Ark. 207; also, in *Pearce v. Maguire*, 17 R. I. 65, holding, further, that the loss of the property by act of God does not release.

Offer to return part of the property, or all burdened with a lien placed on, after execution of the bond, does not release from obligation, p. 344.

Cited to same effect in *Mullally v. Townsend*, 119 Cal. 51. Cited in *Rosenthal v. Perkins*, 123 Cal. 244, on point that lien is removed on release under such bond.

58 Cal. 345-348. **BREWER v. HOUSTON.**

**Mistake in Patent** cannot be corrected in action to quiet title, p. 348.

Cited to same effect in *Castro v. Barry*, 79 Cal. 448; *Harrigan v. Mowry*, 84 Cal. 467; *Shanahan v. Crampton*, 92 Cal. 14, holding, further, that the rights of the cestui qui trust against trustee's vendee cannot be determined in action to quiet title; dissenting opinion, *Miller v. Grunsky*, 141 Cal. 451, 458, construing state patent and upon point that patent is not attackable collaterally.

58 Cal. 348-355. **CHASE v. EVOY.**

Parties named in counterclaim must be parties to original action, p. 354.

Approved in *Harrison v. McCormick*, 69 Cal. 618, where same is held true of cross-complaint. Cited to same effect in *Roberts v. Donovan*, 70 Cal. 112; *Stockton Society v. Giddings*, 96 Cal. 90, S. C. 31 Am. St. Rep. 186, holding, further, that a surety may avail himself of any defense that would authorize his principal to rescind the contract, where the suit is between the original parties, and no rights of innocent holders involved.

**Pleading.—Defects in form in averments or uncertainty are waived by failure to demur specially**, p. 352.

Cited to same effect in *Waldrip v. Black*, 74 Cal. 411; also, in *Wine v. Hogan*, 77 Cal. 188; *Ward v. Clay*, 82 Cal. 505.

Surety signing note as joint maker may be regarded by payee as principal, p. 353.

Approved in *Luke v. Hancock*, 76 Cal. 130. Cited in *Bank v. De Shorb*, 137 Cal. 693, noted under *Harlan v. Ely*, 55 Cal. 340.

**Intervene.—Right to is statutory**, p. 355.

Cited in *Fischer v. Hanna*, 8 Colo. App. 486.

**New Trial.—Failure to prepare and serve statement within time required by statute will defeat motion for**, p. 352.

Cited to same effect in *Bunnel v. Stockton*, 83 Cal. 320.

The fact that judgment has been appealed from does not warrant trial court dismissing a motion for new trial, p. 352.

Approved in *Rayner v. Jones*, 90 Cal. 81. Cited in *Fuller v. United States*, 182 U. S. 573, noted under *Carpentier v. Williamson*, 25 Cal. 154.

**Probate Claim.**—Complaint in action on held sufficient as against general demurrer, p. 352.

Cited in Guerian v. Jones, 133 Cal. 408, sustaining complaint in similar action.

#### 58 Cal. 356. IN RE REAL ESTATE ASSOCIATION.

**Insolvency—Receiver.**—An appeal from an order adjudicating an insolvent does not suspend functions of receiver, p. 356.

Cited to same effect in Dennery v. Superior Court, 84 Cal. 11. Approved in Tibbets v. Cohn & Co., 116 Cal. 369, 370; Farmers' National Bank v. Backus, 63 Minn. 118, holding that where a supersedeas bond is duly executed and filed, the power of the receiver is suspended. Cited in Home Ins. Co. v. Dutcher, 48 Neb. 759.

#### 58 Cal. 357. RHODA v. ALAMEDA COUNTY.

**Fixture.**—Measure of Damages for removing is the value of the article as it was in place as a part of the realty immediately preceding its removal, p. 357.

Cited with approval in Dutro v. Kennedy, 9 Mont. 108, holding, further, that damages for replacing the fixture could be recovered under proper pleadings.

#### 58 Cal. 358-360. VON ROUN v. SUPERIOR COURT.

**Insolvency—Receiver.**—Court may order sheriff to turn over attached property to receiver in insolvency, p. 360.

Cited to same effect in Ex parte Desmond, 59 Cal. 400; In re Real Estate Association, 58 Cal. 356.

**Same.**—Court may appoint receiver before appointment of assignee, p. 358.

Cited to same effect in Loaiza v. Superior Court, 85 Cal. 36; S. C. 20 Am. St. Rep. 212.

**Certiorari.**—Writ of, not a writ of error where no excess of jurisdiction, p. 359.

Approved in White v. Superior Court, 110 Cal. 64.

**Insolvency—Attachment.**—The lien acquired by, is not vacated by subsequent appointment of receiver, p. 360.

Cited to same effect in Arnold v. Weimer, 40 Neb. 223.

Appointment of a receiver does not affect the title of any party to the property in litigation, p. 360.

Approved in Marshall v. Otto, 59 Fed. Rep. 255. Cited in Bories v. Union etc. Assn., 141 Cal. 78, holding attachment lien not affected by subsequent receivership; Garretson etc. Co. v. Arndt, 144 Cal. 66,

holding title to rents and profits on foreclosure not affected by appointment of receiver; Seiler v. Union Mfg. Co., 50 W. Va. 219, holding trust lien superior to debt created by receiver.

**58 Cal. 360. MERCED BANK v. MORTON.**

**Attachment.**—Affidavit must not be in the alternative, p. 360.

Cited to same effect in Schrivener v. Dietz, 68 Cal. 3, holding that if irregularities are waived the attachment becomes valid.

**58 Cal. 361. MUIR v. SUPERIOR COURT.**

**Certiorari.**—Where there is no excess of, jurisdiction will not lie to review errors, p. 361.

Approved in White v. Superior Court, 110 Cal. 66. Cited in note on general subject to Mullin v. People, 22 Am. St. Rep. 421.

**58 Cal. 362-363. WHITAKER v. MITCHELL.**

**Findings.**—Conflict in Evidence will not invalidate findings, p. 363.

Cited to same effect in Kansas City, Ft. Scott & Gulf Ry. v. Kelley, 36 Kan. 666; S. C. 59 Am. Rep. 601.

**58 Cal. 364-373. HENDERSON v. HICKS.**

**Contracts.**—Specific performance will not be required if complainant is in default, p. 364.

Cited in Wilson v. Sturgis, 71 Cal. 229, holding further that a vendor cannot rescind for failure of vendee to make payments, without offering to retain money received on account of contract. Approved in Loaiza v. Superior Court, 85 Cal. 31; S. C. 20 Am. St. Rep. 208. Approved, but distinguished in Stratton v. California Land Co., 86 Cal. 361.

**Same.**—Unreasonable delay in bringing suit will defeat an action for specific performance, p. 372.

Approved in Combs v. Scott, 76 Wis. 668. Note to Smith v. Thompson, 54 Am. Dec. 132.

**58 Cal. 373-378. FISH v. FOWLER.**

“Real Property” defined, p. 375.

Cited in Martinovich v. Marsicano, 137 Cal. 356, holding term to include any interest in land; State v. Superior Court, 31 Wash. 457, under Ballinger’s Code, sections 4333, 4334, railroads may condemn equitable interest in tide lands held by purchasers from state under contract of sale.

Execution will reach any interest in land, legal or equitable, p. 375.

Cited in *Muller v. Flavin*, 13 S. Dak. 611, noted under *Le Roy v. Dunkerly*, 54 Cal. 452.

**Mortgage** by vendee of legal title made subsequent to a contract of sale by a vendor to a third party is a valid lien subject to the contract, p. 377.

Cited and distinguished in *Travis v. Supply Co.*, 42 Kan. 630. Approved in *Reynolds v. Fleming*, 43 Minn. 515, holding that the interest of a vendee under a contract for the sale of land is subject to levy and sale upon execution; also in note to *McIlvaine v. Smith*, 97 Am. Dec. 310, 314, 315.

#### 58 Cal. 380-381. SAN JOSE SAVINGS BANK v. PHARIS.

**Corporation—Liability of Stockholders.**—Discharge of corporation discharges stockholders, pro tanto, p. 382.

Cited in note on general subject to *Thompson v. Reno Bank*, 3 Am. St. Rep. 940.

#### 58 Cal. 385-387. MOORE v. KELLOGG.

**Judgment.**—Default will not be set aside if grantee of defendant before default does not join in the motion, p. 386.

Cited in *Malone v. Big Flat Gravel Min. Co.*, 93 Cal. 388, 390, where the principal case is discussed, and said to not be in conflict with the decision there given. It appears otherwise.

**Same.**—A motion to set aside a judgment is addressed to the discretion of the trial court, and its decision will not, generally, be disturbed, p. 386.

Approved in *Evans v. Fall River County*, 4 S. Dak. 123.

#### 58 Cal. 387-421. ROSENBERG v. FRANK.

District courts had equity jurisdiction to construe a probated will, p. 400.

Cited to same effect in *Williams v. Williams*, 73 Cal. 104; *Siddall v. Harrison*, 73 Cal. 562, holding that the superior court is not bound to entertain an action to construe a will that has been admitted to probate, and should not do so, except where there is some special reason for seeking its interposition. Cited and criticised in *McDaniel v. Patterson*, 98 Cal. 101, holding that the jurisdiction of a probate court to establish a will is exclusive; *Chadwick v. Chadwick*, 6 Mont. 576; *Decke v. Gerk*, 73 Am. Dec. 560, note. Distinguished in *Toland v. Early*, 129 Cal. 153-155, 79 Am. St. Rep. 104, 105, and held inapplicable since constitution of 1879.

District courts have same jurisdiction as that administered by high court of chancery in England, p. 400.

Cited to same effect in *Faught v. Faught*, 98 Ind. 476. Cited in *Wright v. Superior Court*, 139 Cal. 477, noted under *People v. Davidson*, 30 Cal. 391.

**Jurisdiction.**—Mere grant of jurisdiction to one court does not imply that it is exclusive, p. 402.

Cited in *Green v. Superior Court*, 78 Cal. 502, but held not to be applicable.

**Executors** have no concern as to how the estate should be distributed, p. 420.

Cited to same effect in *McCabe v. Healy*, 138 Cal. 90, noted under *Estate of Wright*, 49 Cal. 550; *Goldtree v. Thompson*, 83 Cal. 422, holding that they have no concern as to who shall bear the costs of litigation; *Jones v. Lamont*, 118 Cal. 503, as to administrators.

**Construction of Terms in Will**, p. 405.

Cited in *Conklin v. Davis*, 63 Conn. 382, but not applicable. Cited in *Le Breton v. Cook*, 107 Cal. 418.

**General Reference.**—Jurisdiction of probate court, *Robinson v. Fair*, 128 U. S. 83-86. Note to *Buckley v. Superior Court*, 41 Am. St. Rep. 141.

#### 58 Cal. 421-425. HOUGHTON v. STEELE.

**Performance of Condition** precedent cannot be required by one who has prevented its performance, p. 425.

Cited to same effect in *Griffith v. Happersberger*, 86 Cal. 614. Cited in *Antonelle v. Lumber Co.*, 140 Cal. 316, holding party estopped under facts stated from insisting on such performance.

#### 58 Cal. 426-428. BROWN v. SAN FRANCISCO LIGHT COMPANY.

**Executor**, qualified in another state and empowered by will to sell, may sell in this state without obtaining letters or giving bond, p. 428.

Cited to same effect in *Murphy v. Crouse*, 135 Cal. 18, but held inapplicable when local ancillary administrator has been appointed; *Fox v. Tay*, 89 Cal. 350, 23 Am. St. Rep. 480, holding that qualified executor of another state may bring suits respecting the estate in this state without taking out letters testamentary.

Presumption is that law in other states is the same as in this, in absence of proof to contrary, p. 428.

Cited to same effect in *Palmer v. Atchinson R. R. Co.*, 101 Cal. 196; also in *Meuer v. Chicago etc. Ry. Co.*, 5 S. Dak. 574; S. C. 49 Am St. Rep. 900. Cited in *The Henry B. Hyde*, 82 Fed. Rep. 684, where the principal case is doubted, and holding, further, that in admiralty cases where there is no evidence of the *lex contractus*, general legal principles will govern.

**58 Cal. 428-430. GRAHAM v. OVIATT.**

**Homestead** declaration, subsequent to mortgaging property, creates an interest subordinate to that of mortgagee, p. 430.

Approved in Hefner v. Urton, 71 Cal. 480, holding, further, that it was necessary to make parties to the foreclosure all persons who had any rights in the mortgaged premises.

**58 Cal. 431-435. BEAUCHAMP v. ARCHER. 41 Am. Rep. 266.**

**Contract of Sale.**—Where delivery and payment are concurrent conditions, refusal to pay on delivery entitles other party to rescind, p. 434.

Approved in Meeker v. Johnson, 5 Wash. 728, holding further that right of rescission is not defeated by tender made on a day subsequent to default.

**58 Cal. 439-441. EMERSON v. WEEKS.**

**Landlord and Tenant.**—Evidence shows that the relation did not exist, p. 441.

Cited in Warnock v. Harlow, 96 Cal. 303, S. C. 31 Am. St. Rep. 211, to show that action for rent cannot be maintained unless relation exists.

**Landlord and Tenant.**—Rent cannot be collected where relation does not exist, p. 441.

Cited in Murphy v. Hopcroft, 142 Cal. 46, noted under O'Conner v. Corbitt, 3 Cal. 370.

**58 Cal. 442-443. FRIXEN v. CASTRO.**

**Pleading.**—Complaint in action to enforce contract, failing to allege a readiness and willingness to perform a condition concurrent, is defective, p. 243.

Cited to same effect in Dorris v. Sullivan, 90 Cal. 287.

**58 Cal. 443-449. HERROLD v. REEN.**

**Homestead.**—Since the amendment of 1862, husband and wife are joint tenants in, p. 446.

Cited to same effect in Tipton v. Martin, 71 Cal. 327; also, in Tyrrell v. Baldwin, 78 Cal. 474, holding, further, that the homestead is not terminated by the death of either spouse; In re Ackerman, 80 Cal. 210; S. C. 13 Am. St. Rep. 117; Sanders v. Russel, 86 Cal. 120; S. C. 21 Am. St. Rep. 27; Baker v. Brickell, 87 Cal. 339; Collins v. Scott, 100 Cal. 451. Cited in Holbrook v. Wightman, 31 Minn. 171, holding that the survivor acquires an estate for life, with no limitation on the manner of enjoyment.

**Same.**—Act of 1860 was a statute of descent, p. 448.

Cited to same effect in *Levins v. Rovegno*, 71 Cal. 283.

**Same.**—Setting apart by the probate court of the premises as a homestead does not change the nature or character of the title, p. 449.

Approved in *In re Gilmore*, 81 Cal. 243; *Dickey v. Gibson*, 113 Cal. 32, S. C. 54 Am. St. Rep. 324, holding surviving spouse may mortgage.

**Homestead.**—The law in force at time of death and not that in force at time of declaration controls, p. 446.

Cited to same effect in *Gruwell v. Seybolt*, 82 Cal. 10.

#### 58 Cal. 457-519. ESTATE OF HINCKLEY.

**Trusts.**—Perpetual charitable, are not prohibited by the constitution or laws of California, p. 471.

Cited to same effect in *Estate of Gay*, 138 Cal. 553, but held inapplicable to perpetual trust in will whose income is to be devoted to testator's burial plot. *Estate of Robinson*, 63 Cal. 621, holding, further, that municipal corporations may take property in trust for charitable purposes.

**Cy Pres** power is possessed by the courts of this state, p. 512.

Cited to same point in *Pell v. Mercer*, 14 R. I. 436.

In order that there be a good trust for a charitable use, there must be some public benefit open to an indefinite and vague number, p. 488.

Cited to same effect in *People v. Cogswell*, 113 Cal. 137. Cited in *Mason v. Perry*, 22 R. I. 484, holding bequest void in part.

**Charities** are not prohibited by the provisions of the code which prohibit perpetuities, p. 474.

Cited to same effect in *Estate of Robinson*, 63 Cal. 621. Cited in *Estate of Willey*, 128 Cal. 12, sustaining charitable bequests to widows' and orphans' funds of specified orders; *Estate of Winchester*, 133 Cal. 274, sustaining bequest to unincorporated body that afterward incorporated and directing payment to this corporation; *Fay v. Howe*, 136 Cal. 603, sustaining trust for aid of deserving aged persons of stated town; *Estate of Merchant*, 143 Cal. 544, as to bequest for benefit of equipment of hospital for Pacific Coast soldiers; *St. James' Orphan Asylum v. Shelby*, 60 Neb. 803, 804, 83 Am. St. Rep. 558, sustaining charitable bequests, under local statutes; note to *Hoeffer v. Clogan*, 63 Am. St. Rep. 254 et seq., and *Fifield v. Van Wyck*, 64 Am. St. Rep. 745, on charitable uses.

Decree of distribution, unless appealed from, is conclusive of the matters determined, p. 518.

Approved in *Matter of Trust of Trescony*, 119 Cal. 570; *Crew v. Pratt*, 119 Cal. 150. Cited in *More v. More*, 133 Cal. 495, but held inapplicable as to constructive trust created by fraud.

**Probate Court has Jurisdiction** to recognize and to declare trusts, p. 518.

Approved in *Siddall v. Harrison*, 73 Cal. 564; *Morffew v. S. F. & S. R. R. Co.*, 107 Cal. 594, where it is stated that prior to the enactment of sections 1699 to 1703 of the Code of Civil Procedure, the probate court had no further control; *In re Stewart's Estate*, 26 Wash. 38, following rule; *Clayton v. Hallett*, 30 Colo. 249, Denver may accept and execute trust for education of poor white male orphans; *In re Walkerly*, 108 Cal. 659, but the court cannot, even with consent of the parties, declare trusts valid which are opposed to the express mandate and policy of the law; *Goldtree v. Allison*, 119 Cal. 346, holding, further, that a decree of distribution under the will is an adjudication of the validity of the trust; *Goad v. Montgomery*, 119 Cal. 558; *In re John's Will*, 30 Oreg. 504, holding court has power to construe will.

**Charitable Uses.**—"Religion" is a charitable use, p. 511.

Cited to same effect in *Estate of Hewitt*, 94 Cal. 378, holding that a bequest to trustees of a religious society, to be used for missionary purposes, is a bequest in trust for charitable uses.

One-third of a testator's "distributable assets" may be devised or bequeathed to charitable uses, p. 514.

Approved in *Estate of Pearsons*, 98 Cal. 611, holding, further, that the valuation of the inventory is not conclusive.

**Inventory.**—Valuation in is not intended to be conclusive for any purpose, p. 516.

Cited to this point in *Estate of Fernandez*, 119 Cal. 584; *Horton v. Barto*, 17 Wash. 678; *Estate of Carver*, 123 Cal. 106, noted under *Estate of Simmons*, 43 Cal. 549.

**Perpetuities.**—Mere power to exchange lands is not a power to alien the estate, p. 481.

Cited to same effect in *Estate of Walkerly*, 108 Cal. 656, 657, S. C. 49 Am. St. Rep. 113, 115, holding that the rule against perpetuities, and in restraint of alienation applies to personal as well as real property. Cited in lengthy note on "Rule against perpetuities" in *In re Walkerly*, 49 Am. St. Rep. 133.

#### 58 Cal. 519. WARD v. SUPERIOR COURT.

**Justice's Court.**—If undertaking is sufficient to sustain appeal, it cannot be objected that it is insufficient to stay execution, p. 519.

Approved in *Rutledge v. Superior Court*, 67 Cal. 86.

#### 58 Cal. 520. MURPHY v. SUPERIOR COURT.

**Prohibition.**—The sole purpose of the writ is to restrain inferior judicial tribunals from excess of jurisdiction, p. 520.

Approved in *Spect v. Superior Court*, 59 Cal. 319.

**58 Cal. 521-527. COFFEY v. EDMONDS.**

**Contested Election.**—Ballot will not be rejected for marks upon it, unless it is shown they were placed there to show who voted it, p. 526.

Approved in Coffey v. Lyman, 92 Cal. 137; also, State v. Saxon, 30 Fla. 676, 698; 32 Am. St. Rep. 50, 64; Easterday v. Howe, 28 Neb. 623, holding, further, that such words or marks should be treated as surplusage. "Conduct of elections," note to People v. Bates, 83 Am. Dec. 750.

**58 Cal. 527-529. WILLIAMS v. McDONALD.**

**Printed Signature** may be adopted, p. 529.

Cited to same effect in Ligare v. California Southern Ry., 76 Cal. 611, holding that the affixing of a seal is sufficient evidence of adoption.

Description, in an assessment for a street improvement, may be made by diagram, p. 529.

Cited in Labs v. Cooper, 107 Cal. 658, which case holds that description by a particular number, which is the number the lot bears on the official map, is insufficient if there is nothing contained in the assessment referring to such official map.

**Street Assessment.**—Objections cannot be first raised on appeal, p. 529.

Cited in Lambert v. Marcuse, 137 Cal. 47, noted under Deady v. Townsend, 57 Cal. 298; Mutual L. Ins. Co. v. McGraw, 188 U. S. 309, federal question first raised in petition for rehearing in highest state court is too late to confer jurisdiction on United States supreme court.

**58 Cal. 530-533. ESTATE OF MARTIN.**

**Olographic Will.**—Date is essential to the validity of, p. 533.

Cited to same effect in Estate of Billings, 64 Cal. 427, holding, further, that if part of the date is printed, this will invalidate the will. Note on general subject to Lagrave v. Merle, 52 Am. Dec. 592.

**58 Cal. 533-536. PRATT v. CRANE.**

**Conflict of Patents.**—A patent of the United States for land to which it has no title conveys none, p. 536.

Cited to same effect in Crane v. Carr, 59 Cal. 105; also, Carr v. Crane, 59 Cal. 302; Cucamonga Fruit Land Co. v. Moir, 83 Cal. 107; Howell v. Slauson, 83 Cal. 546; Pioneer Land Co. v. Maddux, 109 Cal. 641, S. C. 50 Am. St. Rep. 72, holding, further, that a vested right to a patent from the state for public land is equivalent to a patent so far as the state is concerned.

**58 Cal. 537-538. CITY OF SANTA ROSA v. COULTER.**

**Taxation.**—Agricultural lands situated within the city limits are subject to city taxation, p. 538.

Cited and approved in *Town of Dixon v. Mayes*, 72 Cal. 168, although it is stated that the decisions of the different states do not agree. Approved in *Ferguson v. Snohomish*, 8 Wash. 673. Cited in *Vestal v. Little Rock*, 54 Ark. 327, which approves the proposition, but holds that in that state agricultural lands, in no way connected with a city and not needed by the city for its use, cannot be annexed.

**.58 Cal. 538-543. MULLER v. CAREY.**

**State Lands.**—The act of March 27, 1872, validates every application to purchase state lands, where payment has been made either in whole or in part, p. 541.

Approved in *Upham v. Hosking*, 62 Cal. 259.

**.58 Cal. 550-553. SHATTUCK v. OAKLAND SMELTING COMPANY.**

Trustees cannot vote themselves compensation for services after the services have been rendered, p. 553.

Cited to same effect in *Pfeiffer v. The Lansberg Brake Co.*, 44 Mo. App. 63.

**.58 Cal. 553-555. CHAPMAN v. POLACK.**

Patent by the United States to land which the state had selected as lieu land is void and conveys no title, p. 555.

Cited to same effect in *Polack v. Gurnee*, 66 Cal. 267; *Chapman v. Polack*, 70 Cal. 482.

**.58 Cal. 556-558. WATSON v. HIS CREDITORS.**

Homestead selected by husband and wife, on the death of either, vests absolutely in survivor, and is subject to his debts subsequently contracted, p. 557.

Cited in *Tipton v. Martin*, 71 Cal. 327, holding, further, as to mode of abandoning. Approved in *Tyrrell v. Baldwin*, 78 Cal. 474, this case holds, however, that, due to an amendment to the code, the homestead is now exempt from debts in the hands of the surviving spouse the same as when both are living; *Collins v. Scott*, 100 Cal. 451; *Dickey v. Gibson*, 113 Cal. 31, S. C. 54 Am. St. Rep. 323, holding that the surviving husband may mortgage the homestead without the consent of his second wife.

Same.—The order setting apart the homestead to the surviving spouse relieves it from administration, but does not affect the title, p. 558.

Approved in *Estate of Gilmore*, 81 Cal. 243; *Sheehy v. Miles*, 93 Cal.

295, holding, further, that the court must first determine that a valid homestead exists.

**58 Cal. 558-561. PEOPLE v. RANSOM.**

Provisions of the constitution and code relating to justice of peace construed, p. 560.

Cited with approval in *People v. Harvey*, 58 Cal. 338; *Bishop v. City of Oakland*, 58 Cal. 574; *Coggins v. City of Sacramento*, 59 Cal. 599; *Ex parte Henshaw*, 73 Cal. 507, holding that police courts constitute a part of the judiciary of the state; *Kahn v. Sutro*, 114 Cal. 331, 332; *In re Mitchell*, 120 Cal. 390. Notes on "Offices and officers" to *Shelby v. Alcorn*, 72 Am. Dec. 187, and *State v. Hocker*, 63 Am. St. Rep. 187.

**58 Cal. 561-572. WOOD v. BOARD OF ELECTION COMMISSIONERS.**

**Constitutional Law.**—The constitution of 1879 does not repeal the special acts fixing the time for municipal elections in San Francisco. p. 565.

Cited in opinion of Myrick, J., in *Staude v. Election Commissioners*, 61 Cal. 323, where the opposite view is held, Sharpstein, J., dissenting. Cited in *Treadwell v. Yolo County*, 62 Cal. 566, 573, where Ross and McKee, JJ., hold that the act of March 7, 1881, is prospective in its operation. Approved in *People v. Harvey*, 58 Cal. 338.

The constitution of 1879 did not by implication affect the charters of municipal corporations then in existence, p. 569.

Cited with approval in the *Matter of Carrillo*, 66 Cal. 5; also, in *In re Guerrero*, 69 Cal. 100, holding that the existence of each municipality under its charter is continued by the constitution until a majority of its electors determine to reincorporate under general law, or to frame a charter for its government; *People v. Babcock*, 114 Cal. 563; *Huntington v. City of Nevada*, 75 Fed. Rep. 61, holding, further, that the legislature is not restrained from exercising control by general laws over municipal corporations, created prior to the adoption of the constitution.

Statutes of a general nature do not repeal by implication charters and special acts passed for the benefit of particular municipalities, p. 563.

Approved in *Moore v. Minneapolis*, 43 Minn. 422; also in *State v. Chaplin*, 18 R. I. 455; *Port Townsend v. Eisenbeis*, 28 Wash. 543, where city under its special charter was entitled to lien on realty until taxes assessed thereon should be paid, with power to enforce collection summarily, it did not lose rights by reincorporating under general law.

**58 Cal. 572-576. BISHOP v. OAKLAND.**

The provisions of section 103 of the Code of Civil Procedure, relating to elections, are constitutional, p. 574.

Affirmed in *Jenks v. City of Oakland*, 58 Cal. 577; also in *Coggins v. City of Sacramento*, 59 Cal. 599; *Ex parte Henshaw*, 73 Cal. 506; *In re Mitchell*, 120 Cal. 390.

Section 6 of article 11 of the constitution has no reference to police courts or judges, p. 575.

Approved in *Ex parte Henshaw*, 73 Cal. 507. Notes to *Shelby v. Alcorn*, 72 Am. Dec. 187, and *State v. Hocker*, 63 Am. St. Rep. 187, on Public Officers.

**58 Cal. 576-578. JENKS v. CITY OF OAKLAND.**

**Justice of Peace—Constitutional Law.**—Section 103 of the Code of Civil Procedure, relating to salary of justice of peace in cities, is constitutional, p. 577.

Cited to same effect in *Coggins v. City of Sacramento*, 59 Cal. 599; *Ex parte Henshaw*, 73 Cal. 507; *In re Mitchell*, 120 Cal. 390, affirming that justices of the peace are part of the constitutional judiciary of this state.

**58 Cal. 578-581. HANDLEY v. FIGG.**

**Appeal.—Sufficiency of evidence to support findings cannot be reviewed on appeal from the judgment, unless appeal is taken within sixty days**, p. 580.

Cited to same effect in *Forni v. Yoell*, 99 Cal. 178.

**58 Cal. 581-585. CASHIN v. DUNN.**

**Construction of Statute.**—“One Twelfth Act” has no application to the auditing and payment of demands for salaried officers whose appointment is provided for and salaries fixed by law, p. 585.

Cited to same effect in *Welch v. Strother*, 74 Cal. 416, holding that salaries fixed by law are not liabilities against the treasury which rest upon any authorization or contract by the board of supervisors. Approved in *Lewis v. Widber*, 99 Cal. 414, holding that the payment of the salary of a public officer, whose office has been created and salary fixed by law, is not within the prohibition of section 8 article XI. of the constitution; *San Francisco v. Broderick*, 111 Cal. 307.

**58 Cal. 585-589. DYER v. MILLER.**

**Construction of Statute—Street Assessment.**—Act of April 1, 1872, relating to, construed.

Cited in *Gately v. Leviston*, 63 Cal. 366.

**58 Cal. 590-596. MARTIN v. WALKER.**

**Partition.**—In this proceeding the rights of all parties may be fully inquired into and finally determined, p. 596.

Cited to same effect in *Luco v. De Toro*, 91 Cal. 423; *Hill v. Young*, 7 Wash. 37; note to *De Uprey v. De Uprey*, 87 Am. Dec. 87. Cited in *Adams v. Hopkins*, 144 Cal. 29, noted under *De Uprey v. De Uprey*, 27 Cal. 335.

Cotenant out of possession may maintain suit in partition against a cotenant whose possession is adverse and hostile, p. 595.

Cited with approval in *Jamison v. Hayward*, 106 Cal. 687, S. C. 46 Am. St. Rep. 270, holding, further, in action between tenants in common of an estate for years, the court may refuse to order a sale of the reversion, of which one of the defendants is the sole owner. Approved in *Weston v. Stoddard*, 137 N. Y. 126; S. C. 33 Am. St. Rep. 701; note on general subject to *Nichols v. Nichols*, 67 Am. Dec. 707; *King v. Mason*, 89 Am. Dec. 433, 434; *Gates v. Salmon*, 95 Am. Dec. 152.

#### .58 Cal. 596-599. SHINN v. MacPHERSON.

The homestead law cannot be diverted from its beneficent purposes to perpetuate and cloak a fraud, p. 598.

Cited in note to *Bishop v. Hubbard*, 83 Am. Dec. 134. Distinguished in *In re Wilson*, 123 Fed. 23 (approved in dissenting opinion), under California laws, use of funds by insolvent to discharge lien on homestead does not give bankruptcy trustee right to subject homestead to lien for amount so diverted from creditors.

#### .58 Cal. 600-605. FARMERS' NATIONAL BANK v. WILSON.

**Corporations.**—Transfer of stock is good as between the parties and against subsequent purchaser with notice, without being entered upon the books of the corporation, p. 604.

Cited to same effect in *Spreckels v. Nevada Bank*, 113 Cal. 276, S. C. 54 Am. St. Rep. 350, holding, further, that the pledgee has the right to cause a proper entry of the transaction between himself and the pledgor to be entered upon the books of the corporation for his protection; *West Coast etc. Co. v. Wulff*, 133 Cal. 317, 318, 85 Am. St. Rep. 173, noted under *Weston v. Mining Co.*, 5 Cal. 186; *Hall v. Cayot*, 141 Cal. 17, noted under *People v. Elmore*, 35 Cal. 653; *Lippitt v. American Paper Co.*, 15 R. I. 145, S. C. 2 Am. St. Rep. 888, holding, further, that an equitable interest in corporate stock is not attachable, under Rhode Island statute.

#### .58 Cal. 605-608. NICHOLS v. DUNPHY.

Reversal of judgment upon appeal of one defendant does not prevent issuance of execution against a defendant not appealing, p. 607.

Cited to same effect in *Little v. Superior Court*, 74 Cal. 221. Cited in *Grundel v. Union Iron Wks.*, 127 Cal. 441, 78 Am. St. Rep. 78, holding proceedings against certain joint tort-feasors not affected by limits-

tion of liability proceedings by one of their number under federal statutes.

**.58 Cal. 608-616. COLLINS v. TOWNSEND.**

**Contracts—Rescission.**—Party who has been defrauded in making a contract, on discovery of the fraud, may, within a reasonable time, rescind the contract, or ratify it and sue for damages, p. 615.

Approved in Loaiza v. Superior Court, 85 Cal. 32; S. C. 20 Am. St. Rep. 208. Cited in note to Commonwealth v. Hays, 74 Am. Dec. 662.

Failure to rescind within a reasonable time after discovering the fraud waives the right to do so, p. 616.

Approved in Hammond v. Wallace, 85 Cal. 531; S. C. 20 Am. St. Rep. 243.

**Pleading.**—A pleading stating that an act occurred shortly after a particular date will be construed to mean that it occurred immediately after that date, p. 614.

Approved in Hiller v. Dyerville Mfg. Co., 116 Cal. 135.

**Contract—Rescission.**—Person desiring to rescind the contract because of fraud must restore—so far as his action can do this—the parties to their former condition within a reasonable time, p. 610.

Cited to same effect in Hammond v. Wallace, 85 Cal. 532; S. C. 20 Am. St. Rep. 244; also Kelly v. Owens, 120 Cal. 508.

**.58 Cal. 617-618. BAKER v. SNYDER.**

Unless affidavits, when used on a motion are then indorsed or marked by the clerk, his certificate to the identity of such papers cannot be held to be determinative of the fact as against his subsequent statement that he signed the certificate by mistake, p. 617.

Cited with approval in White v. Longmire, 63 Cal. 233; Peltret v. Frank, 66 Cal. 34, holding that, on an appeal from an order made after final judgment, no papers other than the judgment-roll will be considered, unless they are identified as having been used on the hearing of the motion; Heffron v. Bowers, 72 Cal. 275, cited in dissenting opinion of Temple, J., which intimates that the principal case is overruled by the decision of the majority. Cited in State v. Millis, 19 Mont. 448. Approved in McKay v. Farr, 15 Utah, 265. Distinguished in Simmons etc. Co. v. Alturas Com. Co., 4 Idaho, 390, attorneys of record may certify that transcript on appeal contains correct copies of all papers used on hearing of motion below.

**.58 Cal. 621-624. WORMOUTH v. JOHNSON.**

**Resulting Trust.**—Evidence of declarations as to ownership is admissible, when against declarant's interest, p. 624.

Notes Cal. Rep.—185.

Cited in *Harp v. Harp*, 136 Cal. 424, admitting declarations of heirs when opposed to their interests.

**58 Cal. 624-659. PEOPLE v. PARKS.**

**Constitutional Law.**—The act of April 23, 1880, entitled "An act to promote damage," is unconstitutional, p. 636.

Cited to this effect in *Doane v. Weil*, 58 Cal. 334; also in *Miller v. Dunn*, 72 Cal. 465, S. C. 1 Am. St. Rep. 68, holding, further, that an act appropriating money to pay certain indebtedness incurred on behalf of the state, under the act of April 23, 1880, is constitutional; *Callahan v. Dunn*, 78 Cal. 367; *Roddan v. Doane*, 92 Cal. 558; *Chaddock v. O'Brien*, 104 Cal. 218.

Every act shall embrace but one subject, which shall be expressed in its title, p. 635.

Cited in *In re Werner*, 129 Cal. 571, holding amendatory statute unconstitutional where containing matter not embraced by original title; *People v. Mullender*, 132 Cal. 220, sustaining statutes discussed; *Lewis v. Dunne*, 134 Cal. 299, 86 Am. St. Rep. 265, holding commissioner's code amendments void; *Law v. San Francisco*, 144 Cal. 388, sustaining title to ordinance of San Francisco under charter provisions; note in *Davis v. State*, 61 Am. Dec. 345.

The legislature has no power to create a board composed of executive officers of the state, and delegate to it legislative duties, p. 644.

Cited to this effect in *Miller v. Dunn*, 72 Cal. 470; S. C. 1 Am. St. Rep. 73; also, *Moulton v. Parks*, 64 Cal. 181. Cited to this point in *Pueblo County v. Smith*, 22 Colo. 543; *Commissioners of Wyandotte County v. Abbott*, 52 Kan. 161; *Baltzell v. Stewart*, 74 Wis. 631, where the principal case is explained. Approved in *United States v. Blasingame*, 116 Fed. 655, provision of sundry civil appropriation act of June 4, 1897, making it a crime to violate any rule or regulation thereof, is void; *United States v. Maid*, 116 Fed. 653, perjury under Revised Statutes, section 5392, cannot be based on affidavit of nonmineral character of land made in support of homestead entry, though land office regulation requires such affidavit to be made in certain states, since it is not required by Revised Statutes, section 2290.

The legislature has no power to impose taxes for the benefit of individuals connected with a private enterprise, even though the private enterprise might benefit the local public in a remote way, p. 639.

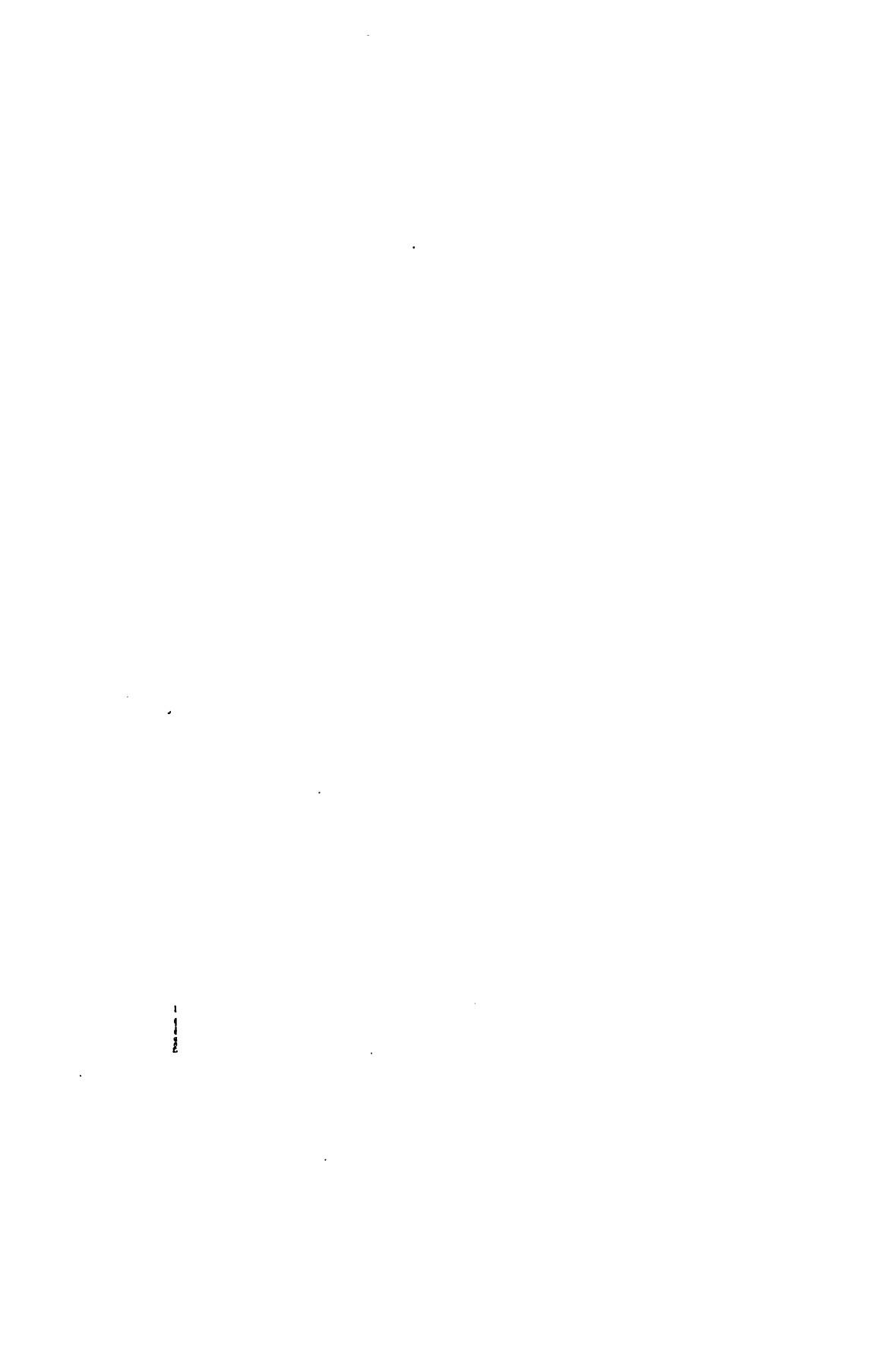
Cited on this point in *In re Madera Irrigation District*, 92 Cal. 309, 27 Am. St. Rep. 113; but an act will be upheld where it appears that it is for the benefit of the general public, although advantages may accrue to some individuals beyond those enjoyed by the general public.

Where a statute is found to be in conflict with the constitution, courts must not hesitate to condemn it, p. 635.

Cited in *Ex parte Leddell*, 93 Cal. 638, holding that section 24 of article IV of the constitution, respecting the title of acts of the legis-

lature, should be given a liberal construction. Affirmed in *State v. Commissioners of Humboldt County*, 21 Nev. 238, but the conflict must be clear and unquestioned; also, in *State v. Commissioners of Washoe County*, 22 Nev. 411; *State v. Bartley*, 41 Neb. 283, holding that an act in evasion of the constitution, as properly interpreted and understood, and frustrating its general, express, or plainly implied purposes, is as clearly void as if in express terms forbidden; *Goodsill v. Woodmansee*, 1 N. Dak. 252; *State v. Morgan*, 2 S. Dak. 41; note to *Davis v. State*, 61 Am. Dec. 339, 340.

**General Citation.**—*Dodge v. Mission Tp.*, 107 Fed. 833.



## VOLUME LIX.

By C. H. SQUIRE.

Revised to include citations to Volume 147, by CHARLES L. THOMPSON.

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### 59 Cal. 1-4. **BARILARI v. FERREA.**

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Cited to same effect in *People v. Blake*, 60 Cal. 512.

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Cited to same effect in *White v. Soto*, 82 Cal. 657.

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#### No Constitutional Objection to Sunday Law, p. 8.

Approved in *Ex parte Carson*, 59 Cal. 429; also, in *Ex parte Koser*, 60 Cal. 192, 193, 201; *State v. Sopher*, 25 Utah, 322, 324, upholding Revised Statutes, section 4234, prohibiting keeping open of places of business on Sunday, as applied to barber-shop; *State v. Nichols*, 28 Wash. 631, upholding Ballinger's Code, section 7251, prohibiting keeping places of business open on Sunday. Note on general subject to *City Council v. Benjamin*, 49 Am. Dec. 618, 622.

**Constitutional Law.**—The provision of the constitution that "the legislature shall not pass local or special laws" applies to future and not to past legislation, p. 10.

Cited to the same effect in *Lerch v. Gallup*, 67 Cal. 595; also, *Nevada School District v. Shoecraft*, 88 Cal. 373; *Smith v. McDermott*, 93 Cal. 425. Approved in *Dean v. County Commissioners*, 6 Colo. 205; also, *Cutting v. Taylor*, 3 S. Dak. 16, 17, holding that neither constitutions

nor statutes should be so construed as to give them retroactive effect, unless such intention is clearly expressed; *Kirby v. W. U. T. Co.*, 4 S. Dak. 110.

**59 Cal. 22-26. SEELEY v. SAN JOSE INDEPENDENT MILL & LUMBER COMPANY.**

**Corporation**.—Director may hold corporation for money advanced to pay debts at request of manager, p. 25.

Cited to same effect in *Santa Cruz R. R. Co. v. Spreckles*, 65 Cal. 199; cited in *Pauly v. Pauly*, 107 Cal. 18, S. C. 48 Am. St. Rep. 102, holding that corporation is liable on all loans, whether on authorized notes or not, if money was used for its benefits; *Edwards v. Carson Water Co.*, 21 Nev. 481, and in note to *Hall v. Turnpike Co.*, 87 Am. Dec. 76. Distinguished in *Pacific Vinegar & Pickle Works v. Smith*, 145 Cal. 368, where president of corporation buys outright notes of corporation and causes corporation by himself as president to become indorser thereof to himself individually without authority or approval of corporation, he cannot sue on indorsement.

**Manager of corporation** may do in transaction of ordinary business all that corporation may do, p. 22.

Cited to same effect in *Bank of Healdsburg v. Bailhache*, 65 Cal. 331, but holding further, the president or a director cannot settle a defalcation—such a transaction being out of the course of ordinary business. Approved in *Greig v. Riordan*, 99 Cal. 322; *Bates v. Coronado Beach Co.*, 109 Cal. 162, holding corporation is liable for all contracts entered into by its manager, with full knowledge and acquiescence of its officers.

**59 Cal. 28-33. STURGIS v. GALINDO.** 43 Am. Rep. 239.

**Specific Performance** will not be decreed of an agreement that is uncertain, p. 31.

Cited to same effect in *Smith v. Taylor*, 82 Cal. 541. Cited in *Newman v. Freitas*, 129 Cal. 288, noted under *Cooper v. Pena*, 21 Cal. 403; *Brooklyn Baseball Club v. McGuire*, 116 Fed. 783, contract which plaintiff has option to terminate at any time on giving ten days' notice will not be specifically enforced against other party.

Courts will not, generally, enforce specific performance of contracts for personal services, p. 32.

Cited to this effect in *Sloan v. Williams*, 138 Ill. 46.

**General Citation**.—*Jacksonville v. Ledwith*, 26 Fla. 208.

**59 Cal. 37-51. JANIN v. BROWNE.**

**Survival of Contract**.—Where personal representative can fairly and sufficiently execute all that deceased could have done, he is bound to do

so, and, if he does not, may be made to pay damages out of the assets, p. 44.

Cited to same effect in *McCann v. Pennie*, 100 Cal. 551. Cited in *Rankin v. Newman*, 114 Cal. 861, where the court was divided in opinion as to the power of the executor under the facts. Note on general subject to *Hawkins v. Ball's Admr.*, 68 Am. Dec. 760, 761; also, *Chamberlin v. Dunlop*, 22 Am. St. Rep. 813; *Schlicker v. Hemenway*, 52 Am. St. Rep. 126. Cited, also, in *Dunn v. Mackey*, 80 Cal. 107, as to sufficiency of complaint in similar case; *Cox v. Martin*, 75 Miss. 239, 65 Am. St. Rep. 608, as to contract and trust deed to secure advances to plant crop; note to *Fletcher v. American etc. Co.*, 78 Am. St. Rep. 200, 201, on general subject.

**Notice to Creditors.**—A claim against the estate may be presented to an administrator before his notice of publication to creditors, p. 43.

Cited to same effect in *McCann v. Pennie*, 100 Cal. 552; *Thomason v. Carroll*, 132 Cal. 152, applying rule to filing of protest in street improvement proceedings.

**Contracts.**—Strictly personal contracts terminate with death of party whose personal service is required, p. 44.

Approved in *Smith v. Preston*, 170 Ill. 185, holding, further, whether contract is personal depends upon intention of the parties.

#### 59 Cal. 51-52. **BRADY v. DOWDEN.**

The recital in a tax deed as to whom the property was assessed is conclusive, p. 51.

Cited to same effect in *Bosworth v. Webster*, 64 Cal. 2, holding that an assessment to parties "known and unknown" is illegal, and that a certificate and deed based on such an assessment would convey no title; Cited in *Eustis v. City of Henrietta*, 91 Tex. 329, applying rule to recitals as to amount of tax for which sale was made.

**Tax Deed based on an illegal assessment is void**, p. 52.

Cited with approval in *Pearson v. Creed*, 78 Cal. 147, holding that an assessment to a certain person named, "and all owners and claimants," is void; *Russ & Sons Co. v. Crichton*, 117 Cal. 703.

**Assessment not made as prescribed by statute is invalid**, p. 51.

Approved in *City of San Luis Obispo v. Pettit*, 87 Cal. 502; also, in *Gwynn v. Dierssen*, 101 Cal. 566, holding an assessment to a party named, and to unknown party, void; *State v. Ernst*, 26 Nev. 127, where assessor had returned assessment against E. and board of equalization ordered him to add name of M. L. & L. Co., and to add certain property to such assessment, and E. did not own such property and was only a stockholder in company, board's order was void; *Lewis v. Blackburn*, 42 Or. 116, assessment of land to "unknown owners, and to all owners and claimants, known and unknown," is void.

**59 Cal. 52-57. BRADY v. PAGE.**

Courts take judicial notice of the streets of San Francisco, p. 55.

Cited to same effect in *People v. McGregor*, 88 Cal. 144. Approved in *Williams v. Savings and Loan Soc.*, 97 Cal. 124, holding courts will take notice of the location and relation of such streets; also, *Labs v. Cooper*, 107 Cal. 658, but court will not take notice that there is an official map of the city of Sacramento; *Diggins v. Hartshorne*, 108 Cal. 158, holding, further, that the rule applies only to streets established by act of legislature, and not to those established by dedication, or opened or adopted by municipal ordinance. The dedication or passage of the ordinance is a question of fact, p. 158; *Gunning v. People*, 189 Ill. 169, but held inapplicable to question of location of building of a certain name; *Los Angeles etc. Co. v. City*, 88 Fed. 747 (quoted in S. C., 177 U. S. 581), as to terms of contract not embodied in act ratifying it; note on general subject to *Lanfear v. Mestier*, 89 Am. Dec. 669, 680. Cited as authority in similar case in *Brady v. Page*, 59 Cal. 301.

**Appeal before entry of judgment is premature and does not divest trial court of jurisdiction**, p. 52.

Cited to this effect in *Brady v. Burke*, 90 Cal. 5. Estate of *Devincenzi*, 131 Cal. 454, appeal from order vacating sale of real estate of deceased person taken before order was entered in minutes of court is premature and confers no jurisdiction on appellate court.

**59 Cal. 64-76. McBROWN v. MORRIS.**

**Pre-emption.—Land inclosed and used by another cannot be pre-empted**, p. 74.

Cited with approval under same state of facts in *McBrown v. Wilson*, 59 Cal. 318, and *McBrown v. Emerson*, 59 Cal. 319. Cited to same effect in *Hambleton v. Duhain*, 71 Cal. 140, as to homesteads; apparently approved, though not decided, in *People v. Wheeler*, 73 Cal. 256. Approved in *Goodwin v. McCabe*, 75 Cal. 588, but intimates that the rule would not apply if the first party had mere constructive possession; holding, further, that fences and natural barriers constitute a sufficient inclosure to give actual possession; *Bullock v. Rouse*, 81 Cal. 595, holding, further, that the burden of proof of showing possession is on the one claiming possession; *Peterson v. Kinkead*, 92 Cal. 377; *Rourke v. McNally*, 98 Cal. 292; *McGuire v. Brown*, 106 Cal. 670, where it is held that one who has acquired water rights in public land cannot be divested of them by a subsequent pre-emptor or homesteader; *Nickals v. Winn*, 17 Nev. 195; *Field v. Grey*, 1 Ariz. 407, where the rule is applied to mineral lands; *United States v. Williams*, 12 Saw. 147, S. C. 30 Fed. Rep. 314, applying the rule to lands appropriated by state; *Caldwell v. Bush*, 6 Wyo. 361, as referred to in *Goodwin v. McCabe*, 75 Cal. 588; *Cosmos etc. Co. v. Gray Eagle Oil Co.*, 112 Fed. 17, holding land not "vacant" under facts stated, within forest reservation act; *Clepper Min. Co. v. Eli Min. etc.*

Co., 194 U. S. 231, entry upon prior valid placer mining location for purpose of prospecting for unknown lodes when made against will of placer locators can initiate no title to lode claims thus located within exterior boundaries of placer claim; Empire State etc. Co. v. Bunker Hill etc. Co., 114 Fed. 419.

**59 Cal. 79-89. HOWARD v. THROCKMORTON.**

If one tenant occupies the property and cultivates it, in absence of contract with his co-owners, he is entitled in law to the entire product, but if he rent the property to others he is bound to account, p. 89.

Cited in Plass v. Plass, 122 Cal. 11, noted under Pico v. Columbet, 12 Cal. 414; McCord v. Oakland, 64 Cal. 146, S. C. 49 Am. Rep. 696, which holds that, where a mine is owned in common, and is worked and ore taken out exclusively by one tenant, at suit of the other tenants a court of equity should order an accounting, p. 149. Note on "When tenant in common is liable to action to recover share of rents and profits" to Pico v. Columbet, 73 Am. Dec. 555; Goodenow v. Ewer, 76 Am. Dec. 550; Ward v. Ward, 52 Am. St. Rep. 926.

**59 Cal. 89-91. PEOPLE v. PFEIFFER.**

**A Party Aggrieved** Means a Party to the action or one prejudiced by the judgment, p. 91.

Approved in State v. Eves, 6 Idaho, 148, state may appeal from judgment rendered in foreclosure where mortgage provided for illegal interest, as it is interested in penalty.

**59 Cal. 91-94. SWANGER v. MAYBERRY.**

**Contract—Consideration.**—A contract founded on an illegal consideration is void, p. 94.

Cited in Berka v. Woodward, 125 Cal. 126, 127, 73 Am. St. Rep. 36, 37, as to contract by city trustee to sell lumber and other materials to it; O'Hanlon v. Denvir, 81 Cal. 62, S. C. 15 Am. St. Rep. 20, which case holds that a contract to clear government land of "scrub oaks" is not illegal. Approved in Gardner v. Tatum, 81 Cal. 373, 376, where the rule was applied to contract to pay physician for professional services, he not having certificate permitting him to practice; Jones v. Hanna, 81 Cal. 510, 515.

**59 Cal. 94-96. BIDDLE v. OAKS.**

**Constitutional Law.**—An act of the legislature imposing a penalty on those who neglect to have their property assessed at the proper time, is constitutional, p. 96.

Cited to same effect in City of San Luis Obispo v. Pettit, 87 Cal.

500; Farmers' Bank v. Board of Equalization, 97 Cal. 324; and in Appeal of Fox and Wife, 112 Pa. St. 358, where a similar statute is upheld.

**59 Cal. 97-99. SILVEY v. NEARY.**

Finding contrary to facts admitted by the pleadings is a finding against evidence, and judgment rendered thereon is erroneous, p. 98.

Cited to same effect in Benton v. Benton, 122 Cal. 398, noted under Burnett v. Stearns, 33 Cal. 468; Walker v. Brem, 67 Cal. 601, holding, further findings should be confined to the facts put in issue by the pleadings; White v. Douglass, 71 Cal. 119; Ortega v. Cordero, 88 Cal. 226, holding such finding will be disregarded on appeal, where no bill of exception appears in the record; Wilson v. Hawthorne, 14 Colo. 532, S. C. 20 Am. St. Rep. 292, holding "failure to deny material allegations admits them."

**59 Cal. 99-100. BAUDER v. TYRRELL.**

New Trial.—Whether new trial should be granted on the ground of conflicting evidence is a question left to the discretion of the trial court, p. 100.

Cited to same effect in Reclamation Co. v. Cunningham, 71 Cal. 222; also, Bennett v. Hobro, 72 Cal. 179, and supreme court will not interfere with this discretion except in extreme cases; Sharp v. Hoffman, 79 Cal. 407; Wilson v. California C. R. R. Co., 94 Cal. 168, holding, further, that fact that judge who heard motion for new trial had not tried the case is immaterial. Cited with approval in Reay v. Butler, 95 Cal. 215, but appellate court will look more closely into the evidence when it consists entirely of depositions, affidavits, or notes of former testimony; Jones v. Saunders, 103 Cal. 679, holding it to be the duty of trial court to review conflicting evidence.

Same.—Notice need not in terms contain a notice of intention to move that decision be vacated, p. 101.

Cited to same effect in Heinlen v. Heilbron, 71 Cal. 559; also, Locke v. Moulton, 96 Cal. 31.

**59 Cal. 105-107. GRADY v. BRAMLET.**

Supplemental Answer presenting a defense arising after suit brought should be allowed, if there is no unreasonable delay, p. 107.

Cited to same effect in Seehorn v. B. M. & B. W. R. Co., 60 Cal. 251.

**59 Cal. 107-113. SONOMA VALLEY BANK v. HILL.**

Pledgee may maintain action for the debt without first exhausting the subject of the pledge, p. 111.

Cited to same effect in Ehrlich v. Ewald, 66 Cal. 98. Cited in French

v. McCarthy, 125 Cal. 512, permitting retention of collateral until satisfaction of judgment for the debt; note on "Pledgee's remedy by suit on debt" to 79 Am. Dec. 500.

**Corporations.—Stockholders are liable for debts of corporation as principal debtors, not as sureties, p. 109.**

Approved in Hyman v. Coleman, 82 Cal. 653; S. C. 16 Am. St. Rep. 180; also Knowles v. Sandcock, 107 Cal. 642, and fact that debt is secured by mortgage which the creditor holds does not affect the liability of the stockholder; Aldrich v. Anchor Coal Co., 24 Oreg. 37; S. C. 41 Am. St. Rep. 835. Cited in note on "Stockholder's liability" to Prince v. Lynch, 99 Am. Dec. 434; also, in similar note to Thompson v. Reno Savings Bank, 3 Am. St. Rep. 849, 851.

**59 Cal. 113-117. BIGGINS v. CHAMPLIN.**

**Boundary.—Acquiescence in boundary line for the time prescribed by the statute of limitations as a bar to an action for the recovery of real property gives title and estops owners and their grantees from denying it, p. 116.**

Cited with approval in Johnson v. Brown, 63 Cal. 393. Cited and distinguished in Quinn v. Windmiller, 67 Cal. 464, where it is held, where owners of adjacent land, being ignorant of the exact boundary, erect a fence under an agreement that when the true line is ascertained the fence shall be placed thereon, neither can by prescription obtain any title to land included by mistake. Approved in Hughes v. Wheeler, 76 Cal. 234.

**59 Cal. 117-119. ELLIOTT v. FIGG.**

The right to pre-empt upon the death of a pre-emptor survives for the benefit of his heirs, p. 119.

Cited to same effect in Wittenbrock v. Wheadon, 128 Cal. 152, 153, 79 Am. St. Rep. 34, 35, discussing nature of estate of heirs in title derived under section 2269, United States Revised Statutes; Buxton v. Traver, 67 Cal. 172, mere occupant of public land, who has taken no steps toward its pre-emption, has a mere privilege of pre-emption, and no estate which will descend to his heir.

**59 Cal. 119-129. GOWER v. ANDREW. 43 Am. Rep. 242.**

Agent cannot use information derived in course of agency so as to buy property for himself, p. 128.

Cited in Clendenning v. Hawk, 10 N. Dak. 95, denying his right to lease principal's property to himself.

**59 Cal. 130-131. BARNHART v. FULKERTH.**

**Disqualification of Judge.—Judge who has been an attorney in cause brought before him is disqualified, p. 131.**

Approved in Upton v. Upton, 94 Cal. 28, but he may call in another judge to hear the case in his place. Note on general subject to Shattuck v. Myers, 74 Am. Dec. 245.

#### 59 Cal. 131. ESTATE OF BULMER.

A School District is a corporation, p. 131.

Cited to same effect in Kennedy v. Miller, 97 Cal. 432; also in Hamilton v. County of San Diego, 108 Cal. 280, holding, further, that a school district regularly organized, but unknowingly and unintentionally within the limits of a city, is a corporation de facto; Barber v. Mulford, 117 Cal. 358, holding that the district may be made a defendant, together with its officers, in mandamus proceedings; In re Royers Estate, 123 Cal. 624, university may take by will.

#### 59 Cal. 132-135. CERF v. OAKS.

**Insolvency.**—After being adjudged an insolvent, the petitioner cannot retrace his steps and cause his petition to be dismissed, unless by consent of all his creditors, p. 135.

Cited to this effect in dissenting opinion of Ross, J., in Brangdon v. His Creditors, 64 Cal. 396.

**Attachment** is dissolved by order for meeting of creditors and staying proceedings, p. 134.

Cited in Scoville v. Anderson, 131 Cal. 593, further discussing meaning of "month" as used in section 21, Insolvent Act; State v. District Court, 18 Nev. 288, where it is held that the pendency of insolvency proceedings and order staying proceedings in one jurisdiction will not of itself operate to stay proceedings against the insolvent in another.

#### 59 Cal. 139-141. WARD v. WARD.

**Pleading.**—**Judgment by Default** will be vacated where there was a substantial departure in the form of the summons from that required by the code, p. 141.

Cited in Kaybers v. McComber, 67 Cal. 398, holding that such a judgment is voidable only, and cannot be attacked collaterally. Cited and distinguished in Bewick v. Muir, 83 Cal. 369, which case holds that in an action to foreclose liens, if the summons states the nature of the action in general terms, it is sufficient. Cited in People v. Dodge, 104 Cal. 491, where it is held that a judgment by default on an irregular summons is voidable, but not void. Cited with approval in Sawyer v. Robertson, 11 Mont. 421. Authority questioned in Schuttler v. King, 12 Mont. 156, 158, but approved in dissenting opinion of De Witt, J., in same case, p. 161. Approved in Sweeney v. Schultes, 19 Nev. 55. Cited in Ralph v. Lomar, 3 Wash. 405, holding that where summons contains everything essential to be known and works no injury to defendant, it is sufficient.

**59 Cal. 142. WATERMAN v. GREEN.**

Chattel Mortgage—Crops.—Lien continues only so long as crop remains on land of mortgagor, p. 142.

Approved in Byrnes v. Hatch, 77 Cal. 244, but removal of the crop from land by order of mortgagee would probably not extinguish lien; also, Horgan v. Zanetta, 107 Cal. 32. Note on general subject to Gillilan v. Randall, 18 Am. St. Rep. 771.

**59 Cal. 142-148. ZUCK v. CULP.**

Trust—Evidence.—A trust established in relation to personal property may be proved by parol, p. 148.

Cited to this effect in Roach v. Caraffa, 85 Cal. 445, 446.

Statute of Limitations.—In case of continuing trust, the statute does not run until there is a disavowal of the trust, p. 148.

Cited to same effect in Parks v. Satterthwaite, 132 Ind. 415. Notes to Miles v. Thorne, 99 Am. Dec. 398.

**59 Cal. 148-149. EDWARDS v. SONOMA VALLEY BANK.**

Findinga.—A finding of fact stated as a conclusion of law loses none of its efficacy by this displacement, p. 149.

Cited to same effect in Bath v. Valdez, 70 Cal. 355; also, McCarthy v. Brown, 113 Cal. 19.

Sale of personal property, not accompanied by immediate delivery, is void as to existing creditors, p. 149.

Approved in Rohrbough v. Johnson, 107 Cal. 149, holding further the same of chattel mortgages, other than those authorized by statute; also, Adams v. Weaver, 117 Cal. 48, but the fact that vendor remained on the premises as a servant will not vitiate sale; Autrey v. Bowen, 7 Colo. App. 411.

General Citation.—Walters v. Ratliff, 10 Okla. 275.

**59 Cal. 149-154. BOOTH v. CHAPMAN.**

Contract.—Executory contract of sale construed, p. 153.

Cited in Roberts v. Hawn, 20 Colo. 80, where it is stated there is no conflict.

**59 Cal. 154-168. PALMTAG v. DOUTRICK. 43 Am. Rep. 245.**

Bailment—Jus Tertii.—Bailee can only set up such right in an action by the bailor when he defends on such title, and by authority of such third person, p. 168.

Cited to same effect in Dodge v. Meyer, 61 Cal. 423. Approved in concurring opinion of Thornton, J., in Bull v. Houghton, 65 Cal. 425;

Barnhart v. Fulkerth, 73 Cal. 529, holding, further, he cannot set up a title acquired subsequent to a levy on the pledged property; Wetherly v. Straus, 93 Cal. 287, but burden of proof of showing such right is on bailee. Affirmed in Jeffers v. Easton & Co., 113 Cal. 355, as to contract of sale. Note on general subject to 79 Am. Dec. 500.

Bailee cannot set up *jus tertii* without surrender of the property, p. 160.

Cited in Barnum v. Cochrane, 143 Cal. 645, noted under Gross v. Kierski, 41 Cal. 112.

**Estoppel of tenant to deny landlord's title.**

Note to Gates v. Salmon, 95 Am. Dec. 139, holding tenant is not estopped where he did not enter under the lease.

**Notice.**—Where the circumstances are such as to put a reasonably prudent man on his inquiry, the law charges him with notice, p. 166.

Cited to same effect in Dreyfus v. Hirt, 82 Cal. 625.

**Pledgee loses his lien by surrendering possession of pledge.**

Cited in American etc. Co. v. German, 126 Ala. 241, 85 Am. St. Rep. 27, but holding aliter when pledgor has wrongfully retaken possession. Note to Treadwell v. Davis, 94 Am. Dec. 775.

**59 Cal. 168-179. AMADOR CANAL AND MINING CO. v. MITCHELL.**

Judgments may be impeached for those frauds only which are extrinsic to the merits of the case, and by which court has been misled, p. 179.

Approved in Pico v. Cohn, 91 Cal. 135; S. C. 25 Am. St. Rep. 164; Dunlap v. Steere, 92 Cal. 355, S. C. 27 Am. St. Rep. 143, holding, further, that the rule has no application to a case in equity where the plaintiff had no knowledge of the pendency of the action, and could not have protected his rights; Steen v. March, 132 Cal. 617, noted under Hayden v. Hayden, 46 Cal. 333, Belle v. Brown, 37 Or. 593, denying right to vacate judgment for newly discovered evidence. Note, on general subject, to Pico v. Cohn, 25 Am. St. Rep. 167; Dunlap v. Steere, 27 Am. St. Rep. 148; and Little Rock Ry. v. Wells, 54 Am. St. Rep. 232.

**Practice—Mortgage—Foreclosure.**—The court in which action is pending will not take judicial notice of proceedings in bankruptcy subsequently commenced, p. 177.

Approved in Wells v. Edmison, 4 Dak. 50, and discharge from debts in bankruptcy does not affect such a judgment. Note on "Other proceedings in same court" to Lanfear v. Mestier, 89 Am. Dec. 689. Cited and explained in Mitchell v. Canal Co., 75 Cal. 493, 494.

**59 Cal. 181-183. HEINLEN v. MARTIN.**

**Law of the Case.**—The points decided in a cause by the supreme court

constitute the "law of the case" for all subsequent proceedings in it, and is a final adjudication, p. 183.

Cited in Heinlen v. Beana, 71 Cal. 298, on a question of fact. Apparently approved in Sharon v. Sharon, 79 Cal. 653. Approved in Cowdery v. Bank, 130 Cal. 307, noted under Argenti v. San Francisco, 30 Cal. 487; Sharon v. Sharon, 79 Cal. 687, the rule applies only when the facts are substantially the same; Venard v. Green, 4 Utah, 458; Furth v. Snell, 13 Wash. 665.

#### 59 Cal. 183-188. SAN JOSE SAVINGS BANK v. STONE.

**Contracts.**—An agreement enlarging and making definite the terms of a contract amounts to a new contract, for which the old is consideration, p. 187.

Approved in Griswold v. Pieratt, 110 Cal. 263.

**Parol Evidence** is inadmissible to alter terms of note as to payment, p. 187.

Cited in dissenting opinion in Ames v. S. P. Co., 141 Cal. 734, discussing conditions in railroad ticket.

#### 59 Cal. 188-191. DUSY v. HELM.

**False Imprisonment.**—Action will now lie where jurisdiction to issue warrant existed unless in case of entire lack of evidence in essential particular, p. 189.

Explained and distinguished in Fukumoto v. Marsh, 130 Cal. 69, holding party liable where affidavit for arrest was radically defective, although warrant was issued thereunder, and cf. Kaeppeler v. Bank, 8 N. Dak. 411; Tillman v. Beard, 121 Mich. 479, denying liability in case of arrest under ordinance thereafter declared void; note to Tryon v. Pingee, 67 Am. St. Rep. 412, on general subject.

**Process Valid on Face** protects officer executing it, p. 191.

Approved in Blumaur etc. Drug Co. v. Branstetter, 4 Idaho, 561, affidavit and notice of foreclosure of chattel mortgage are process and protect sheriff in execution thereof.

#### 59 Cal. 191-193. KILE v. TUBBS.

**Patent.**—United States patent to land listed to state conveys no title, p. 191.

Cited to same effect in Cucamonga Fruit Co. v. Moir, 83 Cal. 107; also, in dissenting opinion of Murphy, J., in South End Co. v. Tinney, 22 Nev. 46.

#### 59 Cal. 197-206. CHIDESTER v. CONSOLIDATED DITCH COMPANY.

**Negligence** is a question of fact, and in cases where reasonable men

might differ in their conclusions, the supreme court will not interfere with a verdict, p. 201.

Approved in *Herbert v. S. P. Co.*, 121 Cal. 229 (quoted in *Wahlgren v. Ry. Co.*, 132 Cal. 663), noted under *Fernandes v. Railroad Co.*, 52 Cal. 45; *McKeever v. Market St. R. R. Co.*, 59 Cal. 300. Cited to same effect in *McDermott v. S. F. & N. P. R. R. Co.*, 68 Cal. 34; also, *Bowers v. U. P. R. R. Co.*, 4 Utah, 225 and a verdict will not be set aside as contrary to the evidence, if there be a substantial conflict in the evidence.

**Act of God** not an excuse where the injury might have been avoided by the exercise of due care on part of defendant, p. 204.

Approved in *Odd Fellows' M. A. Assn. v. James*, 63 Cal. 607; S. C. 49 Am. Rep. 112. Cited in *Pope v. Farmers' etc. Co.*, 130 Cal. 141, noted under *Polack v. Pioche*, 35 Cal. 416; *Grand Val. etc. Co. v. Pitzer*, 14 Colo. App. 126, but holding defendant not liable for damage caused by overflow of irrigating ditch during unprecedeted storm; note to *Polack v. Pioche*, 95 Am. Dec. 125.

#### 59 Cal. 206-243. **MULLIGAN v. SMITH.**

Where the law requires that a petition be signed by a majority of the owners in frontage of the property to be charged with the cost of improvements, this must be complied with to give the board of public works jurisdiction, p. 226.

Approved in *Kahn v. Board of Supervisors*, 79 Cal. 396; also, in *Watkins v. Griffith*, 59 Ark. 358; *Aplin v. Fisher*, 84 Mich. 133, holding, further, as to the signatures to the petition; Cited in *Harmon v. City*, 53 Neb. 168, and *Town v. Dominice*, 9 N. Mex. 628, holding assessment and tax void for lack of such petition; *Allen v. City*, 35 Or. 433, on point that question of regularity of signature can be raised collaterally, citing case at p. 440, sustaining signature by corporate agent; *Armstrong v. Ogden*, 12 Utah, 492; same case approved on appeal, 168 U. S. 236; *Liebman v. San Francisco*, 11 Saw. 153, 155; S. C. 24 Fed. Rep. 708, 710. Note on "Preliminary Petitions" to *Jones v. City of Camden*, 51 Am. St. Rep. 840.

**Executors and Administrators** are not empowered to sign petitions to encumber the estates of the decedents whom they represent, p. 225.

Cited to same effect in *Kahn v. Board of Supervisors*, 79 Cal. 398, holding that such signatures cannot be considered.

**Jurisdiction.**—The judgment of a court not having jurisdiction does not estop parties to the action from showing jurisdictional defects on appeal, p. 233.

Cited to same effect in *Kahn v. Board of Supervisors*, 79 Cal. 399; also, *Strout v. City of Portland*, 26 Oreg. 300, holding, further, as to what constitutes a waiver of jurisdictional defects; *Watkins v. Griffith*,

59 Ark. 361; *Zeigler v. Hopkins*, 117 U. S. 687. Cited in *Scotten v. Detroit*, 106 Mich. 569, 570.

**Tenants in Common.**—One joint owner can do nothing in hostility to the common title, p. 225.

Approved in *Los Angeles Lighting Co. v. City of Los Angeles*, 106 Cal. 160, but he may do any act to protect the entire estate from injury, and the authority of his co-owners will be presumed to have been given: *Fallbrook Irrigation District v. Abila*, 106 Cal. 361, holding, further, as to meaning of "owner" as used in "Wright Act."

**Constitutional Law.**—Constitutional provision respecting the taking of private property for public use construed and explained, p. 230.

Cited on this point in *In re Smith's Petition*, 9 Wash. 88. Approved in *Power v. Larabee*, 2 N. Dak. 153, holding, further, as to necessity of giving taxpayer an opportunity to be heard; *San Mateo v. Southern* "due process of law." Cited in *Wilson v. B. & P. R. R. Co.*, 5 Del. Ch. Pacific Co., 13 Fed. Rep. 784, holding, further, as to meaning of phrase 547, further as to necessity of giving notice before taking property. Note to *Steamboat Co. v. Foster*, 48 Am. Dec. 278. Note to *Hagar v. Reclamation District*, 111 U. S. 712, on necessity of notice.

**General Citations.**—Explained in *Spalding v. Homestead Assn.*, 87 Cal. 41, 42, 46; also, *Crall v. Poso Irrigation District*, 87 Cal. 149. Cited in *Davis v. City of Lynchburg*, 84 Va. 870; *Merchants' Bank v. McKinney*, 2 S. Dak. 116. Cited and explained in *Liebman v. San Francisco*, 11 Saw. 153, 155; 24 Fed. Rep. 708, 710, in connection with the subject of street assessments; *Bradley v. Fallbrook*, 68 Fed. Rep. 961.

#### 59 Cal. 243-259. **PEOPLE v. CAMPBELL.** 43 Am. Rep. 257.

**Dismissal of Indictment** does not bar another indictment for same offense, p. 244.

Cited in *People v. Breen*, 130 Cal. 74, so ruling under section 999, Penal Code, although no resubmission was formally ordered.

**Homicide.**—Threats, unaccompanied by acts which threaten the life or limb of the slayer, will not excuse, p. 247.

Approved in *Brown v. State*, 74 Ala. 43, and evidence to show such is properly excluded; also, *People v. Tamekin*, 62 Cal. 472, evidence of threats may be admitted to show who was the aggressor. Note on general subject to *Campbell v. People*, 61 Am. Dec. 63; *Hart v. Commonwealth*, 7 Am. St. Rep. 579; *Garner v. State*, 29 Am. St. Rep. 256; *Miller v. State*, 37 Am. St. Rep. 847.

**Vested Rights.**—"No such thing as a vested right in any particular remedy," p. 246.

Approved in *South v. State*, 86 Ala. 619, as to statute changing number of challenges; also, in *Mill & Lumber Co. v. Olmstead*, 85 Cal. 85, as Notes Cal. Rep.—186.

to statute shortening the time within which to file a mechanic's lien. *Contra, State v. Kingsley*, 10 Mont. 545.

**Constitutional Law.**—Statute authorizing prosecution by information cannot be objected to as being *ex post facto*, because it is applicable to offenses committed before its enactment, p. 246.

Approved in *In re Wright*, 3 Wyo. 484, 31 Am. St. Rep. 100; *People v. McDonald*, 5 Wyo. 537; *State v. Ah Jim*, 9 Mont. 174. Denied in *State v. Kingsley*, 10 Mont. 545-548, holding the question is not one of procedure. Note to *People v. Hayes*, 37 Am. St. Rep. 595.

#### 59 Cal. 259-260. **PEOPLE v. O'NEIL.**

Instruction as to what evidence is necessary to prove alibi sustained, p. 260.

Approved in similar case, *People v. Burns*, 59 Cal. 359; *People v. Kessler*, 13 Utah, 84, holding, further, as to burden of proving alibi.

#### 59 Cal. 260-262. **ROGERS v. SHAW.**

**Alteration of Instrument.**—Action is maintainable on bond twice altered without fraudulent intent, where original form is restored, p. 261.

Cited in *Wallace v. Tice*, 32 Or. 28, 280, sustaining action to restore original form of note innocently altered, and recovery thereon on such original form.

#### 59 Cal. 262-264. **LORENZ v. JACOBS.**

**Equity—Jury Trial.**—It is optional with the court to submit issues of fact to a jury, p. 264.

Cited to same effect in *Fish v. Benson*, 71 Cal. 435.

#### 59 Cal. 265-267. **WEBER v. BOARD OF SUPERVISORS.**

**Constitutional Law.**—Condemnation of land for public use can only be had by judicial proceedings, and the owner is entitled to a jury trial for the purpose of ascertaining damages, p. 266.

Cited to same effect in *Trahern v. Board of Supervisors*, 59 Cal. 321; also, in *Snohomish County v. Hayward*, 11 Wash. 431, where the Washington constitution was under consideration; *Seanon v. County Commissioners*, 13 Wash. 50.

A section of the constitution in conflict with a statute abrogates the statute, p. 267.

Approved in *Peterson v. Smith*, 6 Wash. 165.

**General Citation** on the power of the legislative department of government in *In re Stevens*, 83 Cal. 332; S. C. 17 Am. St. Rep. 260.

**59 Cal. 267-268. SMITH v. HIS CREDITORS.**

**Insolvency.**—The fact that a debtor, after filing his petition, collected and retained to a small debt owed him, will not prevent his discharge, it appearing to the jury that there was no fraud, p. 268.

Cited to same effect in *In re Bowman*, 83 Cal. 155; also, in *Demartin v. Demartin*, 85 Cal. 79, holding, further, that a mistake in the proceedings, there being no fraud, is immaterial.

**59 Cal. 269-272. TENNENBROCK v. SOUTH PACIFIC R. R. CO.**

**Negligence.—What Constitutes**, p. 269.

Cited in *Toomey v. S. P. R. R. Co.*, 86 Cal. 380, where it is held that the defendant was not negligent in not causing signals to be given in order to render its track safe to trespassers; *St. L., I. M. & S. Ry. v. Monday*, 49 Ark. 284, holding that the liability of a railroad company to a trespasser must be measured by the conduct of its employees after they become aware of his presence; *Anderson v. Railway Co.*, 87 Wis. 203, 206, walking on the track of a railway is negligence per se.

**59 Cal. 273-274. PFISTER v. WADE.**

**Injunction.—Complaint** may be amended on application to dissolve based on insufficiency of complaint, p. 273.

Cited in *World etc. Co. v. Trade's Assembly*, 24 Mont. 351, noted under *Barber v. Reynolds*, 33 Cal. 497.

**59 Cal. 274-275. DESMOND v. SUPERIOR COURT.**

Pleading to the merits cures defective summons, p. 275.

Approved in *Sears v. Starbird*, 78 Cal. 231.

**59 Cal. 282-283. COOPER v. VIERRA.**

Location and acquiescence in boundary line for five years gives title, and estops owners and their grantees from denying it, p. 283.

Cited to same effect in *Johnson v. Brown*, 63 Cal. 393. Cited in *Dierssen v. Nelson*, 138 Cal. 398, quoting *White v. Spreckels*, 75 Cal. 610; *Western Union Oil Co. v. Newlove*, 145 Cal. 774, where findings as to practical location by agreed fence are supported by evidence and are sufficient to support judgment for defendant, findings which are mere legal conclusions from practical location, as to laches and estoppel of owner under whom plaintiff claims, are immaterial. Distinguished in *Quinn v Windmiller*, 67 Cal. 464, which case holds that rights shall be neither lost nor gained by erecting a division fence under an agreement that when the true line is discovered the fence shall be placed upon it.

Approved in *White v. Spreckels*, 75 Cal. 616, holding, further, that such agreements are not within the statute of frauds.

**59 Cal. 284. BERNAL v. O'HANLON.**

**Findings.**—Where there is evidence to support the findings, the appellate court will not disturb the judgment, p. 284.

Approved in Pico v. Cohn, 78 Cal. 387.

**59 Cal. 285-286. FAYMONVILLE v. McCOLLOUGH.**

**Liability of Stockholders of Corporations,** p. 285.

Cited in note on this subject to Prince v. Lynch, 99 Am. Dec. 434; also, Thompson v. Savings Bank, 3 Am. St. Rep. 851.

**59 Cal. 288-289. SHARP v. BLANKENSHIP.**

Title acquired by adverse possession under statute cannot be divested by the legislature, p. 289.

Approved in Cent. Pac. R. R. Co. v. Shackelford, 63 Cal. 268, but at any time before the title becomes vested the statute may be altered or repealed; also, Johnson v. Brown, 63 Cal. 394; Heilbron v. Heinlen, 72 Cal. 378; Water Company v. Richardson, 72 Cal. 601, holding that the statute confers an absolute title. See note to Arrington v. Liscom, 94 Am. Dec. 742; Cannon v. Stockmon, 95 Am. Dec. 209.

The provision requiring the payment of taxes as an element of adverse possession is not retroactive, p. 289.

Cited to same effect in Webber v. Clark, 74 Cal. 19; also, Johnson v. Brown, 63 Cal. 394; Estate of Richards, 133 Cal. 527, applying rule to amendments of sections 55 and 68, Civil Code; Cook v. Cockins, 117 Cal. 149, stating that no part of the code is retroactive unless so expressly declared.

**59 Cal. 290-292. FORD v. SANTA CRUZ RAILROAD COMPANY.**

**Nuisance.**—Private action lies to abate a public nuisance in case of special damage, p. 292.

Cited to same effect in Hargro v. Hodgdon, 89 Cal. 629. Distinguished in Beronio v. Southern Pac. R. R. Co., 86 Cal. 421; S. C. 21 Am. St. Rep. 60.

Measure of damages is the actual loss sustained prior to the commencement of the suit, p. 292.

Disapproved in J. T. & K. W. Ry. v. Lockwood, 33 Fla. 592, holding that entire damage done may be recovered, and testimony to show the market value of the property before and after the act complained of should be admitted. Cited in note to Ohio etc. R. R. Co. v. Wachter, 5 Am. St. Rep. 539.

**59 Cal. 292-293. ESTATE OF HARDWICK.**

**Order Setting Apart the Homestead** relieves it from administration, p. 292.

Cited to same effect in *In re Gilmore*, 81 Cal. 243; explained in *Estate of Tittel*, 139 Cal. 152, 153, but holding title in fee remaining in heirs still subject to creditor's claims.

**59 Cal. 293-294. DIAS v. PHILLIPS.**

Misjoinder of Parties appearing on face of complaint is ground for demurrer, p. 294.

Explained and distinguished in *Redfield v. Oakland Ry. Co.*, 110 Cal. 291. Cited with approval in *Robertson v. Burrell*, 110 Cal. 576.

**59 Cal. 294-301. MCKEEVER v. MARKET STREET RAILROAD COMPANY.**

**Negligence.**—Verdict of the jury will not be set aside, unless, in the judgment of reasonable men, no such deduction as expressed in the verdict could be drawn from the evidence, p. 300.

Cited to the same effect in *McDermott v. S. F. & N. P. R. R. Co.*, 68 Cal. 34; *Herbert v. S. P. Co.*, 121 Cal. 229 (quoted in *Wahlgren v. Ry. Co.*, 132 Cal. 663), on point that question of negligence is one of fact; *Bowers v. U. P. R. R. Co.*, 4 Utah, 225, holding, further, that the court could take the question from the jury only in case the course which common prudence would dictate be plain and clear.

**Mental Anguish as element of damage**, p. 294.

See note to *West v. W. U. T. Co.*, 7 Am. St. Rep. 535; *Louisville v. Goodykoontz*, 12 Am. St. Rep. 376.

**Measure of Damages** is the pecuniary loss suffered by the party entitled to recover (head note), p. 294.

Approved in *Treadwell v. Whittier*, 80 Cal. 580; S. C. 18 Am. St. Rep. 181.

**General Citation.**—Cited in *Farrell v. Waterbury Horse R. R. Co.*, 60 Conn. 256, as substantially holding that when the facts are undisputed, contributory negligence is a question of law for the court; see, also, *Bowers v. U. P. R. R. Co.*, 4 Utah, 225. Cited in *Munro v. Dredging Co.*, 84 Cal. 525; S. C. 18 Am. St. Rep. 255; also, in *Morgan v. Southern Pac. Co.*, 95 Cal. 518, S. C. 29 Am. St. Rep. 146, in both of which it is stated that the principal case decides nothing as to damages for mental anguish.

**59 Cal. 301. BRADY v. PAGE.**

Courts will take judicial notice of the streets of San Francisco and of their relation to each other and of the direction in which they run, p. 301.

Cited in note to *Temple v. State*, 49 Am. Rep. 202.

**59 Cal. 304-307. ECLIPSE MINING COMPANY v. SPRING.**

**Mining Patent.**—A patent, under section 2322 of the Revised Statutes of the United States, excludes from the grant any ledge located by parties other than the grantees prior to May 10, 1872, although the top or apex of such other ledge may lie inside of the exterior lines of the premises granted, p. 306.

Cited in Lee v. Stahl, 13 Colo. 177, holding that the act does not, ex proprio vigore, reserve out of the grant rights other than cross veins acquired prior to its enactment. Cited in note to Catron v. Old, 58 Am. St. Rep. 278.

**59 Cal. 307-311. FAY v. McKEEVER.**

**Complaint.—Clerical Error in, is not fatal on demurrer for ambiguity,** p. 308.

Cited in Harnley v. Brownstone, 123 Cal. 646, noted under Salmon v. Wilson, 41 Cal. 595.

**59 Cal. 312-313. GREGG v. SAN FRANCISCO & NORTH PACIFIC RAILROAD COMPANY.**

It is within the discretion of the trial court to deny a motion for a new trial, on condition that the plaintiff remit a specified portion of the damages awarded him, p. 313.

Cited to same effect in Davis v. Southern Pac. R. R. Co., 98 Cal. 18, where the rule is applied to damages for personal injury; also, Brooks v. S. F. & N. P. Ry. Co., 110 Cal. 176; Sherwood v. Kyle, 125 Cal. 654; Sills v. Hawes, 14 Colo. App. 162 (quoted in Chicago etc. Co. v O'Marr. 25 Mont. 252), sustaining such orders.

**59 Cal. 320. PATEMAN v. TYRREL.**

Transcript must Show Service of Notice of appeal on opposite attorneys, p. 320.

Approved in Adams v. McPherson, 3 Idaho, 721, following rule.

**59 Cal. 320-321. TRAHERN v. BOARD OF SUPERVISORS.**

**Constitutional Law.**—Land cannot be taken for public use without judicial proceedings, p. 320.

Distinguished in Estate of Stevens, 83 Cal. 332; S. C. 17 Am. St. Rep. 260.

**59 Cal. 321-326. PEOPLE v. SUPERVISORS OF SACRAMENTO COUNTY.**

**Constitutional Law.**—Assessment of railroad property, where road is operated in more than one county, shall be made by state board of equalization, p. 324.

Cited to same effect in *S. F. & N. P. R. R. Co. v. State Board*, 60 Cal. 28, holding, further, that the section of the constitution so providing is self-executing. Distinguished in *Farmers' Bank v. Board*, 97 Cal. 324. Cited in *Santa Clara County v. South Pacific R. R. Co.*, 118 U. S. 411; *County of San Mateo v. Southern Pacific Co.*, 13 Fed. Rep. 748, legislation may be had providing for the mode in which the powers of the board shall be exercised; *Reinhart v. M'Donald*, 76 Fed. Rep. 405. Note to *Wulzen v. Supervisors*, 40 Am. St. Rep. 44.

**59 Cal. 328-340. PEOPLE v. DUNN.**

Board of equalization has no authority to increase the county assessment on money, but may increase on mortgages, pp. 332, 333.

Approved in *Schroder v. Grady*, 66 Cal. 213. Cited, also, in dissenting opinion of Ross, J., in same case, in which he holds the decision in *People v. Dunn*, respecting mortgages, is erroneous; *Farmers' Bank v. Board*, 97 Cal. 325. Cited in *State v. Thomas*, 16 Utah, 99, denying right of state board to change valuation of property listed at legal value.

**General Citation.**—*Baldwin v. Ellis*, 68 Cal. 499, on general power of equalization board. Distinguished in *Farmers' Bank v. Board*, 97 Cal. 324.

**59 Cal. 341-342. PEOPLE v. SCOTT.**

**Criminal Law.**—Motion to withdraw a plea of guilty, there being evidence that defendant was insane at time of making plea, should be allowed, p. 342.

Cited to same effect in *City of Salina v. Cooper*, 45 Kan. 16.

**59 Cal. 342-343. PEOPLE v. SEPULVEDA.**

**Uncertainty in Verdict** invalidates it, p. 342.

Cited in *Willard v. Archer*, 63 Cal. 34, which case holds that a verdict for defendant, in a civil action against two defendants, will not be set aside for uncertainty.

**59 Cal. 343-344. PEOPLE v. QURISE.**

**Evidence.**—Reporter's notes of evidence formerly given are not admissible in criminal cases, p. 344.

Cited in *Reid v. Reid*, 73 Cal. 207, which case decides that the reporter's certified transcript of the testimony, in a civil case, given by a party in a prior action, is not admissible in a subsequent action as evidence of what he said on the former trial. Approved in *People v. Gardner*, 98 Cal. 132, where recollections of person present at former trial as to what witness said were held inadmissible; *People v. Gordon*, 99 Cal. 233. Cited in *Mattox v. United States*, 156 U. S. 241, where it

is stated the opposite rule prevails in the United States district courts. Note to *Cline v. State*, 61 Am. St. Rep. 889.

**59 Cal. 345-357. PEOPLE v. BROWN.**

**Criminal Law.**—Instructions as to evidence required to convict, p. 354.

Cited in *People v. Foon Ark*, 61 Cal. 529, and *State v. Ryan*, 12 Mont. 299, where it is stated court must instruct jury that they must be satisfied of defendant's guilt beyond a reasonable doubt; *Reeves v. Territory*, 10 Okla. 210. Note on "Circumstantial evidence" to *Rippey v. Miller*, 62 Am. Dec. 183. Note on "Conspiracy" to *Spies v. People*, 3 Am. St. Rep. 479. Note to *Daniels v. State*, 6 Am. St. Rep. 242.

**59 Cal. 357-358. PEOPLE v. HIGGINS.**

**Former Jeopardy.**—An accused who escapes during trial, thereby necessitating the discharge of the jury, cannot on a subsequent trial for the same offense set up the plea of former jeopardy, p. 358.

Cited in *Summeralls v. State*, 37 Fla. 164, S. C. 53 Am. St. Rep. 248, to the effect that the first trial is mistrial.

**Verdict.**—In criminal proceedings, the absence of the defendant during any part of the trial invalidates the verdict, p. 358.

Cited to same effect in *People v. Holmes*, 118 Cal. 448.

**59 Cal. 359-362. PEOPLE v. EDWARDS.**

**Burglary.**—Variance as to ownership, if the facts are alleged with sufficient precision to enable the defendant to understand the accusation made against him, is immaterial, p. 361.

Cited to same effect in *People v. Bitancourt*, 74 Cal. 191; also in *People v. Arras*, 89 Cal. 227; *People v. Main*, 114 Cal. 634. Cited in *People v. Nunby*, 142 Cal. 107, 108, holding variance in names in grand larceny not material.

**59 Cal. 362-363. PEOPLE v. LOPEZ.**

**Larceny.**—Evidence of other like offenses, occurring at same time, may be given in rebuttal where defendant attempts to show that he came into possession of the stolen property rightfully, p. 363.

Approved in *People v. Cunningham*, 66 Cal. 669; cited in dissenting opinion of Thornton, J., in same case, where it is said to be not in point.

**Instructions.**—A party cannot object to instructions given at his own request, p. 363.

Cited to same effect in *Dawson v. Schloss*, 93 Cal. 205; also in *Territory v. Burgess*, 8 Mont. 76.

**59 Cal. 364. PEOPLE v. HOLLAND.**

**Jurisdiction.**—Where action is commenced in good faith within jurisdiction, judgment may be taken without regard to, p. 364.

Approved in *McLean v. State*, 23 Fla. 283, "jurisdiction is determined by the indictment."

**59 Cal. 365-367. PEOPLE v. SMITH.**

**Commitment.**—Where there is no deposition in writing, the commitment may be indorsed on the complaint, p. 365.

Approved and followed in *People v. Hope*, 62 Cal. 293; also, in *People v. Young*, 64 Cal. 213. Cited in *People v. Price*, 143 Cal. 353, treating complaint as a deposition in this regard.

**General Citation.**—Cited in *Territory v. Evans*, 2 Idaho, 396, as authority that instructions must be founded on some evidence in the case.

**59 Cal. 367-370. PEOPLE v. SOTO.**

The jury may reject the whole testimony of a witness who has willfully sworn falsely as to a material point, p. 369..

Cited in *People v. Plyler*, 121 Cal. 163, noted under *People v. Sprague*, 53 Cal. 494; *Cameron v. Wentworth*, 23 Mont. 78, noted under *People v. Hicks*, 53 Cal. 354; *Singer Mfg. Co. v. Cramer*, 100 Fed. 658, noted under *People v. Strong*, 30 Cal. 155; *White v. Disher*, 67 Cal. 403, holding, further, a witness false in one part of his testimony is to be distrusted in others, and an instruction that he may be distrusted is error; *People v. Treadwell*, 69 Cal. 238, to same effect, and it is not error to omit the word "willfully." Note on general subject to *Robertson v. Dodge*, 81 Am. Dec. 270; *Dunn v. People*, 86 Am. Dec. 330, 331.

**59 Cal. 372-381. PEOPLE v. KELLY.**

**Perjury.**—In indictment for, the materiality of the oath must be averred, or facts stated showing that it was material, p. 381.

Approved in *People v. Ah Bean*, 77 Cal. 15. Cited in *Maynard v. People*, 135 Ill. 426, holding, further, there is no perjury in false swearing if the one who administered the oath had no authority to do so; *People v. Greenwell*, 5 Utah, 115, as to false swearing before a grand jury. Note on "Materiality of false swearing" to *State v. Shupe*, 85 Am. Dec. 498.

**59 Cal. 381-385. PEOPLE v. BARNHART.**

A technical error, which is not prejudicial to the rights of litigants, is immaterial, p. 384.

Cited in *People v. Clark*, 106 Cal. 40, as to evidence admitted errone-

ously. Approved in *People v. Maroney*, 109 Cal. 279, where jury convicted of burglary in second degree, where evidence showed it should have been in the first; *People v. Lowen*, 109 Cal. 384; *People v. Muhlmer*, 115 Cal. 306.

**Burglary.**—Information which simply charges the crime of, without stating time, embraces both degrees of the crime, p. 384.

Cited in *People v. Smith*, 136 Cal. 208, but holding conviction of one degree not maintainable when indictment charges only the other. Doubted in *Bromley v. State*, 150 Ill. 301, under statute of that state.

**General Citation.**—Distinguished in *People v. Mitchell*, 62 Cal. 413.

#### 59 Cal. 385-386. **PEOPLE v. CLEMENTSHAW.**

**Perjury—Instructions.**—It is the duty of the court to determine whether any particular evidence is material, p. 385.

Cited to same effect in *People v. Lem You*, 97 Cal. 229; also in *State v. Caywood*, 96 Iowa, 374.

**Same.**—Certain proper instructions were refused by the court, but given in effect in the general charge. No error, p. 385.

Cited to same effect in *Territory v. Evans*, 2 Idaho, 398.

#### 59 Cal. 386-389. **PEOPLE v. MARSHALL.**

**Criminal Law—Instruction.**—Instruction, under an indictment for abduction, that defendant must establish his defense by preponderance of evidence, is erroneous, p. 389.

Approved in *People v. Smith*, 59 Cal. 608; *People v. Cheong Foon Ark*, 61 Cal. 528.

Bail after conviction should not be allowed, unless circumstances of an extraordinary character had intervened since conviction, p. 388.

Approved in *Ex parte Brown*, 68 Cal. 183.

**Circumstantial Evidence.**—Under an indictment for abduction for purposes of prostitution, acts are the surest indications of one's purpose, p. 388.

Approved in *Ex parte Estrado*, 88 Cal. 319, holding, further, that there need not be express testimony to show that the purpose of taking a girl was to make her a prostitute; *State v. Keith*, 47 Minn. 562.

**Abduction.**—The "taking" need not be by force, but may be by improper solicitations or inducements, p. 388.

Cited to same effect in *State v. Johnson*, 115 Mo. 493.

#### 59 Cal. 389-390. **PEOPLE v. MONAHAN.**

**Instructions.**—Confused instructions is ground for a new trial, p. 390. Cited in *People v. Phillips*, 70 Cal. 63.

**59 Cal. 390-391. PEOPLE v. CORE.**

**Robbery.**—The prosecution must establish guilt beyond a reasonable doubt in order to convict.

Note to State v. McCune, 70 Am. Dec. 179.

**59 Cal. 392-396. PEOPLE v. WREDEN.**

**Instructions.**—Contradictory instructions is ground for new trial, p. 396.

Approved in People v. Hamilton, 62 Cal. 384.

Rule as to when a nonexpert may give an opinion, p. 394.

Cited in Robinson v. Exempt Fire Co., 103 Cal. 6, S. C. 42 Am. St. Rep. 97, although the case does not appear to be in point. Approved in similar case, Armstrong v. State, 30 Fla. 201, holding witness may give an opinion as to the sanity of a person with whom he conversed—first detailing the facts on which the opinion is based; also, Goodwin v. State, 96 Ind. 558. Cited in People v. Casey, 124 Mich. 282, quoting Armstrong v. State, 30 Fla. 201.

Instruction that where insanity is relied on it must be closely established by satisfactory proof, is erroneous, p. 395.

Approved in People v. Wells, 145 Cal. 142, 143, following rule.

**General Citation.**—Cited in People v. Ribolsi, 89 Cal. 497, on the point as to what evidence is necessary to establish the truth of a fact. Note to People v. Garbutt, 97 Am. Dec. 176, on burden of proof when insanity is a defense.

**59 Cal. 397-398. PEOPLE v. WILLIAMS.**

Information, charging with crime against nature, in words of statute, is good, p. 398.

Cited in Cross v. State, 17 Tex. App. 477, holding the indictment in the particular case sufficient, but not going as far as rule in principal case. Note on general subject to State v. Campbell, 94 Am. Dec. 254.

**59 Cal. 400-401. PEOPLE v. AH SING.**

Instruction that a certain fact is a strong circumstance in the case is error, p. 401.

Cited to same effect in People v. Titherington, 59 Cal. 598, whether or not a particular fact is strong evidence is a question for the jury alone; also, People v. Cline, 74 Cal. 577; Estate of Blake, 138 Cal. 311, noted under McMinn v. Whelan, 27 Cal. 319. Approved in State v. Sullivan, 9 Mont. 178; Bank of Denver v. Lowrey, 36 Neb. 300, holding it reversible error to direct the jury as to what weight shall be given evidence. Cited in note on "Possession of stolen goods, effect as evidence of larceny," to Hunt v. Commonwealth, 70 Am. Dec. 449, 452; State v. Whit, 72 Am. Dec. 545.

**59 Cal. 402-403. PEOPLE v. BARNHART.**

Trial.—Erroneous statement of testimony by counsel in argument before jury not ground for new trial, p. 403.

Cited to same effect in *People v. Lee Ah Yute*, 60 Cal. 97.

**59 Cal. 405-416. EX PARTE HOLLIS.**

Contempt.—Jurisdiction to punish for this offense is reviewable on appeal, p. 408.

Cited in *Miskimins v. Shaver*, 8 Wyo. 410, noted under *Ex parte Kearney*, 55 Cal. 212. Disapproved in *Tyler v. Connolly*, 65 Cal. 31, stating what is said in *Ex parte Hollis* as to appeal, is dictum. Approved in *Dodge v. Langhorne*, 12 Wash. 595; *Snow v. Snow*, 13 Utah, 23. Note on "Jurisdiction" to *Morley v. Green*, 42 Am. Dec. 114; *People v. Turner*, 52 Am. Dec. 303.

Title to property cannot be determined in proceedings to punish for contempt, p. 413.

Approved in *Ex parte Casey*, 71 Cal. 271; *Baldwin v. Circuit Judge*, 101 Mich. 135. Cited in *Stuparich etc. Co. v. Superior Court*, 123 Cal. 292, applying rule to determination of question on writ of prohibition against receiver's acts; *Tomsky v. Superior Court*, 131 Cal. 624, denying right of; *Estate of Vance*, 141 Cal. 627, noted under *Haverstick v. Trudell*, 51 Cal. 431, probate court to compel attorney to return fees, as not properly earned; *Ex parte Tinsley*, 37 Tex. Cr. App. 531, 66 Am. St. Rep. 825, but holding order valid in part; *Brunings v. Townsend*, 139 Cal. 139, holding refusal to make order one of discretion, and application not favored.

Contempt of Court is a specific criminal offense, p. 408.

Cited to same effect in *Ex parte Ah Men*, 77 Cal. 200, 11 Am. St. Rep. 264, but, as a matter of practice, is presented in the cause or proceeding out of which it arose, and not as a separate proceeding with a title of its own; *Ex parte Gould*, 99 Cal. 362, 37 Am. St. Rep. 59, holding, further, defendant cannot be compelled to be sworn as a witness against himself; *McClatchy v. Superior Court*, 119 Cal. 419; *Snow v. Snow*, 13 Utah, 23, holding contempt proceedings to enforce payment of alimony is civil and remedial; *State v. District Court*, 24 Mont. 35, discussing penalties for, under local statute; *Rodgers v. Pitt*, 89 Fed. 426, noted under *Mahoney v. Van Winkle*, 33 Cal. 448.

Insolvency.—Receiver may maintain action to protect rights of creditors and insolvent debtor, p. 416.

Cited to same effect in *Dennerly v. Superior Court*, 84 Cal. 11. Distinguished in *Tibbets v. Cohn & Co.*, 116 Cal. 369, further as to what actions receiver may not bring.

Summary Proceedings.—A court has no authority to order a party to

turn over to a receiver property held by him adversely to the insolvent debtor, p. 414.

Cited with approval in Deering v. Richardson, 109 Cal. 83, as to authority to order garnishee to pay to particular plaintiff when it appears there are other parties claiming liens on same money. Distinguished in Ex parte Clark, 110 Cal. 407. Cited in State ex rel. Boardman v. Ball, 5 Wash. 388, S. C. 34 Am. St. Rep. 866, receiver must proceed in ordinary way to try his right to the property; Baldwin v. Circuit Judge, 101 Mich. 129.

**General Citations.**—Cited in Sayers v. Superior Court, 84 Cal. 645, as to contempt proceedings; In re Wolford, 10 Kan. App. 286.

#### ·59 Cal. 416-417. EX PARTE STRANGE.

**Bail.**—Under habeas corpus, prisoner may be admitted to bail on showing that the offense for which he is detained is bailable, p. 417.

Approved in Ex parte Smith, 23 Tex. App. 123.

#### ·59 Cal. 417-420. EX PARTE COTTRELL.

**Alimony.**—The court may modify its orders in this respect at any time, p. 418.

Approved in Ex parte Spencer, 83 Cal. 465; S. C. 17 Am. St. Rep. 270.

Power of court to decree after divorce granted, p. 417.

Note to Buckminster v. Buckminster, 88 Am. Dec. 657.

Court may imprison for contempt for failure to comply with its order to pay alimony, p. 420.

Cited to same effect in Ex parte Spencer, 83 Cal. 465, S. C. 17 Am. St. Rep. 270; but failure to comply with the order may be excused by showing inability to do so; Ex parte Gordon, 95 Cal. 378, holding further, that the rule applies to the payment of money for the support of minor children; Snow v. Snow, 13 Utah, 24.

**Alimony—Appeal—Query.**—Whether any undertaking could be given which would operate as a stay of the execution of the order pending the appeal, or whether any appeal lies from such an order, p. 419.

Cited in Sharon v. Sharon, 67 Cal. 215, 216, 220, which case holds the affirmative of both propositions.

#### 59 Cal. 420-423. EX PARTE COTTRELL.

**Appeal.**—Under habeas corpus proceedings, the supreme court will not review questions of fact determined by the trial court, p. 421.

Cited in Golden Gate Min. Co. v. Superior Court, 65 Cal. 190, 191, where the same rule is affirmed of certiorari proceedings; Ex parte Sternes, 77 Cal. 163, S. C. 11 Am. St. Rep. 255, and where jurisdiction

depends on a fact that is litigated in a suit. the judgment record is conclusive evidence of jurisdiction, until set aside by direct proceeding. Approved in *Ex parte Noble*, 96 Cal. 364; *Ex parte Stephen*, 114 Cal. 281.

#### 59 Cal. 423-425. EX PARTE HOPE.

**Attempt to commit crime. Punishment, p. 423.**

Cited in *State v. King*, 9 N. Dak. 151, affirming sentence under local statutes; note to *People v. Moran*, 20 Am. St. Rep. 747.

#### 59 Cal. 430-438. PEOPLE v. HUNT.

**Misconduct of Juror.—Affidavit of juror to disprove such charge is admissible, p. 432.**

Cited to same effect in *People v. Goldenson*, 76 Cal. 352. such affidavit is conclusive on the point; *People v. Murray*, 94 Cal. 217; S. C. 28 Am. St. Rep. 114; also in *Glaspell v. N. P. Ry. Co.*, 43 Fed. 910, affidavit of juror admissible to support the verdict; *State v. Favre*, 51 La Ann. 441, as to charge of prejudice and bias; *Thompson Co. v. Gunderson*, 10 S. Dak. 43, as to charge of separation of jury; *Griffiths v. Montandon*, 4 Idaho, 379, affidavits of jurors to impeach verdict are not receivable unless verdict obtained by resort to chance.

Instruction as to the degree of murder established by the evidence is error, p. 433.

Distinguished in *People v. Baldwin*, 90 Cal. 197, where the court instructed, if jury found certain facts, then verdict should be in specified degree.

**Same—Justification.—No man can by his own lawless act create a necessity for self-defense, p. 435.**

Approved in *Carter v. State*, 30 Tex. App. 558; S. C. 28 Am. St. Rep. 950.

**Murder in First Degree.—Instruction held proper, p. 435.**

Cited in *State v. Morgan*, 22 Utah, 170, noted under *People v. Bealoba*, 17 Cal. 399.

**General Citation.—In *Territory v. Johnson*, 9 Mont. 29, to show under what facts a verdict of murder in the first degree will be sustained.**

#### 59 Cal. 438-442. PEOPLE v. CLOUGH.

**Robbery must be effected against the will of person robbed, p. 439.**

Cited in note to *State v. Hull*, 72 Am. St. Rep. 705, on effect of consent.

**Criminal Law—Robbery.—Possession of stolen property, immediately after the theft, unexplained, is a circumstance tending to show guilt, p. 441.**

Approved in *People v. Velarde*, 59 Cal. 464. Note on "What constitutes robbery" to *State v. McCune*, 70 Am. Dec. 182.

Where the penalty for the offense charged is less than imprisonment for life, the defense is entitled to ten peremptory challenges, the state five, p. 441.

Cited to same effect in *People v. Riley*, 65 Cal. 109; *People v. Logan*, 123 Cal. 417, allowing ten challenges in rape case, and *People v. Sullivan*, 132 Cal. 94, in burglary case; *People v. Fultz*, 109 Cal. 259, although if the question were *res integra*, probably not.

**General Citation.**—*People v. Etting*, 99 Cal. 578, approving generally.

**59 Cal. 442-444. LESLIE v. CONWAY.**

Contract for Delay of Payment suspends the remedy under the original contract, p. 444.

Cited to same effect in *Staver v. Missimer*, 6 Wash. 177; S. C. 36 Am. St. Rep. 145, and in extended note.

**59 Cal. 444-455. CITY OF LOS ANGELES v. MELLUS.**

**Bond—Execution.**—Erasure of a name of a surety written in the body of a joint and several official bond after execution by other sureties, and failure of such party to sign, will not affect validity, p. 450.

Cited to same effect in *People v. Stacey*, 74 Cal. 376, and failure to state the sum in which one of the sureties is bound will not invalidate. Approved in *Cavanaugh v. Casselman*, 88 Cal. 550, holding, further, that in absence of showing that the contract was not to be deemed complete until other signatures should be added, the parties signing will be bound.

**Res Adjudicata.—Judgment on general demurrer does not bar another action, providing the complaint is so amended as to no longer be vulnerable to attack made in former suit.** p. 453.

Cited in *Kirsch v. Kirsch*, 113 Cal. 61, on general subject; *Newhall v. Hatch*, 134 Cal. 272, noted under *Terry v. Hammonds*, 47 Cal. 32. Approved in *Gilmer v. Morris*, 30 Fed. Rep. 481.

Where the statute exonerates from requirements of the common law, its conditions must be strictly followed, p. 451. (dictum.)

Cited to this effect in *Harmon v. Comstock Horse & Cattle Co.*, 9 Mont. 248, on point that jurisdiction of inferior courts must be pleaded; *Willets v. Walter*, 32 Or. 415, noted under *Young v. Wright*, 52 Cal. 407.

**General Citation.**—In *Wise v. Hogan*, 77 Cal. 180, as to allegations necessary to support a complaint by an administrator or executor; *City of Butte v. Cohen*, 9 Mont. 442, on liability of sureties.

**59 Cal. 456-457. LOOMIS v. COUNTY OF LOS ANGELES.**

**Taxes.**—Money voluntarily paid in satisfaction of a void tax cannot be recovered back, p. 457.

Cited to same effect in O'Brien v. County of Colusa, 67 Cal. 505, as to illegal license tax; also in Grimley v. County of Santa Clara, 68 Cal. 575; Hayes v. County of Los Angeles, 99 Cal. 78, which case holds that under section 3804 of the Political Code, as amended, taxes twice collected, through accident, oversight or mistake, must be refunded. Approved in Brooks v. County of Tulare, 117 Cal. 468, as to payment of taxes on land of the United States. This case distinguishes Hayes v. Los Angeles, *supra*; Pennock v. Douglas County, 39 Neb. 301; S. C. 42 Am. St. Rep. 586; Budge v. City of Grand Forks, 1 N. Dak. 319. Note on general subject to Pennock v. Douglas County, 42 Am. St. Rep. 588, 589. Doubted in Stewart etc. Co. v. County, 142 Cal. 664, discussing remedies under sections 3804, 3819, Political Code.

**59 Cal. 457-464. PEOPLE v. VELARDE.**

The regularity of the proceedings by information do not depend on the affidavit on which the warrant of arrest was issued, p. 458.

Cited to same effect in People v. Wheeler, 73 Cal. 255; also in People v. Staples, 91 Cal. 26, holding that irregularities in the warrant of arrest are immaterial; People v. Warner, 147 Cal. 549, when murder charge was examined by committing magistrate and evidence taken warrants holding of defendant, information cannot be set aside for defects in complaint for arrest; People v. Lee Look, 143 Cal. 219, affirming principle and overruling later cases; People v. Dolan, 96 Cal. 317. Doubted in People v. Howard, 111 Cal. 659, holding that the complaint is the basis of the prosecution. Cited in United States v. Collins, 79 Fed. Rep. 68, where it is stated that it is practically overruled by the later cases.

Conflict of instructions which could not operate injuriously to appellant is no ground for reversal, p. 464.

Approved in Dennison v. Chapman, 105 Cal. 458. Cited in Smitson v. S. P. Co., 37 Or. 104, holding conflict immaterial.

Definition of confession, p. 461.

Cited in State v. Heidenreich, 29 Oreg. 383; also in Mora v. People, 19 Col. 262; Fletcher v. State, 90 Ga. 471; Lee v. State, 102 Ga. 226, quoting Fletcher v. State, 90 Ga. 471; State v. Porter, 32 Or. 146, holding certain declarations admissible as confession. Note to Daniels v. State, 6 Am. St. Rep. 242.

**Larceny.**—Possession of stolen article is not sufficient per se to warrant conviction, p. 463.

Cited in People v. Vidal, 121 Cal. 221, noted under People v. Swinford, 57 Cal. 86.

**General Citation.**—Approved generally in *People v. Etting*, 99 Cal. 578.

**59 Cal. 464-470. DE CELIS v. PORTER.**

Attachment lien is subject to all equities, p. 470.

Cited to same effect in *Ward v. Waterman*, 85 Cal. 507.

**59 Cal. 471-476. SOUTHERN PACIFIC COMPANY v. SUPERIOR COURT.**

**Practice.**—On appeal from a justice's court in which defendant has appeared specially, the superior court has no power to require him to file an answer, p. 475.

Distinguished in *Curtis v. Superior Court*, 63 Cal. 436, holding, further, as to proceedings in case defendant answers but does not appear at trial.

Writ of prohibition will not issue unless attention of court whose proceedings are sought to be arrested has been called to the alleged excess of jurisdiction, p. 475.

Cited to same effect in *Baughman v. Superior Court*, 72 Cal. 576. Explained in *Havemeyer v. Superior Court*, 84 Cal. 391, 402; 18 Am. St. Rep. 233, 242, holding, further, plea of preliminary objection is unnecessary where want of jurisdiction is apparent on the face of proceedings in the lower court.

Where there has been no trial of issues of fact in the justice's court, the superior court will entertain and decide the appeal upon questions of law alone, p. 474.

Cited to same effect in *Fabretti v. Superior Court*, 77 Cal. 306, 307; *People v. Spiers*, 4 Utah, 395; *Hart v. Carnall-Hopkins Co.*, 103 Cal. 139, holding, further, that where superior court has jurisdiction of the parties, it may try issues of fact of which it has original jurisdiction; *Maxson v. Superior Court*, 124 Cal. 471, noted under *People v. County Court*, 10 Cal. 19.

Statement is not necessary where the errors appear in the copy of the justice's docket, or papers sent up as required by statute, p. 474.

Cited with approval in *Rossi v. Superior Court*, 114 Cal. 374.

**59 Cal. 476-479. ALEXANDER v. DENAVEAUX.**

**Attachment.**

Cited in note to *Clark v. Randall*, 76 Am. Dec. 265.

**59 Cal. 480-482. BUELL v. BECKWITH.**

**Practice—Verification of Pleadings.**—It is within the discretion of the court to allow it to be done at any time before trial, p. 482.

Cited to same effect in *Ruffatti v. Lexington Min. Co.*, 10 Utah, 597.

Notes Cal. Rep.—187.

**59 Cal. 483-484. STEENERSON v. COUNTY OF SANTA BARBARA.**

**Fees of Office—Sheriff.**—Construction of statute relating to, p. 483.  
Cited in Stevenson v. County Commissioners, 68 Minn. 514.

**59 Cal. 484-486. LOVE v. MABURY.**

**Contract—Conditional Promise.**—Voluntarily putting it beyond power to perform condition constitutes breach, p. 485.

Approved in Poirier v. Gravel, 88 Cal. 83. Cited in Bagley v. Cohen, 121 Cal. 606, and Carter v. Rhodes, 135 Cal. 48, noted under Wolf v. Marsh, 54 Cal. 228.

**59 Cal. 486-490. DE ARNAZ v. ESCANDON.**

**Deed of Married Woman,** properly executed, although intended by her to be a mortgage, this fact unknown by grantee, if delivered by her husband binds her as well as he, p. 489.

Cited in Bull v. Coe, 77 Cal. 57, 11 Am. St. Rep. 237, holding further as to a wife signing and acknowledging a deed of the property and delivering it to her husband to use as security for borrowing money; Karcher v. Gass, 13 S. Dak. 394, 79 Am. St. Rep. 900, holding wife's consent to delivery of mortgage shown under facts stated. Approved in Schultz v. McLean, 93 Cal. 357, stating the general rule.

**Certificate of Notary,** as to wife's knowledge of the contents of the deed, conclusively her, p. 489.

Approved in Banning v. Banning, 80 Cal. 274, 13 Am. St. Rep. 158, unless fraud can be shown. Distinguished in Le Mesnager v. Hamilton, 101, Cal. 536, 537, S. C. 40 Am. St. Rep. 84, 85, holding further that the certificate is not conclusive evidence of the fact of acknowledgment.

**59 Cal. 490-494. CARDWELL v. SABICHI.**

Jurisdiction of justices' courts must affirmatively appear, or judgment will be absolutely void, p. 493.

Cited in Curtis v. Underwood, 101 Cal. 670, on general subject; Brann v. Blum, 138 Cal. 650, but held inapplicable to finding of superior court as to jurisdictional steps in justice's court.

**59 Cal. 496-502. RUMPP v. GERKENS.**

Equity will sometimes preserve a charge when at law it would be merged, p. 501.

Approved in Anglo-Californian Bank v. Field, 146 Cal. 654, where assignee of plaintiff's mortgage took it from plaintiff pending suit, with guaranty of priority and subsequently acquired fee from mortgagor under deed reciting it was taken subject to both mortgages prior mortgage not merged in fee as against subsequent mortgage; Schriv-

*mer v. Dietz*, 84 Cal. 299, where legal title and mortgagee's interest were held by the same person; also in *Shaffer v. McCloskey*, 101 Cal. 579, 580; *People v. County of Marin*, 103 Cal. 231; *Jameson v. Hayward*, 106 Cal. 688; S. C. 46 Am. St. Rep. 271; *Davis v. Randall*, 117 Cal. 17, holding merger will not be implied where there is an intervening claim; dissenting opinion, *Gibson v. Greene*, 6 Kan. App. 202, main opinion holding merger established; *Scott v. Lewis*, 40 Or. 44, purchase money mortgagee who voluntarily releases mortgage and takes reconveyance of premises with knowledge or means of knowledge that mortgagor has executed bond for title therefor takes subject to equity so created; *Woodhurst v. Cramer*, 29 Wash. 49, where conveyance of mortgaged premises was made to mortgagee in satisfaction of debt, who took in ignorance of subsequent judgment lien, equity revives lien as against execution purchaser; *Bowling v. Garrett*, 49 Kan. 522, S. C. 33 Am. St. Rep. 384, where mechanic's lien and legal title were held by same person.

**Mortgage—Foreclosure.**—Purchaser is assignee in equity of debt, p. 501.

Cited to same effect in *Wilson v. White*, 84 Cal. 243.

**General Citation.**—Cited in *Brackett v. Banegas*, 116 Cal. 285, S. C. 58 Am. St. Rep. 168, on constructive notice and mistake of fact.

#### 59 Cal. 507-516. WEDEL v. HERMAN.

**Deed of Married Woman.**—Acknowledgment is a part of the execution of the instrument, p. 513.

Cited to same effect in *Joseph v. Dougherty*, 60 Cal. 360, as to execution of mortgage; *Danglarde v. Elias*, 80 Cal. 67; *Snell v. Snell*, note to 5 Am. St. Rep. 531.

**Acknowledgment.**—Act of officer taking is judicial, p. 514.

Cited in *Horbach v. Tyrrell*, 48 Neb. 518, holding the act is ministerial. Note to *Havemeyer v. Dahn*, 58 Am. St. Rep. 708.

**Power to Reform a Defective Certificate.**—The superior court has such jurisdiction, p. 514.

Cited with approval in *Hutchinson v. Ainsworth*, 73 Cal. 454, 2 Am. St. Rep. 825, holding further that the notary is not a necessary party defendant. Note to *Jordan v. Corey*, 52 Am. Dec. 521, 523, 525; *Rindskoff v. Malone*, 74 Am. Dec. 369; *Snell v. Snell*, 5 Am. St. Rep. 531, note; 65 Am. St. Rep. 513, note.

**Community Property—Presumption.**—Where real property is conveyed to a married woman, and the consideration is nominal, the presumption is that the premises conveyed become community property, p. 516.

Cited in *Swink v. League*, 6 Tex. Civ. App. 311; *Cooke v. Bremond*, 86 Am. Dec. 637, 642; *Shaw v. Hill*, 96 Am. Dec. 423.

**Conveyance of a Married Woman** of her separate real property must be acknowledged after examination separate and apart from her husband, p. 513.

Cited to same effect in *Tolman v. Smith*, 74 Cal. 350, holding further that a mortgage is a "conveyance."

Certificate of acknowledgment is not an essential part of her conveyance, p. 513.

Cited in *Banbury v. Arnold*, 91 Cal. 610, holding that certificate to an instrument affecting her title is no essential part of the execution or validity of the instrument.

**General Citation.**—In *Jennings v. Jennings*, 104 Cal. 154, on what constitutes proof of delivery of a deed; *Lake v. Bender*, 18 Nev. 385, to the effect that parol evidence may be admitted for the purpose of showing the consideration for a deed. In note to *Wilder v. Brooks*, 88 Am. Dec. 55, on conveyance from husband to wife.

**59 Cal. 517-522. SAN DIEGO WATER COMPANY v. CITY OF SAN DIEGO.**

Contract to pay for water which the company under its charter is bound to furnish "free of charge" is void, p. 520.

Approved in *Spring Valley W. W. v. San Francisco*, 61 Cal. 23, but holding that the act relating to "free water" has been abrogated by provisions of the constitution; *Boise City etc. Water Co. v. Boise City*, 123 Fed. 234, under Idaho Revised Statutes of 1887, section 2711, water companies must furnish water free for street sprinkling and sewer flushing. Note on "Contracts which cannot be ratified," to *Building & Loan Association v. Walton*, 59 Am. St. Rep. 640.

**Contracts—Ultra Vires.**—Contracts entered into by a city beyond the powers conferred by its charter are invalid, p. 521.

Cited to same effect in *South Pasadena v. Terminal Ry. Co.*, 109 Cal. 320, as to contract to regulate railroad fares outside the limits of the city; also, in *Gutta Percha Co. v. Ogalalla*, 40 Neb. 779; S. C. 42 Am. St. Rep. 698.

**59 Cal. 522-532. BIXBY v. BENT.**

**Findings.**—The court has power to modify or amend at any time before entering judgment, p. 532.

Cited to same effect in *Curtis v. Walling*, 2 Idaho, 386; *Victor etc. Co. v. Bank*, 18 Utah, 93, 72 Am. St. Rep. 769, noted under *Polhemus v. Carpenter*, 42 Cal. 375.

**Exchange.**—Definition of, p. 528.

Cited in *Martin v. Ashland Mill*, 49 Mo. App. 29.

**Appeal** must be taken from modified decree, p. 532.

Cited in *Hayes v. Silver etc. Co.*, 136 Cal. 239, noted under *Mann v. Haley*, 45 Cal. 63.

#### 59 Cal. 535-538. **BROWN v. BURBANK.**

**Findings.**—Failure to find on material issue is ground for new trial, p. 538.

Approved in *Cummings v. Conlan*, 66 Cal. 414.

Cited in *Kaiser v. Dalto*, 140 Cal. 170, noted under *Knight v. Roach*, 56 Cal. 17.

#### 59 Cal. 538-539. **WASHBURN v. WILKINSON.**

**Mortgage—Foreclosure.**—Supplemental complaint is required to recover insurance paid after suit brought, p. 539.

Approved in *Galliano v. Kilfoy*, 94 Cal. 88.

#### 59 Cal. 540. **PIERCE v. SCHADEN.**

**Evidence.**—Answer of a witness on cross-examination as to collateral matter, irrelevant to the issue, is conclusive, and cannot be impeached, p. 540.

Cited to same effect in *Young v. Brady*, 94 Cal. 130.

#### 59 Cal. 540-541. **MILLER v. CHANDLER.**

**Pleading.**—Admissions contained in a special defense must be confined to that defense, p. 541.

Cited to same effect in *Ball v. Putnam*, 123 Cal. 139, noted under *Siter v. Jewett*, 33 Cal. 92; *Dillon v. Center*, 68 Cal. 564, holding in an action of ejectment, plaintiff must show that defendant was in possession at the time of the commencement of the action, and he cannot do this by defendant's admission under special defense—statute of limitation. Approved in *Miles v. Woodward*, 115 Cal. 316, holding the effect of denial in one defense is not waived by admissions in another; *Lake Shore & M. S. Ry. Co. v. Warren*, 3 Wyo. 137.

#### 59 Cal. 541-544. **BECKMAN v. SKAGGS.**

**Constitutional Law.**—An agreement valid when made cannot be impaired by a statute or constitutional provision subsequently enacted, p. 544.

Cited to same effect in *New England Security Co. v. Vader*, 12 Saw. 73; S. C. 28 Fed. Rep. 273.

**59 Cal. 545-548. GREEN v. BECKMAN.**

**Stockholder's Liability.**—Action may be brought within three years to recover for money had and received by the corporation, p. 547.

Cited in *Mitchell v. Beckman*, 64 Cal. 121, as to the time when the statute of limitations begins to run; *Redington v. Cornwell*, 90 Cal. 57; *London etc. Bank v. Parrott*, 125 Cal. 488, 73 Am. St. Rep. 75, applying rule to liability on notes given in renewal of debts on overdraft. Cited in note on general subject, *Freeland v. McCullough*, 43 Am. Dec. 703; also, *Corning v. McCollough*, 49 Am. Dec. 309, 310; *Thompson v. Reno Savings Bank*, 3 Am. St. Rep. 872.

**Same.**—The liability is created by law, p. 547.

Cited to same effect in *Moore v. Boyd*, 74 Cal. 171; also, *Hyman v. Coleman*, 82 Cal. 653; S. C. 16 Am. St. Rep. 180; *Kennedy v. California Savings Bank*, 97 Cal. 97, 100; S. C. 33 Am. St. Rep. 165, 167, which case, in construing the constitution on the general subject, holds that contracts made by the corporation bind the stockholders to the extent named; *Hunt v. Ward*, 99 Cal. 614; S. C. 37 Am. St. Rep. 89. Note to *Thompson v. Reno Savings Bank*, 3 Am. St. Rep. 834.

**59 Cal. 548-550. PEACHEY v. BOARD OF SUPERVISORS.**

**Constitutional Law.**—The provision of the special act, approved March 9, 1878, relating to the salary of superintendent of schools never went into effect, p. 549.

Cited to same effect in *Spiegle v. Joy*, 60 Cal. 278, as regards the salary of recorded; also, *Whiting v. Haggard*, 60 Cal. 513. Distinguished in *County of Los Angeles v. Lamb*, 61 Cal. 198; *People v. Whiting*, 64 Cal. 68.

**59 Cal. 550-557. BIXLER'S APPEAL.**

Supreme Court has no appellate jurisdiction of special cases and proceedings, p. 554.

Cited to same effect in *Sharon v. Sharon*, 67 Cal. 206, 214, in dissenting opinion of McKee, J., holding, further, that cases for annulment of marriage and divorce are included in this class; *In re Curtis*, 108 Cal. 663.

**Special Cases and Proceedings.**—Definition, p. 554.

Cited for this purpose in *Lord v. Dunster*, 79 Cal. 483, 486, and discussion as to whether contested election cases are special cases.

**Swamp Land Proceedings.**—“Final” judgment defined, p. 556.

Cited in *Lambert v. Bates*, 137 Cal. 679, noted under *Houghton's Appeal*, 42 Cal. 35.

**59 Cal. 558-560. MITCHELL v. HEEKER.**

Sureties of public administrator are liable for his misappropriation though letters issued did not refer to his official character, p. 560.

Approved in Los Angeles Co. v. Kellogg, 146 Cal. 593, where public administrator is required to turn over fees to treasury, he must turn over fees allowed on estates which he continues to administer upon after expiration of his term of office.

**59 Cal. 560-563. GOODWIN v. GOODWIN.**

**Fraud—Pleading.**—The facts and circumstances constituting the fraud must be alleged, p. 562.

Cited to same effect in Estate of Kidder, 66 Cal. 490; also, Hartford Ins. Co. v. Bonner Mercantile Co., 44 Fed. Rep. 157.

**Undue Influence** to vitiate an act must amount to force and coercion, destroying free agency, p. 561.

Approved in Estate of Carpenter, 94 Cal. 412, 413; Estate of Donovan, 140 Cal. 394, holding undue influence not shown as to execution of will; In re Wilson, 117 Cal. 269, holding that the facts stated do not constitute; President of Bowdoin College v. Merritt, 75 Fed. Rep. 493, 511, holding, further, mere advice, persuasion, or entreaty do not constitute undue influence.

**59 Cal. 563-566. VAN EVERY v. OGG.**

**Unlawful Detainer.**—Counterclaim for damages from condition of property is not sustainable, p. 564.

Cited in Vidyer v. Nolin, 10 N. Dak. 358, denying right under local statutes.

**Landlord's Liability** to repair is limited by section 1942 of the Civil Code, p. 566.

Cited to same effect in Sieber v. Blanc, 76 Cal. 174; Gately v. Campbell, 124 Cal. 522, 523, noted under Brewster v. DeFremery, 33 Cal. 341; Torreson v. Walla, 11 N. Dak. 483, in action by lessor, to recover rent, lessee cannot counterclaim damages caused by failure to connect cellar of dwelling with sewer in absence of express contract so to do; Willson v. Treadwell, 81 Cal. 59, holding, further, that an employer of a tenant, who has received injuries resulting from defective condition of the premises, cannot recover from landlord, when the lease contains no covenant to repair; Tatum v. Thompson, 86 Cal. 206, 208; Green v. Redding, 92 Cal. 550, holding, further, that in absence of agreement, tenant cannot abandon the premises on account of being in untenable condition, without first notifying landlord and requesting him to repair; Callahan v. Loughran, 102 Cal. 480; Moroney v. Hillings, 110 Cal. 221; Peterson v. Kreuger, 67 Minn. 450, to the effect that a tenant cannot

justify an unlawful detainer by alleging a violation of a covenant to repair prior to the commencement of the proceedings; *Phillips v. Port Townsend Lodge*, No. 6, 8 Wash. 535. Cited in note on "Covenants to Repair" to *Pollack v. Pioche*, 95 Am. Dec. 119.

**59 Cal. 567. PEOPLE v. HELBING.**

Where a defendant pleads two defenses, there must be a verdict on both before judgment of conviction, p. 567.

Cited to same effect in *People v. Fuqua*, 61 Cal. 377; also, *People v. Tucker*, 115 Cal. 338; *State v. Childers*, 32 Or. 128, and *People v. Kerm*, 8 Utah, 271, noted under *People v. Kinsey*, 51 Cal. 278.

**59 Cal. 568-580. DAVIS v. BAUGH.**

**Findings.**—Conclusions of Law not properly drawn from the facts is not ground for reversal of judgment, if the ultimate conclusion, upon which the judgment rests, is not erroneous, p. 576.

Cited to same effect in *Spencer v. Duncan*, 197 Cal. 427.

**Variance** which would not mislead is immaterial, p. 576.

Cited to same effect in *Amador Gold Mining Co., Limited, v. Amador Gold Mine*, 114 Cal. 348; *Stockton etc. Works v. Glenn etc. Co.*, 121 Cal. 173, noted under *Marshall v. Ferguson*, 23 Cal. 66.

Resulting Trust arises from payment of consideration in money or other property, when deed is taken in name of another, p. 573.

Cited to same effect in *Murphy v. Clayton*, 113 Cal. 157.

**59 Cal. 583-585. IN RE MONTGOMERY.**

**Appeal.**—On failure of appellant to appear or to file points and authorities, the judgment of the trial court will be affirmed, p. 584.

Cited to same effect in *Faris v. Lampson*, 73 Cal. 191.

**59 Cal. 585-591. CENTRAL PACIFIC RAILROAD COMPANY v. MUDD.**

**Vendor and Vendee.**—Vendee, if entitled to possession of real property, under contract, may defend his possession at law, p. 589.

Cited in *Hicks v. Lovell*, 64 Cal. 20; S. C. 49 Am. Rep. 682, but ejectment will lie against a vendee who, after part performance, refuses to further comply with the terms and conditions of the contract, or surrender possession; *Southern Pacific Co. v. Terry*, 70 Cal. 486; *Hyde v. Mangan*, 88 Cal. 325, holding, equitable title, entitling the holder to possession in equity is sufficient defense to an action of ejectment. Approved in *Mining Compeny v. Briscoe*, 47 Fed. Rep. 279. Note to *Salmon v. Hoffman*, 56 Am. Dec. 326.

**Same.**—Where contract for sale of land stipulates vendor may re-enter in case of default by vendee, vendor may maintain ejectment, p. 589.

Cited to same effect in *Hannan v. McMickle*, 82 Cal. 126, holding, further, that vendor need not rescind the contract and return purchase money already paid—dissenting opinion of Patterson, J; *Alexander v. Jackson*, 92 Cal. 526; S. C. 27 Am. St. Rep. 158; *Rayfield v. Van Meter*, 120 Cal. 419, 420, where the rule is applied to contract for sale of personal property; *Gates v. McLean*, 70 Cal. 49. Note to *Alexander v. Jackson*, 27 Am. St. Rep. 166.

#### 59 Cal. 592-595. PEOPLE v. DE SILVERA.

**Instructions.**—The appellate court will consider the entire charge, and, if it fairly presents the law, will not disturb the judgment on account of immaterial error, p. 595.

Approved in *Territory v. Evans*, 2 Idaho, 398.

#### 59 Cal. 598. PEOPLE v. TITHERINGTON.

**Instruction as to weight of evidence is erroneous**, p. 598.

Cited to same effect in *State v. Sullivan*, 9 Mont. 178. Note to *Hunt v. Commonwealth*, 70 Am. Dec. 449.

#### 59 Cal. 599-600. COGGINS v. CITY OF SACRAMENTO.

**Constitutional Law.**—Provisions of sections 103 of the Code of Civil Procedure as amended, relating to justice courts, sustained as constitutional, p. 599.

Cited in *Los Angeles v. Los Angeles*, 65 Cal. 477, as to general provisions of the statute; *Ex parte Henshaw*, 73 Cal. 507, to the effect that police courts constitute a part of the courts of the state; *In re Mitchell*, 120 Cal. 390.

#### 59 Cal. 601-608. PEOPLE v. SMITH.

The commission of the homicide by the defendant being proved, the burden of proving circumstances in mitigation devolves upon him, unless the prosecution proves manslaughter, or its proof tends to show defendant was justifiable; this may be shown by preponderance of evidence merely, p. 607.

Cited in *People v. Knapp*, 71 Cal. 5. Approved in *People v. Bushton*, 80 Cal. 164; *People v. Elliott*, 80 Cal. 305, holding an instruction erroneous which omits the latter part of the rule; *People v. Travers*, 88 Cal. 239, holding the rule does not affect the rule that the burden of showing insanity is upon the defendant who relies upon it as a defense; *People v. McNulty*, 93 Cal. 444. Cited in *People v. Mitchell*, 129 Cal. 587, sustaining instruction as to effect of proof of good character; but cf. *State v. Sloan*, 22 Mont. 301, holding instruction erroneous as to this point.

Conflicting instructions which could not operate injuriously to appellant is immaterial error, p. 604.

Cited to same effect in *Dennison v. Chapman*, 105 Cal. 458. Cited in *People v. Marshall*, 112 Cal. 424, where it was held to give contradictory instructions is error; *Smitson v. S. P. Co.*, 37 Or. 104, noted under *People v. Velarde*, 59 Cal. 457.

**59 Cal. 608-609. CITY OF STOCKTON v. DUNHAM.**

Assessment to certain parties, known, and to others unknown, is void, p. 609.

Cited to same effect in *Gwynn v. Dierssen*, 101 Cal. 566.

**59 Cal. 612-613. NIAGARA MINING COMPANY v. BUNKER HILL MINING COMPANY.**

Action to Quiet Title.—Defendant cannot introduce evidence to show prior possession in a stranger from whom he did not deraign title, p. 612.

Cited to same effect in *Kitts v. Austin*, 83 Cal. 171. Approved in *Fulkerson v. Chisna Min. etc. Co.*, 122 Fed. 786, under Alaska Code, section 475, one in possession of mining claim under valid location has such title as will support action to quiet title against adverse claimant.

**59 Cal. 613-615. FUNK v. STERRETT.**

Mining Claim—Possession.—A party can show a right to possession of a mining claim (in absence of patent), only by actual pedis possession, as against a wrongdoer, or compliance with the requirement of the act of Congress, p. 614.

Cited to same effect in *Russel v. Brosseau*, 65 Cal. 609; *Kitts v. Austin*, 83 Cal. 171; *Patchen v. Keeley*, 19 Nev. 413; also, *Patterson v. Tarbell*, 26 Or. 36. Note on "Possessory Rights of Miner" to *McClintock v. Bryden*, 63 Am. Dec. 105, 106.

**59 Cal. 615-619. BARRETT v. SIMS.**

A judgment creates no lien upon a homestead, except for the purpose of and as a foundation for instituting and carrying on proceedings to have an appraisement and sale under the statute, p. 619.

Cited to same effect in *Sanders v. Russell*, 86 Cal. 120; 21 Am. St. Rep. 27; *Lean v. Givens*, 146 Cal. 441, levy of execution on homestead creates lien conditionally to extent excess over homestead exemption; *Vincent v. Vineyard*, 24 Mont. 216, construing similar local statutes. Note to *Vanstory v. Thornton*, 34 Am. St. Rep. 506.

Homestead is exempt from sale under execution, p. 618.

Cited in note to *Ackley v. Chamberlain*, 76 Am. Dec. 518: also note

**to Blue v. Blue**, 87 Am. Dec. 273, 276, 279; also, **Filley v. Duncan**, 93 Am. Dec. 351.

**59 Cal. 620-623. HARRIS v. HARRIS.**

Special findings control general findings on the same subject, when there is a conflict between them, p. 622.

Cited to this effect in **Walley v. Deseret Bank**, 14 Utah, 323.

**Deed.—Delivery** includes intent of maker to that effect, p. 622.

Cited in **Kenney v. Parks**, 137 Cal. 531, holding delivery not shown under facts stated.

**Mental Incapacity.**—Findings held not to show, as to execution of deed, p. 621.

Cited in **Jacks v. Estee**, 139 Cal. 512, construing section 38, Civil Code, and holding mortgage void thereunder.

**59 Cal. 625-626. LAUGENOUR v. HENNAGIN.**

**Ejectment.**—Plaintiff may maintain action on certificate of purchase issued to him by the register of the land office, p. 626.

Cited to same effect in **Cucamonga Land Co. v. Moir**, 83 Cal. 110; **Witcher v. Conklin**, 84 Cal. 502, holding that receiver's receipt for land pre-empted contains the whole substance of an official certificate of purchase.

**Land Warrant** is primary evidence that the holder is owner of the land described therein, p. 626.

Cited with approval in **Goodwin v. McCabe**, 75 Cal. 587, holding that an entry under a swamp land certificate, in the belief that it confers a right to the land, is an entry under color of title.

**59 Cal. 626-628. HUMPHREYS v. HARKEY.**

**Fraudulent Conveyance.**—Change of possession held sufficient, p. 627.

Cited in **Rosenbaum v. Hayes**, 10 N. Dak. 324, noted under **Montgomery v. Hunt**, 5 Cal. 366.

**59 Cal. 628-629. EVANS v. JACOB.**

**Findings.**—Judgment will be reversed for indefiniteness in findings, p. 628.

Approved in **Evans v. Jacob**, 59 Cal. 629. Cited in **Lake v. Bender**, 18 Nev. 373.

**59 Cal. 630-639. ISENHOOT v. CHAMBERLAIN.**

**Evidence.**—Parol evidence is admissible in case of mistake or fraud to vary terms of a written instrument, p. 637.

Approved in *Brison v. Brison*, 75 Cal. 533; S. C. 7 Am. St. Rep. 196, holding, parol evidence is admissible to raise a trust in cases of actual or constructive fraud; *Eva v. McMahon*, 77 Cal. 472; *Capelli v. Dondero*, 123 Cal. 330.

**Purchaser Without Notice**, when right is claimed on that ground, must allege and prove the facts, p. 639.

Cited to same effect in *Davis v. Ward*, 109 Cal. 189, 50 Am. St. Rep. 31; *Bell v. Pleasant*, 145 Cal. 413, in action to cancel deeds where plaintiff asserts title under prior unrecorded deed and defendants claim unrecorded deeds resting on subsequent recorded deed from plaintiff's grantor, under which grantee took no title as such, burden is on defendants to show bona fide purchase; *Alcorn v. Buschke*, 133 Cal. 658, noted under *Dupont v. Wertheman*, 10 Cal. 368.

#### 59 Cal. 640-651. PEOPLE v. TAYLOR.

It is essential to the admissibility of dying declarations that they were made under a sense of impending death, p. 648.

Cited to same effect in *People v. Gray*, 61 Cal. 175; also, in *People v. Lee Sare Bo*, 72 Cal. 625, holding that an express statement by the declarant that he believes he is about to die is not necessary, provided the circumstances show in him at the time a sense of impending death; *State v. Russel*, 13 Mont. 168; *Jack v. Mutual Res. etc. Assn.*, 113 Fed. 56, as to proof of knowledge in declarant on subject of declarations.

Declarations of the deceased are admissible only to those things to which he would have been competent to testify if sworn as a witness in the cause, p. 645.

Cited to same effect in *People v. Wasson*, 65 Cal. 539; *People v. Lanagan*, 81 Cal. 144, hence matters of opinion are not admissible.

Admissions voluntarily made by defendant before a coroner's jury are admissible in evidence against him, p. 651.

Approved in *People v. Martinez*, 66 Cal. 280.

General Citation on "admissibility of evidence" to *People v. Wheeler*, 60 Cal. 590; S. C. 44 Am. Rep. 77, as to reading extracts from a book in argument before jury.

#### 59 Cal. 652-655. LOGAN v. TALBOT.

**Assumpsit—S sureties.**—One who is legally compelled to pay money which another is under legal liability to pay, can maintain an action against him for money paid to his use, p. 654.

Cited in *Davis v. Heimbach*, 75 Cal. 264; *Ehrman v. Rosenthal*, 117 Cal. 496, holding an action for money had and received may be maintained.

#### 59 Cal. 655-661. CARROLL v. SPRAGUE.

**Claim and Delivery** will lie to recover goods, where sheriff attaches the property of a stranger to the proceedings, p. 659.

Cited to this point in *Wilde v. Rawle*, 13 Colo. 585.

**General Citations.**—Appeal of *Turner*, 72 Conn. 317; *Smith v. Caldwell*, 22 Mont. 328; *Tupp v. Peterson*, 78 Minn. 574.

**59 Cal. 661-662. RICKY v. SUPERIOR COURT.**

**Appeal from Justice's Court.**—On appeal by defendant from judgment taken against him by default, the superior court acquired no jurisdiction to allow the defendant to file an answer and to retry the case, p. 662.

Cited to same effect in *Maxson v. Superior Court*, 124 Cal. 471, noted under *People v. County Court*, 10 Cal. 19; *Curtis v. Superior Court*, 63 Cal. 435, but holding where defendant has filed an answer in justice's court, then superior court may try the case; *Ketchum v. Superior Court*, 65 Cal. 495, approves, holding, further, if superior court has jurisdiction to try issues of fact, it may allow amendments to the pleadings by which the issues were raised; *Gage v. Maryatt*, 9 Mont. 267; *Italian Swiss Agricultural Colony v. Bartagnolli*, 9 Wyo. 207. Apparently overruled in *Perrott v. Owen*, 7 S. Dak. 457, holding there is no distinction, as to right of appeal, between parties who have suffered judgment by default and those who have appeared in the action.

**59 Cal. 665-668. BEALES v. CROWLEY.**

**Gift.**—Donor may deliver to third party with instructions to deliver to donee, and gift is complete on delivery to such third party, p. 668.

Cited to same effect in *Devol v. Dye*, 123 Ind. 326, holding such third party becomes a trustee for donee and not the agent of donor.

**59 Cal. 669-672. CLARK v. RITTER.**

**Mining Partnerships**, p. 669.

Note on "accounting, payment of debts, liens" to *Skillman v. Lachman*, 83 Am. Dec. 109.

**59 Cal. 672-673. SMITH v. BROWN.**

**Officer.**—Power to remove is an incident to the power to appoint, unless law places a limitation on such power, p. 673.

Cited in *Patton v. Board*, 127 Cal. 399, 78 Am. St. Rep. 74, *Peters v. Bell*, 51 La. Ann. 1628, and *Spongole v. Curnow*, 136 Cal. 582, noted under *People v. Hill*, 7 Cal. 97; *Territory of Dakota v. Cox*, 6 Dak. Ter. 511, to the effect that removal from office is an executive power; *State v. Arehibold*, 5 N. Dak. 377.

**59 Cal. 674. PEOPLE v. WILLIAMS.**

**Appeal.**—Verdict will be affirmed on conflict of evidence, p. 675.

Cited in *People v. Sternberg*, 127 Cal. 512, noted under *People v. Vance*, 21 Cal. 400.

**59 Cal. 678-682. GRANGER v. EMPIRE MILL AND MINING COMPANY.**

**Mortgage—Severance of Debt.**—Where a mortgage is given to cover two debts, one void, the other valid, if the debts are severable, the mortgage is good as to the valid debt, p. 682.

Cited to same effect in *Mill and Lumber Co. v. Hayes*, 76 Cal. 391; S. C. 9 Am. St. Rep., 215.

**Corporations.—Notice of Meeting of Directors** will be presumed in absence of proof to the contrary, p. 682.

Cited to same effect in *Stockton C. H. & A. Works v. Houser*, 109 Cal. 9; also, *Rutherford v. Hamilton*, 97 Mo. 549, where the rule is approved and applied to the meeting of the city council; *Barrell v. Land Co.*, 122 Cal. 132, holding meeting presumed regular rather than special; *Balfour etc. Co. v. Woodworth*, 124 Cal. 172, holding proper notice presumed, and *Lewick v. Glazier*, 116 Mich. 497, on last point, applying rule to village trustees' meeting.

Notice of corporation meeting reciting that meeting will be held, and stating place where and time when it will be held is sufficient, p. 682.

Approved in *Bell v. Standard Quicksilver Co.* 146 Cal. 705, holding notice need not state object or purpose of meeting.

**59 Cal. 683-698. MURDOCK v. CLARKE. S. C. 90 Cal. 427.**

**Mortgagee** in possession is allowed for necessary expenses in managing the property, p. 695.

Cited in *Raynor v. Drew*, 72 Cal. 312, where it is held mortgagee is entitled to compensation for any repairs made which were necessary for the preservation of the property.

**Pleading.**—The allegata and probata must agree, p. 693.

Cited to same effect in *Noonan v. Nunan*, 76 Cal. 49; *Schirmer v. Drexler*, 134 Cal. 139, noted under *Morenhaut v. Barren*, 42 Cal. 605; *Nichols v. Randall*, 136 Cal. 431, noted under *Stout v. Coffin*, 28 Cal. 65.

**General Citation.**—*Spring Brook Ry. Co. v. Lehigh Coal etc. Co.* 181 Pa. 300.

**59 Cal. 698-703. BIXLER v. COUNTY OF SACRAMENTO.**

Writ of certiorari available only for review of an act judicial in character, p. 702.

Cited to same effect in *Williams v. Supervisors*, 65 Cal. 161, hence an order of a board of supervisors creating a swamp land district cannot be reviewed on certiorari; *Glide v. Superior Court*, 147 Cal. 25, prohibition lies to prevent superior court from proceeding with trial of suit to enjoin supervisors from acting on application for organization.

of reclamation district; *Wulzen v. Board of Supervisors*, 101 Cal. 18; S. C. 40 Am. St. Rep. 21. Note to 40 Am. St. Rep. 39.

Certiorari is proper remedy when inferior tribunal or board has exceeded its jurisdiction, p. 701.

Cited to same effect in *Lever District No. 9 v. Farmer*, 101 Cal. 181; *Vernon v. Board*, 142 Cal. 518, discussing and denying mandamus to compel supervisors to canvass votes at election held under void order.

**59 Cal. 703-709. JARNATT v. COOPER.**

**Fraud—Evidence.**—Party alleging fraud must produce such evidence that if standing alone, uncontradicted, it would establish a *prima facie* case, p. 706.

Cited to same effect in *Ward v. Waterman*, 85 Cal. 504, holding, further, the appellate court will not reverse a decision on the ground that the evidence is contradicted by other evidence. Approved in *Grant v. McPherson*, 104 Cal. 167; also, *Moore v. Copp*, 119 Cal. 436, and if the evidence does not meet this test, the appellate court may reverse the judgment on the ground of insufficiency of evidence.

Courts will reform conveyances where there is mutual mistake, p. 709.

Cited to same effect in *James v. Cutler*, 54 Wis. 178, holding, further, as to mistake on one side and fraud on the other. See note 66 Am. St. Rep. 484, 485, 493.



## VOLUME LX.

By C. HARDING TEBBS.

Revised to include citations to Volume 147, by CHARLES L. THOMPSON.

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### 60 Cal. 1-2. PEOPLE v. WILLIAMS.

Shares of Stock are "property" capable of embezzlement, p. 2.

Cited in Ralston v. Bank of Cal., 112 Cal. 213, holding them proper subject of an action for "conversion"; London, Paris and American Bank v. Aronstein, 117 Fed. 605, refusal of corporation without lawful excuse to transfer shares of stock on its books to one who is entitled to such transfer may be treated as a conversion of the stock, and its value may be recovered at law; note to Calkins v. State, 98 Am. Dec. 135, included in the term "property".

### 60 Cal. 2-5. PEOPLE v. FLANAGAN. 44 Am. Rep. 52.

**Self-Defense.**—Defendant pleading must show real or apparent necessity to prevent commission of a felony; preponderance of evidence not required; the reality of the appearance is for the jury. To instruct that both the appearance and actual intent must be shown, is error, p. 4.

Cited in People v. Knapp, 71 Cal. 5, following principal case as to instructions, and referring to subsection 2 of section 197 of the Penal Code; People v. Bushton, 80 Cal. 164, holding that defendant's evidence need only create in the minds of the jury a reasonable doubt; People v. Wallace, 89 Cal. 170, holding that jury must be instructed to consider the element of appearance on which the party assailed was entitled to act; People v. Hecker, 109 Cal. 461, in support of the general principles laid down in subsection 2 of section 197 of the Penal Code; Crawford v. State, 112 Ala. 32, to the point that reasonable belief by defendant, from the appearances presented, of the felonious purpose of the party killed, justified the homicide to prevent commission of the felony; Carpenter v. State, 63 Ark. 311, to support the view that the killing must be solely to prevent commission of a felony where there is a manifest intent or endeavor; State v. Smith, 12 Mont. 392, to the point that the killing must be to prevent a manifest intent or endeavor to commit a felony. Distinguished in People v. Travers, 88 Cal. 239, and in People v. McNulty, 93 Cal. 44, as not applicable where insanity was

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pleaded; *People v. Dollor*, 89 Cal. 516, as not applicable where no question of apparent danger; note to 9 Am. St. Rep. 263, on justifiable homicide in defense of one's property.

#### 60 Cal. 10. **NAGLE v. SPENCER.**

**Appeal from a judgment does not oust jurisdiction to entertain motion for a new trial**, p. 10.

Cited in *Rayner v. Jones*, 90 Cal. 81, to same effect *Knowles v. Thompson*, 133 Cal. 247, and *Brooks v. Syndicate*, 24 Nev. 322, noted under *Towdy v. Ellis*, 22 Cal. 659; *Carter v. Lothram*, 133 Cal. 455, noted under *Spanagel v. Dellinger*, 38 Cal. 284; *Ex parte Fuller*, 182 U. S. 572, noted under *Carpentier v. Williamson*, 25 Cal. 154.

#### 60 Cal. 10-11. **HOWARD v. GALLOWAY.**

**Judgment by Default cannot be rendered in the absence of the proof of service required by statute**, p. 11.

Approved and followed in *Weil v. Bent*, 60 Cal. 604, where the affidavit failed to show that the server was over eighteen at time of service; *Lyons v. Cunningham*, 66 Cal. 43, holding that a description in the affidavit of the server as "a male citizen of the United States" was not proof of his being twenty-one years of age. Cited, also, in *Barney v. Vigoureux*, 75 Cal. 377, where the affidavit of service was held defective on same ground. Approved in *Horton v. Gallardo*, 88 Cal. 582.

**Appeal from a judgment by default, when proof of service is defective, may be taken without moving to set the judgment aside**, p. 11.

Cited in *Swain v. Burnette*, 76 Cal. 301, where on a default judgment for failure to amend complaint, held that the plaintiff was not bound to amend and did not lose his right to appeal against the default judgment.

#### 60 Cal. 12-35. **SAN FRANCISCO ETC. R. R. CO. v. STATE BOARD.**

**Taxation.**—State board of equalization has the sole power to assess the property of railroads operated in more than one county, and the provision in the state constitution relating to the board is not in conflict with section I of the fourteenth amendment of the constitution of the United States, p. 30.

Approved in *Central Pacific Co. v. Board of Equalization*, 60 Cal. 58. Cited in *Sawyer v. Dooley*, 21 Nev. 397, holding that state boards of equalization have power to assess railroad property. Note to 74 Am. Dec. 591, on boards of equalization.

**Assessment of Railroads.**—The constitutional provision relating to assessment of railroads by state boards of equalization is self executing and mandatory; but the legislature may constitutionally regulate their conduct within certain limits, pp. 29, 30.

Cited in *Sawyer v. Dooley*, 2 Nev. 397, holding that the legislature may define the powers of the state board without violating the constitution, which requires a uniform and equal rate of assessment; Railroad Tax cases, 13 Fed. Rep. 770, holding that there is no objection to legislation for the purpose of more effectually carrying out the scheme of the constitution so far as the legislation is not inconsistent with any of its provisions.

Actual Value of all property for assessment is required by the constitution; the fact that the value of one kind of property is to be ascertained by one officer or board and the value of another kind of property by another officer or board does not operate a deprivation of legal protection to the owners nor violate section 1 of the fourteenth amendment of the constitution of the United States, pp. 30, 31.

Cited in *Sawyer v. Dooley*, 21 Nev. 397, that all property must be assessed at its actual cash value, and there is no reason why this value may not be as accurately ascertained by several different men or boards as one; the requisite is uniformity of taxes, not uniformity in the manner of assessment.

**Delegation of Taxing Power** does not arise under act of May 12, 1881, directing addition of exactly twelve per cent for delinquencies, p. 34.

Cited in *State v. Ada Co.*, 7 Idaho, 266, under Revised Statutes, sections 1410, 1411, 1554, as amended in 1899, county is not liable to state for uncollected state taxes on lands sold for delinquency and bid in by county; note to 74 Am. Dec. 592.

**Title of an Act**, distinctly expressing the object of the act, does not violate section 24 of article IV of the constitution, p. 34.

Cited in *Ex parte Liddell*, 93 Cal. 638, holding that it is sufficient if the title to the act clearly shows what the legislature intended to accomplish; *Carpenter v. Furrey*, 128 Cal. 668, and *People v. Oates*, 142 Cal. 14, sustaining title to code amendment; note to *Crookston v. County Commrs.*, 79 Am. St. Rep. 483, on general subject; *Erickson v. Cass Co.*, 11 N. Dak. 502, upholding amendatory act (Laws 1899, c. 79), entitled, "An act to amend section . . . . 1466 of the Revised Code, relating to the establishment, construction and maintenance of drains."

**Assessment of Railroad Property** by State Board of Equalization should be made as a single item, p. 33.

Approved in *California & Nevada Co. v. Mecartney*, 104 Cal. 622.

The roadbed is the foundation on which the superstructure (the rails in place) of a railroad rests; the roadway is the right of way which has been held to be property liable to taxation, p. 34.

Affirmed as to "roadbed" in *San Francisco v. Central Pacific Co.*, 63 Cal. 469, 49 Am. Rep. 100, but holding that "roadway" includes whatever space of ground the company is by law allowed in which to construct its roadbed and lay its track as defined in subdivision four of

the seventeenth and twentieth sections of the act of May 20, 1861. Cited in Standard Insurance Co. v. Langstrom, 60 Ark. 385, and followed as to definition of "roadbed," and holding the term includes also the sidetracks; Santa Clara Co. v. Southern Pacific Railroad, 118 U. S. 412, 414, holding that fences along the line of a railway are not assessable as part of the roadway, but are included in "improvements" under section 3617 of the Political Code, and approving the definitions of roadbed and roadway in the principal case; Chicago etc. Co. v. Cass Co., 8 N. Dak. 20, defining "roadway" in local constitution.

Certiorari.—Proper procedure to have set aside orders of State board of equalization, p. 34.

Cited in note to 40 Am. St. Rep. 44, on certiorari.

**60 Cal. 35-63. CENTRAL PACIFIC COMPANY v. BOARD OF EQUALIZATION.**

Franchise of the Central Pacific Railroad Company is derived solely from the state, and is not exempt from taxation, pp. 60-63.

Reversed in San Benito Co. v. Southern Pacific Co., 77 Cal. 520, in view of the decisions in State v. Central Pacific Co., and California v. Southern Pacific Co., 127 U. S. 1.

Franchise of a railroad company is property subject to taxation, p. 61.

Cited in State v. Anderson, 90 Wis. 561, holding that franchises were incorporeal hereditaments, but not to be reckoned as part of the realty within the tax laws; and were subject to taxation; main and dissenting opinions in Germania etc. Co. v. San Francisco, 128 Cal. 596, 603, discussing assessment of railroad bonds secured by mortgage of local property; Detroit etc. Co. v. Common Council, 125 Mich. 696, 84 Am. St. Rep. 606, noted under Fall v. Mayor, 19 Cal. 391; Russell v. Croy, 164 Mo. 98, 103, holding local statute not to impose double taxation; Commercial etc. Co. v. Judson, 21 Wash. 56, quoting Milwaukee etc. Co. v. Anderson, 90 Wis. 550.

Corporations are not "Persons," within the meaning of the fourteenth amendment of the constitution of the United States, pp. 59, 60.

Disapproved in Railroad Tax cases, 13 Fed. Rep. 760.

**60 Cal. 63-69. MARTIN v. ASTON.**

Taxation.—Under section 2664 of the Political Code, taxes for road purposes cannot be collected from inhabitants of or property within incorporated towns and cities which by municipal authority levy taxes for their own streets, p. 69.

Cited in Miller v. Kern Co., 137 Cal. 520, 521, construing Statutes of 1883, pages 5-10, and sections 2618-2744, Political Code, as to road taxes;

**Commissioners v. Owen**, 7 Colo. 470, holding that such a statute is not in conflict with constitutional provisions for uniformity of taxation.

**60 Cal. 71-72. PEOPLE v. MILNE.**

**Indictment** charging as a single fact an attempt to commit two or more offenses is not open to the objection of duplicity, p. 72.

Cited in **People v. Hall**, 94 Cal. 597, holding that under section 459 of the Penal Code the wrongful entry with intent to commit any of the crimes referred to constituted the offense of burglary, and was complete when the entry was made; and an entry made with intent to commit two or more felonies would constitute only one burglary; **People v. Thompson**, 111 Cal. 256, in dissenting opinion of Henshaw, J., saying that when a statute makes penal a single act done with one of several unlawful intents, an indictment charging the single act with the multifarious purposes, is not objectionable.

**60 Cal. 72-74. PEOPLE v. SIMONS.**

**Justifiable Homicide**.—An instruction "that it must appear the danger was so great that in order to save his own life or prevent his receiving great bodily harm the killing of the other was absolutely necessary" is erroneous, p. 73.

Cited in **People v. Gray**, 61 Cal. 180, holding that a similar instruction containing the statement, that the killing must be absolutely necessary, was erroneous; note to 74 Am. St. Rep. 734.

An instruction that it must appear the defendant was wholly without fault, is erroneous, p. 74.

Cited in **People v. Westlake**, 62 Cal. 307, holding that a defendant might show in justification that, although he brought upon himself an imminent danger, he changed his mind and honestly endeavored to escape from it but could not without striking the mortal blow; **People v. Bush**, 65 Cal. 134, holding that a defendant, originally the assailant, if he in good faith endeavored to decline any further struggle, might justify the killing; **People v. Conkling**, 111 Cal. 627, holding that the right to pursue for the purpose of reasonable private defense ceases as soon as the danger has ceased to be immediate; **Johnson v. State**, 58 Ark. 64, holding an instruction erroneous which excluded the right of self-defense if defendant had abandoned the conflict and killed only to save his own life or prevent great bodily harm. Approved in **Aikin v. State**, 58 Ark. 550, holding that the killing is lawful where the assailant withdraws in good faith, and if the taking of life subsequently becomes inevitable to save life.

**60 Cal. 74-78. PEOPLE v. HURLEY.** 44 Am. Rep. 55.

**Appeal**.—Judgment reversed on the ground of insufficiency of the evidence to justify the verdict, p. 78.

Cited in *People v. Durrant*, 116 Cal. 201, where it is said: "Our examination of the record is only to determine whether legal evidence has been offered sufficient to warrant a conviction."

**Possession of Stolen Property** is not of itself sufficient to justify the inference that the possessor stole the property; it must be also shown that the possession was personal and involved a distinct and conscious assertion of possession, p. 75.

Cited in *People v. Nunley*, 142 Cal. 111, sustaining conviction, under facts stated; *McNeally v. State*, 5 Wyo. 68, holding instruction erroneous; *Roberts v. State*, 17 Tex. App. 87, holding that the settled rule was that "if a party in whose possession goods recently stolen are found fails satisfactorily to account for his possession, the presumption of guilt arising from recent loss and conviction will warrant a conviction"; *Lehman v. State*, 18 Tex. App. 176, 51 Am. Rep. 299, holding that the possession must be personal; notes to 70 Am. Dec. 447; 3 Am. St. Rep. 693; and 5 Am. St. Rep. 896, on this point.

**Recent Possession of Stolen Property** does not necessarily raise presumption that it was stolen by possessor; it must also appear that the possessor acquired possession by his own act or with his own concurrence or knowledge, and it must be unexplained, pp. 76, 77.

Cited in *Lehman v. State*, 18 Tex. App. 179, 51 Am. Rep. 302, stating the true rule.

**Presumption of guilt from possession is completely removed by the good character alone of the accused**, p. 77.

Cited in notes to 70 Am. Dec. 450.

#### 60 Cal. 78-84. EX PARTE CHIN YAN.

Judgment inflicting a fine and imprisonment in default for a term or until payment, under an ordinance imposing a fine or imprisonment, is good, and the prisoner may claim release when the fine has been satisfied by the imprisonment, p. 80.

Affirmed in *Ex parte Lawrence*, 60 Cal. 84, as to form of judgment. Distinguished in *Ex parte Baldwin*, 60 Cal. 435, where a judgment under the general law of a fine or imprisonment held bad, the sole authority for imprisonment being section 1446 of the Penal Code; *Ex parte Miller*, 82 Cal. 455, holding that for a misdemeanor the code provides imprisonment as a means of enforcing the fine.

**City Ordinance** passed pursuant to a power expressly conferred by the legislature, and not in conflict with the constitution, is not unreasonable; but where the mode of exercising the power is not prescribed, the ordinance must be a reasonable exercise of the power, pp. 82, 83.

Cited in *In re Hang Kie*, 69 Cal. 151, stating the rule to be that when a power to pass an ordinance is not given in express terms, but is de-

rived from a general power to legislate, the ordinance must be reasonable; Fayetteville v. Carter, 52 Ark. 303, holding that when a municipal ordinance is passed, under authority of a genral law, requiring the taking out of a license and payment of a certain fee, and the fee is not plainly unreasonable, the court ought not to interfere; Champer v. Greencastle, 138 Ind. 348, 349, 46 Am. St. Rep. 397, holding that no inquiry can be made as to whether an ordinance is reasonable or not where the power to pass it has been conferred by the legislature; Pittsburg Co. v. Crown Point, 146 Ind. 423, to same effect, but holding that an ordinance which the municipality seeks to uphold by virtue of its incidental powers or under a general grant of authority will be declared invalid unless it be reasonable and not arbitrary or oppressive; Des Moines Co. v. Des Moines, 90 Ia. 772, holding that it is settled law that a municipal ordinance must be reasonable, consonant with the general purposes of the corporation and not inconsistent with the laws and policy of the state, and that the courts may declare void ordinances and by-laws which are not reasonable; State v. Harrington, 68 Vt. 632, holding that the legislature may impose a license upon one occupation so long as no discrimination is made among those engaged in it, and may fix the license fee, and the court cannot declare the act unconstitutional because in its opinion the amount is excessive.

#### 60 Cal. 85-92. PEOPLE v. AH LEE.

Instruction that there were no circumstances in the case to reduce the offense below that of murder in the first degree held erroneous, that question being for the jury to determine, p. 86.

Cited in People v. Chew Sing Wing, 88 Cal. 270, holding that the constitution made the jury the exclusive triers of the issue of the degree of the crime; Blocker v. State, 27 Tex. App. 42, holding that the power of the jury to find the degree could not be controlled by the charge of the court. Distinguished in People v. Bawden, 90 Cal. 197, where it is held that where the jury has been fully instructed as to the definitions of murder and malice aforethought and then instructed that if the defendant murdered the deceased wilfully, deliberately and with premeditation, the verdict should be murder in the first degree, there was no error.

**Res Gestae.**—Declarations made by an injured party after the infliction of the injury, unless made under a belief of impending death, are not admissible in evidence, pp. 91, 92.

Cited in People v. Wong Ark, 96 Cal. 128, holding that it is not permissible to introduce, under the guise of res gestae, a narrative of past events made after the events are closed; People v. Lane, 100 Cal. 384, holding that it was the general rule that evidence of a distinct and subsequent offense cannot be admitted in support of the charge of the commission of another offense; Stephenson v. State,

110 Ind. 372, 59 Am. Rep. 224, holding that in order to make declarations, not made in apprehension of death, competent, they must be part of the res gestae; *Mayes v. State*, 64 Miss. 333, 60 Am. Rep. 60, holding that a declaration illustrative of other parts of a transaction, of which it is itself a part, is competent; *Territory v. Clayton*, 8 Mont. 11, holding that a statement made by the defendant was not part of the res gestae unless so closely connected with the act as to become an incident thereof; *Sullivan v. Oregon Ry.*, 12 Or. 400, 53 Am. Rep. 369, holding that the right to introduce declarations as testimony is limited to those cases in which the declaration forms part of the transaction which is in dispute, and defining the test of the matter; *State v. Murphy*, 16 R. I. 530, where it is held that declarations after an act may be admitted which spring so naturally and involuntarily from the thing done as to reveal its character and thus belong to it and be a part of it; *Croomes v. State*, 40 Tex. Cr. App. 675, admitting declarations in case of assault to rape; note to 95 Am. Dec. 64, 76; 58 Am. Rep. 185, 190.

#### 60 Cal. 93-94. ROE v. SUPERIOR COURT.

Certiorari, to review judgment for contempt of court, examination is confined to the record, and the sole question is, had the court jurisdiction of the subject-matter and person, p. 93.

Cited in *Borchard v. Supervisors*, 144 Cal. 14, denying right to impeach return by evidence aliunde; *Cooper v. People*, 13 Colo. 355, holding that a review on writ of error of contempt proceedings extends only to an inquiry into the jurisdiction of the lower court; *State v. Knight*, 3 S. Dak. 517, 44 Am. St. Rep. 815, holding that criminal contempt proceedings may be reviewed and set aside for want of jurisdiction of the lower court over the subject-matter or of the defendant, or want of power to render the particular judgment complained of.

Every Intendment must be made to support the judgment when jurisdiction is once had of the subject-matter and person, p. 93.

Cited in *State v. Board of Aldermen*, 18 R. L 382, to same effect.

#### 60 Cal. 95-97 PEOPLE v. LEE AH YUTE.

**Impeachment of Testimony.**—When a witness denies on cross-examination the use of particular expressions, the impeaching witness should be asked as to the particular words used, p. 96.

Cited in *People v. Nonella*, 99 Cal. 335, holding the proper course was to ask the impeaching witness the direct question "Did the party make such statement at the time and place mentioned"; *People v. Ebanks*, 117 Cal. 665, as authority for certain questions put to defendant on cross-examination; note to 73 Am. Dec. 765.

**Impeachment of Witness**, testifying in foreign language, should be had by interpreter, p. 96.

Cited in *People v. Lewandowski*, 143 Cal. 578, noted under *People v. Lee Fat*, 54 Cal. 527.

**Attorney's Statement** to jury of matters outside the record is not an error for which a new trial will be granted, pp. 96, 97.

Cited in *State v. Phelps*, 5 S. Dak. 495, holding that if the substantial rights of the accused are not prejudiced by counsel's statements the judgment will not be reversed; and note to 9 Am. St. Rep. 569, 570.

#### 60 Cal. 98-102. NESSLER v. BIGELOW.

**Adverse Possession** does not run against the United States, nor against its patentee who commences action to quiet title within five years after issuance of the patent, p. 101.

Cited in *Jatunn v. Smith*, 95 Cal. 157, holding it as settled that the statute of limitations of a state does not apply to the government of the United States, and as a consequence there can be no adverse possession of land under such a law; *Pierce v. Sparks*, 4 Dak. 3, holding that a claimant by occupancy and improvement must show affirmatively a superior equity, that his adversary's patent alone intervenes between him and the legal title, and that but for it he would be entitled to the patent, note to 78 Am. St. Rep. 486.

#### 60 Cal. 103-106. EX PARTE WALLINGFORD.

**Petty Larceny**.—Superior court has no jurisdiction in cases of petty larceny or such other misdemeanors as have been committed by the legislature to the justices' courts, p. 104.

Cited in *Gafford v. Bush*, 60 Cal. 153, holding that the jurisdiction of justices' courts in all crimes and misdemeanors committed to them by the legislature is exclusive; *Green v. Superior Court*, 78 Cal. 559, holding that the constitution having vested in the superior court jurisdiction in all criminal cases amounting to felony, and cases of misdemeanor "not otherwise provided for," as soon as the jurisdiction is "otherwise provided for" the authority of the superior court to act ceases; *Green v. Superior Court*, 78 Cal. 563, holding that under the present constitution the legislature is empowered to establish justices' courts and to confer upon them exclusive jurisdiction over certain misdemeanors; *Patterson, J.*, dissenting on the ground that the principal case was confined to the case of petty larceny and did not extend to all other misdemeanors of the minor class. Cited in *State v. Myers*, 11 Mont. 369, defining the jurisdiction in cases of misdemeanors of district and justices' courts.

**Penal Code**.—Sections 915 and 976 do not bring petty larceny when

prosecuted by indictment within the jurisdiction of the superior court, p. 108.

Cited in *Green v. Superior Court*, 78 Cal. 564, holding that a charge of conspiracy, although requiring to be presented by indictment or information, belongs to the justices' courts.

#### 60 Cal. 107-108. PEOPLE v. LEONG QUONG.

Variance, as to name of owner of property stolen, is not material, p. 108.

Cited in *People v. Prather*, 120 Cal. 662, sustaining allegation of ownership by estate; *People v. Nunley*, 142 Cal. 108, 109, noted under *People v. Edwards*, 59 Cal. 359; *State v. McKee*, 17 Utah, 377, holding variance between commitment and information as to ownership immaterial; *People v. Leong Sing*, 77 Cal. 118, where it is held that where the injured party has two names it will be presumed that evidence of identity was produced; *People v. Oreileus*, 79 Cal. 180, holding to same effect as the principal case, where the rule of "idem sonans" would apply; *People v. Smith*, 112 Cal. 335, holding there is no substantial variance where the offense charged is described with sufficient certainty to identify the act, and the alleged ownership was in effect the same; *People v. Armstrong*, 114 Cal. 573, holding that a difference in description between Samuel and Sam was immaterial.

#### 60 Cal. 108-113. PEOPLE v. GILBERT.

Charge of Robbery involves larceny. A general verdict of "guilty as charged" will not be set aside for uncertainty, because the crime of robbery is not divided into degrees, pp. 110, 111.

Cited in *People v. Nichols*, 62 Cal. 521, holding that a failure to have the verdict read or declared before being recorded was not an irregularity which prejudiced any substantial right of defendant and would not render the verdict invalid; *People v. Crowley*, 100 Cal. 480, holding that larceny and robbery were generically the same, and that under an indictment for the former there might be a conviction of the latter; *State v. Rogers*, 21 Mont. 145, quoting *People v. Crowley*, 100 Cal. 478.

Instruction Refused on the ground that there is no evidence to support it is not error, when the party complaining does not show that there was such evidence, p. 112.

Cited in *Carpenter v. Ewing*, 76 Cal. 488, stating the settled rule to be that where the record contains no part of the evidence, the judgment will not be disturbed unless it appeared that the instructions would have been erroneous under every conceivable state of facts; *State v. Mason*, 24 Mont. 344, noted under *People v. Torres*, 38 Cal. 141; *Walker v. Superior Court*, 135 Cal. 374, noted under *People v. Donahue*, 45 Cal. 321; note to 87 Am. Dec. 102.

**60 Cal. 116-117. PEOPLE v. KALLOCH.**

Public Official, Indictment of for receiving money, is defective which fails to charge the accused with having received a reward, or promise thereof, as an inducement to official action, p. 117.

Cited in State v. Bauer, 1 N. Dak. 278, where the court say: "In this case it is not alleged or claimed that defendant asked for or received any emolument, gratuity or reward as an inducement to the performance of an official act; this we think is essential." Distinguished in People v. Markham, 64 Cal. 162, 49 Am. Rep. 704, holding that a police officer who received money in consideration of his promise not to make an arrest, was guilty of receiving a bribe, without further proof.

**60 Cal. 118-126. CUNNINGHAM v. SHANKLIN.**

After judgment has been entered in an action to determine the right of contestants to purchase state lands, mandamus will lie to compel the surveyor general to obey the judgment; and the state and its officers are estopped from selling the same land to an applicant who files his claim pending the action or subsequent thereto, p. 125.

Cited in Youle v. Thomas, 146 Cal. 544, after reference of contest of right to purchase state land to courts, and after action is begun, and before final determination thereof, surveyor general has no power to receive application of another to purchase land involved in contests; Cecil v. Clark, 44 W. Va. 675, holding state estopped from denying jurisdiction of its courts under its local statutes; Wrinkle v. Wright, 136 Cal. 496, noted under Langenour v. Shanklin, 57 Cal. 70.

Distinguished in Byrd v. Reichert, 74 Cal. 581, where the claim was to land other than involved in the judgment and was the subject of a contest then undetermined.

**60 Cal. 126-142. OAKLAND BANK v. WILCOX.**

Overdrafts authorized by the president of a bank without the sanction required by the by-laws, are a violation of duty by such president, p. 140.

Approved in Cooper v. Hill, 94 Fed. 587, holding directors of national bank liable for misappropriation of its funds, although done in good faith; Winchester v. Howard, 136 Cal. 446, noted under Wright v. Mining Co., 40 Cal. 20; Thompson v. Greeley, 107 Mo. 592, 8 Am. St. Rep. 605, holding that the directors are responsible under the common law to the corporation they undertake to manage for all losses occasioned by any flagrant breach of their duty.

**60 Cal. 142-149. PEOPLE v. MORROW.**

Circumstantial Evidence defined, its value and duty of the jury with respect to it. How jury should be instructed, pp. 143, 144.

Cited in *People v. Urquidas*, 96 Cal. 241, holding that an instruction "that there is nothing in the nature of circumstantial evidence that renders it less reliable than other classes of evidence," correctly stated the law; note to 62 Am. Dec. 181.

**Defendant's Evidence** should be carefully considered; if convincing and carrying with it a belief in its truth, it may be acted on, otherwise rejected, and it is no error so to instruct the jury, p. 147.

Cited in *People v. Wheeler*, 65 Cal. 78, holding that the court correctly instructed the jury that in weighing such evidence they must consider the circumstances under which the witness testified, being the defendant and having such important interests dependent upon the result of the case; *People v. O'Neal*, 67 Cal. 379, 380, exemplifying a proper instruction to the jury as to defendant's testimony; *People v. Fehrenbach*, 102 Cal. 402, approving an instruction as to defendant's testimony in line with that in the principal case; dissenting opinion in *People v. Hoff*, 129 Cal. 505, noted under *People v. Cronin*, 34 Cal. 191. *Vaughan v. State*, 58 Ark. 365, also, exemplifying a correct instruction as to the duty of jury with regard to a defendant's testimony; *Minich v. People*, 8 Colo. 454, holding that the judge in charging the jury might properly single out the testimony of the defendant and direct the attention of the jury thereto, and what were proper comments thereon; *State v. Slingerland*, 19 Nev. 141, defining the duty of the jury with regard to defendant's evidence; *State v. Streeter*, 20 Nev. 409, approving instruction to jury in the terms of the principal case; *Reagan v. United States*, 157 U. S. 307, where the court say of a defendant testifying in his own behalf: "It is within the province of the court to call the attention of the jury to any matters which legitimately affect his testimony and his credibility;" Note to 72 Am. Dec. 547.

#### 60 Cal. 149-153. GAFFORD v. BUSH.

**Exclusive Jurisdiction** of justices' courts is conferred by section 115 of the Code of Civil Procedure over all misdemeanors punishable by fine not exceeding \$500, or imprisonment not exceeding six months, or by both, p. 152.

Cited in *Green v. Superior Court*, 78 Cal. 559, holding that the jurisdiction of the superior courts in all cases of felony and misdemeanors "not otherwise provided for" ceased as soon as the jurisdiction was otherwise provided for, holding also (p. 563), that the legislature had power under the constitution to establish justices' courts and give them exclusive jurisdiction over certain misdemeanors; distinguished by Patterson, J., in his dissenting opinion (p. 569) on the ground that the crime charged in the principal case was not contended to be an infamous offense.

**N. B.**—The principal case is also cited in *Green v. Superior Court*, supra, p. 564, to show that under section 13 of article 6 of the consti-

tution the legislature had power to confer certain limited jurisdiction, it does not appear that that section is referred to in the principal case. Cited in *State v. Myers*, 11 Mont. 369, defining the jurisdiction in cases of misdemeanor of district and justices' courts.

**60 Cal. 153-156. PEOPLE v. MARTIN.**

License Fees for county, city, town, or municipal purposes are taxes within the meaning of section 12 of article 11 of the constitution. The power to impose such taxes was by the present constitution taken from the legislature and vested in the local authorities, pp. 155, 156.

Cited in *In re Lawrence*, 69 Cal. 610, holding as valid a license tax levied by a county ordinance on a liquor dealer, who had paid a similar tax under an ordinance of a city in the same county; *Ex parte Mirande*, 73 Cal. 372, holding as valid a license on the business of grazing, herding, and pasturing sheep imposed by a county ordinance; *El Dorado County v. Meiss*, 100 Cal. 272, is to the same effect; *Ex parte Mansfield*, 106 Cal. 403, holding to same effect as *In re Lawrence*, *supra*; *Ventura County v. Clay*, 112 Cal. 70, to same effect; *State v. French*, 17 Mont. 57, holding that a license fee is a tax sometimes and for some purposes, and sometimes and for some purposes it is not; *State v. Bennett*, 19 Neb. 207, where the principal case is apparently cited as authority for the proposition that under the California constitution a license tax for carrying on a business must be imposed by the municipality in which defendant resided, and not by the county. Evidently this is a misapprehension, the holding being that the power to impose such license taxes lies in the municipal authorities and not in the legislature; *Ex parte Braun*, 141 Cal. 209, 211, sustaining local liquor tax; *Ex parte Jackson*, 143 Cal. 567, on point that such fees are taxes within article 11, section 12 of the constitution. Distinguished in *Sacramento v. Dillman*, 102 Cal. 111, as having held invalid a license tax imposed by the Political Code, and therefore no authority to prove the invalidity of a license tax properly imposed by a municipal ordinance; *State v. Camp Sing*, 18 Mont. 146-148, 56 Am. St. Rep. 561, 562, holding that section 1 of article 13 of the Montana constitution, viz.: "That the legislative assembly may also impose a license tax both upon persons and upon corporations doing business in the state," rendered the decision in the principal case inapplicable. Disapproved in *State v. Camp Sing*, 18 Mont. 148, 56 Am. St. Rep. 562, holding that the distinction as to levying or imposing taxes upon persons or property is more apparent than real—that all taxes are levied upon persons and not upon property—the person is liable and the property is security for payment.

**License Tax.**—The provisions of the Political Code imposing and providing for the collection of license taxes for county, city, town, or municipal purposes are void, p. 155.

Cited in *Ex parte Campbell*, 74 Cal. 25, 5 Am. St. Rep. 422, holding that sections 3356, 3381, 3382, 4045 and 4408 of the Political Code are unconstitutional under the present constitution.

**60 Cal. 157-161. EDWARDS v. BURRIS.**

**Slander of Title.**—An action cannot be maintained by one who fails to show title or interest in the property, and a personal injury through the slander, p. 161.

Cited in note to 87 Am. Dec. 562.

**60 Cal. 164-165. CHRISTIE v. SONOMA COUNTY.**

**Discretion of board of supervisors to allow claim for services,** when claim, though just and correct, is not made in proper form, will not be disturbed by mandamus, p. 165.

Cited by Thornton, J., in *Raisch v. Board of Education*, 81 Cal. 550, in support of his dissenting opinion that the board could not be compelled to pay a claim which had never been presented for their examination and allowance; *Board of Commissioners v. Sherwood*, 64 Fed. Rep. 107, holding that an auditing board may decline to audit a demand and issue a warrant if the demand is not verified.

**60 Cal. 166-177. SAN FRANCISCO FACTORY v. BRICKWEDEL.**

**Spring Valley Water Works** is not obliged to furnish water to the city and county of San Francisco for any purpose free of charge, p. 176.

Cited by Ross, J., in his concurring opinion in *Spring Valley W. W. v. San Francisco*, 61 Cal. 30, in support of the decision of the court (p. 29) that the water company was to receive compensation for all water furnished by it; and by the same judge on page 50, in explanation of his vote denying a rehearing.

**60 Cal. 177-215. EX PARTE KOSER.**

**Sunday Law** under sections 300 and 301 of the Penal Code is not unconstitutional. It is not special legislation within section 25 of article 4 of the constitution, nor does it violate section 11 nor the last clause of section 21 of article 1 of the constitution, p. 189.

Cited in *Ex parte Lichtenstein*, 67 Cal. 361, 56 Am. Rep. 715, upholding the validity of the Pawnbrokers' Act of March 7, 1881; *Ex parte Jentzsch*, 112 Cal. 472, where the rule is said to be that in California Sunday laws are construed as civil and secular enactments; *Scales v. State*, 47 Ark. 482, 58 Am. Rep. 770, holding that a failure to make an exception to a Sunday law in favor of those who faithfully observe a different day as their Sabbath will not render the law invalid; *People v. Haynor*, 149 N. Y. 202, 52 Am. St. Rep. 712, upholding

an act prohibiting barbering on Sunday, after 1 o'clock P. M., in New York and Saratoga Springs, as a valid exercise of the police power; State v. Sopher, 25 Utah, 322, 324, upholding Revised Statutes, section 4234, prohibiting keeping open of business places on Sunday; State v. Nichols, 28 Wash. 631, 634, upholding Ballinger's Code, section 7251, prohibiting keeping open of business places on Sunday.

**Headings of Chapters** in the codes may be resorted to to determine as to the correct interpretation of the sections included in the chapter, p. 192. Their office is to control, limit, and apply the provisions of the chapter, p. 198.

Cited in *Sharon v. Sharon*, 75 Cal. 16, where it is held that the headnotes to the articles of the code are entitled to more consideration than the title to an entire act. They are part of the statute limiting and defining the sections to which they refer.

#### 60 Cal. 215-222. ALDEN v. PRYAL.

**Mistake in Description of Property.**—When public records open to inspection would have enabled a purchaser to ascertain correct boundaries, the maxim "caveat emptor" forbids the purchaser setting up fraudulent misrepresentation of boundaries and quantities in an action to foreclose mortgage to secure purchase money, p. 220.

Cited in *Maddock v. Russell*, 109 Cal. 428, holding if purchaser receives and holds possession of land pointed out he cannot claim rescission of deed conveying other property without offering to restore everything of value received under the contract; *Emmons v. Gille*, 51 Kan. 183, to support the ruling that "it is no defense to a foreclosure suit on a purchase money mortgage that there is an outstanding paramount title or encumbrance when there has been no actual eviction."

**Mortgage Foreclosure.—Attorney's Fees** held properly allowed under mortgage sued on, p. 220.

Cited in *Carpenter v. San Francisco Sav. Union*, 128 Cal. 516, sustaining similar allowance.

#### 60 Cal. 223-228. REAL ESTATE ASSOCIATES v. SUPERIOR COURT.

**Insolvency.—Receiver** may be appointed in chambers, p. 227.

Cited in *Butler v. United States*, 87 Fed. 682, discussing effect of chamber orders.

#### 60 Cal. 228-229. WALSH v. HUTCHINGS.

**Papers in Transcript on Appeal** must be properly identified or they cannot be considered. The clerk of the lower court cannot determine and certify what papers or evidence the court acted on, p. 229.

Cited in *Peltret v. Frank*, 66 Cal. 34, holding that papers in transcript

not incorporated in bill of exceptions, nor identified, cannot be considered; Cited in *People v. Terrill*, 131 Cal. 113, noted under *Borkheim v. Insurance Co.*, 38 Cal. 627; *State v. Millis*, 19 Mont. 448, noted under *Baker v. Snyder*, 58 Cal. 617; *McKay v. Farr*, 15 Utah, 265, noted under *Nash v. Harris*, 57 Cal. 242; *Fish v. Benson*, 71 Cal. 432, holding that affidavits found in the transcript cannot be presumed to be those referred to in the order overruling the motion for new trial, though made by the same parties, and if otherwise uncertified cannot be considered; *Herrlich v. McDonald*, 80 Cal. 476, holding the only proper way in which copies of papers can be brought into the record is by a bill of exceptions or statement; *Somers v. Somers*, 81 Cal. 609, holding that an authentication by the judge in any other way than that provided by the Code of Civil Procedure, sections 646, 649-651, is insufficient; *Fitzpatrick v. Fitch*, 83 Cal. 491, holding that the certificate of the clerk is insufficient to identify papers in the transcript; *Arnold v. Sinclair*, 12 Mont. 260, holding that when a motion for new trial was made on affidavits alone the papers used on the hearing could be certified by the judge; *Bookwalter v. Conrad*, 14 Mont. 63, holding that when some of the grounds of a motion for new trial were upon affidavits, if contention should arise as to what papers were used, the matter could be made clear by a certificate of the judge. Distinguished in *Simmons etc. Co. v. Alturas Com. Co.*, 4 Idaho, 391, attorneys of record may certify that transcript on appeal contains correct copies of all papers used on hearing of motion below.

#### 60 Cal. 229-232. **HINDS v. MARMOLEJO.**

Rate of Interest allowed to be charged by national banks is any rate that may be agreed on, p. 232.

Affirmed in *Farmers' Bank v. Stover*, 60 Cal. 393, and *California Bank v. Ginty*, 108 Cal. 151, where it is said that a national bank can charge a rate of interest in excess of that allowed by the federal statute when such excess can be lawfully contracted for under the statute of the state in which the bank is situated. Cited in *Rockwell v. Bank*, 4 Colo. App. 569, sustaining agreed rate so charged; *National Bank v. Bruhn*, 64 Tex. 578, 53 Am. Rep. 774, holding that national banks were on a footing with other banks, and might contract for the highest rate allowed by the statutes of the state; *Guild v. First Nat. Bank*, 4 S. Dak. 575, holding that in construing section 5197 of the Banking Act, the terms "allowed" and "fixed" are synonymous, and (p. 576) that national banks may contract for the highest rate fixed or allowed by the statutes of the state; *Wolverton v. Exchange Bank*, 11 Wash. 97, holding the terms "fixed" and "allowed" in section 5197 of the Banking Act to be the same.

#### 60 Cal. 232-233. **ESTATE OF CALAHAN.**

The only orders appealable are those specified in subdivision 3 of

section 963 of the Code of Civil Procedure. An order vacating an order of distribution is not an appealable order, p. 233.

Affirmed in *Estate of Dean*, 62 Cal. 614, as to a similar order; *Lutz v. Christy*, 67 Cal. 457, as to an order refusing to set aside an order of distribution; *In re Cahalan*, 70 Cal. 607, holding that although the order in the principal case could not be appealed, yet, on an appeal from a subsequent order of distribution, the order mentioned in the principal case could be reviewed; *Estate of Murphy*, 128 Cal. 340, dismissing such an appeal; *Estate of Franklin*, 133 Cal. 588, defining "final judgment" as applied to probate proceedings; *Estate of Cahill*, 142 Cal. 629, quoting *Estate of Wittmeier*, 118 Cal. 255; *Tuohy's Estate*, 23 Mont. 306, as to order directing executor to execute lease; *Carpenter v. Superior Court*, 75 Cal. 600, holding that an order setting aside a verdict and judgment was not appealable, but could be reviewed on certiorari; *In re Wiard*, 83 Cal. 620, upholding an order refusing to vacate a decree of distribution; *In re Moore*, 86 Cal. 59, upholding an order vacating an order substituting a trustee for one named in a will; *In re Banquier*, 88 Cal. 314, holding that an order refusing to vacate a decree of distribution and to grant a new trial in the matter of the petition of distribution was not appealable, as to the refusal to vacate, on the authority of the principal case, and as to the new trial because there was no statement of the case or bill of exceptions; *Rochat v. Gee*, 91 Cal. 356, holding that an order approving the partial account of a receiver was not one of the orders named in subdivision 3 of section 963 of the Code of Civil Procedure, and was not appealable; *In re Walkerly*, 94 Cal. 353, holding that an order refusing to vacate an order denying an extra allowance to an executor is not appealable, and distinguishing *In re Banquier*, *supra*; *In re Smith*, 98 Cal. 639, holding that in probate proceedings the only appealable orders were those named in subdivision 2, section 963, of the Code of Civil Procedure; *Iversen v. Superior Court*, 115 Cal. 28, holding an ex parte order requiring a distributee to restore property received under a final decree of distribution was not appealable, but could be reviewed on certiorari.

Final Judgments, referred to in subdivision 1 of section 963 of the Code of Civil Procedure, do not include judgments in probate proceedings, p. 233.

Cited in *In re Smith*, 98 Cal. 638, holding that a judgment refusing to admit a will to probate was not a "final judgment" so as to render an order made subsequent thereto appealable.

#### 60 Cal. 254. ANGELL v. DELMAS.

Appeal from Order on final judgment will be dismissed when there is no bill of exceptions, nor anything else in the record to show what papers were used on the hearing, p. 254.

Approved in *Peltret v. Frank*, 66 Cal. 34.

Notes Cal. Rep.—189.

**60 Cal. 255-280. DOHS v. DOHS.**

**Administration of an estate is pending until entry of the decree discharging the executor or administrator, p. 260.**

Affirmed in *Dean v. Superior Court*, 63 Cal. 475, saying that "until the entry of a judgment or decree discharging the executor, the trust still continues in contemplation of law"; *In re Clary*, 112 Cal. 284, holding that jurisdiction of the probate court over an administrator or executor does not cease until his final discharge.

**Claims** duly presented and allowed are not affected by statute of limitations until entry of decree discharging the executor or administrator under section 1569 of the Code of Civil Procedure, p. 260.

Cited in *Wise v. Williams*, 72 Cal. 548, holding that an action to foreclose a mortgage is not affected by the statute of limitations pending proceedings for settlement of the estate, where the claim has been duly presented and allowed.

**60 Cal. 278. SPEEGLE v. JOY.**

**Statutea.**—An act which was not to go into effect until after January 1, 1880, when the constitution of 1879 was adopted, did not go into effect and did not become a law, p. 278.

Cited in *People v. Whiting*, 64 Cal. 68, holding that if parts of an act were to come into effect before and other parts after the adoption of the constitution, the latter never took effect. Distinguished in *Los Angeles County v. Lamb*, 61 Cal. 198, upholding a statute which went into effect prior to the adoption of the constitution, but by reason of circumstances did not go into operation until afterward. A statute may go into effect, but cannot operate until the *casus statuti* occurs.

**60 Cal. 279-280. PEOPLE v. CRANE.**

**Bill of Exceptions and Statement** are the same in form and substance, the only difference is that a statement follows a motion for new trial, and a mistake in entitling a bill of exceptions is not a sufficient ground for refusing to settle same, and settlement may be compelled by mandamus, p. 288.

Cited in *Witter v. Andrews*, 122 Cal. 2, permitting so-called "statement" to be used as bill of exceptions on appeal from judgment; and cf. *Wall v. Mines*, 128 Cal. 140; *Careaga v. Fernald*, 66 Cal. 353, holding that mandamus will lie to compel settlement of statement; *People v. Bitancourt*, 74 Cal. 190, holding the like as to bill of exceptions; *Wood v. Strother*, 76 Cal. 550, 9 Am. St. Rep. 253, to the same effect; *Beets v. Chart*, 79 Cal. 186, holding the code does not provide for settlement of "a statement on appeal to the supreme court"; *Bradbury v. Idaho Co.*, 2 Idaho, 225, holding that exceptions to the ruling of the

court may be considered on a statement, where a statement is authorized, the same as on a bill of exceptions; Schultz v. Keeler, 2 Idaho, 306, holding that being authenticated it makes no difference whether the bill of exceptions is called a statement or bill of exceptions; Keane v. Murphy, 19 Nev. 94, 95, holding that mandamus is the proper remedy to compel the settlement of a statement on motion for a new trial.

**Statement of the Case**, when settled, may be used on the motion for a new trial, and afterward on an appeal from the judgment, p. 279.

Cited in Craig v. Fry, 68 Cal. 369, where it is said that the "statement of the case used on the hearing of a motion for a new trial is part of the record upon which an appeal from the judgment may be heard."

#### 60 Cal. 280-284. BOYD v. BURREL.

**Undertaking on Appeal** must be filed within five days after service of the notice of appeal; filing of the undertaking and service of the notice are not parts of a continuous act, pp. 281, 282.

Affirmed in In re Skerrett, 8 Cal. 63, where the notice was served January 30, 1889, and filed January 31, 1889, and the undertaking was filed February 5th, one day too late to save the appeal; Perkins v. Cooper, 87 Cal. 243, holding that where no undertaking on appeal was ever filed or waived, the appeal was ineffectual for any purpose; Robinson v. Templar Lodge, 114 Cal. 42, holding that notice being served December 31, 1895, the undertaking filed January 6, 1896, was in time, as January 5th was Sunday; Hoyt v. Stark, 134 Cal. 179, 86 Am. St. Rep. 247, further holding actual filing essential; Seattle etc. Co. v. Simpson, 19 Wash. 633, noted under Franklin v. Reiner, 8 Cal. 340; Territory v. Harris, 7 Mont. 431, as an instance of the grounds on which appeals were dismissed.

**Mistake in Record** cannot be corrected by proof made in the appellate court; this must be done in the lower court, which has power to alter it so as to make it speak the truth, p. 284.

Cited in People v. Murback, 64 Cal. 372, holding that a mistake made by the clerk in the entry of a judgment could be corrected at any time while the record was subject to the physical control of the trial court whose power was not suspended by the pendency of an appeal; Warren v. Hopkins, 110 Cal. 509, holding that the record, when properly certified to the appeal court, became conclusive; State v. Central Pacific Co., 21 Nev. 101, denying a motion to amend the record by striking out a pleading on the authority of the principal case; Close v. Close, 28 Or. 109, dismissing appeal for failure to supply lost records; Ward v. Springfield Ins. Co., 12 Wash. 632, holding that record could not be altered or amended by proof made in the appellate court.

**60 Cal. 284-287. HUGHES v. BRAY.**

**Sale by Sample.**—The measure of damages for breach of warranty is the difference between the market value of the article actually delivered and that of an equal quantity of the same kind of article of the same quality as the sample at the time of delivery, p. 287.

Distinguished in Shearer v. Park Nursery Co., 103 Cal. 418, 42 Am. St. Rep. 126, limiting the ruling of the principal case to the case where the time of completion of the sale by delivery, the time of breach of the warranty, and the time when the breach was, or with ordinary care and attention might be, discovered were coincident.

**60 Cal. 289-290. MYERS v. HAMILTON.**

Certiorari does not lie to review the proceedings of a court not acting judicially, p. 290.

Cited in Wulzen v. Board of Supervisors, 101 Cal. 118, 40 Am. St. Rep. 21, holding that certiorari does not lie to review the action of an inferior tribunal or board in the exercise of purely legislative functions which are not judicial in their character.

**60 Cal. 291-292. DONNELLY v. HOWARD.**

**Street Assessment** is illegal if it includes the cost of work not authorized by the resolution of intention nor included in the invitation for bids. The property owner is not bound to appeal to the board against such assessment, p. 292.

Distinguished in Perine v. Forbush, 97 Cal. 312, where it is held that it is only when the contract is void, or where the assessment is for work which the city would have no jurisdiction to contract for, because not in the resolution of intention, nor reasonably related thereto (as in the principal case), that the property owner need not appeal. Cited in Partridge v. Lucas, 99 Cal. 523, holding as in the principal case, and that a resolution to macadamize a street cannot include the cost of rock gutters; Ryan v. Altschul, 103 Cal. 176, holding that an assessment for regrading and macadamizing one-half of the roadway of a street which charged the whole cost on the property on that side of the street was wholly void, because the cost of the grading should have been, under the statute, assessed on the property on both sides of the street; holding, also, on page 177 of same case, that the property owner was not bound to appeal to the board against such assessment.

**60 Cal. 292-295. THOMPSON v. JOHNSON.**

**Amended Complaint**, or an amendment in substance to a complaint, constitutes a new complaint, and all former pleadings and issues in the case are thereby substantially vacated. The amended complaint contains the facts which constitute the cause of action sought to be enforced, and must be served on all the defendants, pp. 294, 295.

Distinguished in *Mott v. Mott*, 82 Cal. 419, holding that a cross-complaint, distinct and complete in all its parts, and an answer thereto, did not fall by reason of the complaint being amended. Cited in *Hawthorne v. Siegel*, 88 Cal. 168, 22 Am. St. Rep. 297, holding that where a general demurrer to the original complaint had been overruled, and the complaint had been amended as to one paragraph, only the amendment was subject to demurrer, and that an amended answer could only be made to the portion of the complaint amended.

**Amending a Complaint in substance opens a default on the original pleading, and the amended pleading must be served on all the parties, including the defaulting defendant, p. 295.**

Cited in *Reinhart v. Lugo*, 86 Cal. 399, 21 Am. St. Rep. 54, holding that under section 472 of the Code of Civil Procedure an amended complaint must be served on a defendant against whom default on the original complaint had been entered; *Witter v. Bachman*, 117 Cal. 319, holding that the amendment of a complaint in matter of substance after the entry of a default had the effect of superseding the original complaint and opened the default; *Woodward v. Brown*, 119 Cal. 304, 63 Am. St. Rep. 125, and *San Diego etc. Bank v. Goodsell*, 137 Cal. 425, but holding aliter where amendment is not one of substance. Distinguished in *Riverside Co. v. Stockman*, 124 Cal. 224, noted under *Livermore v. Webb*, 56 Cal. 489; *Tappendorff v. Moranda*, 134 Cal. 422, holding such reservice necessary under facts stated; *Vermont L. etc. Co. v. McGregor*, 5 Idaho, 512, following rule; *Curtis v. Bunnell etc. Co.*, 6 Idaho, 305, applying rule where amendment merely stated that certificate of acknowledgment of mortgage by married woman by inadvertence failed to show privy examination.

#### 60 Cal. 299-300. LEONARD v. TYLER.

**Failure to Pay Installments of a note, by which default the whole note became due at option of payee; a demand of payment of full amount due before commencing action is a sufficient exercise of the option, p. 300.**

Cited in *Hewitt v. Dean*, 91 Cal. 8, where same doctrine is applied to a note giving power to foreclose for full amount on failure to pay the interest when due; *Maddox v. Wyman*, 92 Cal. 676, applying the same principle to a mortgage, to secure a note payable by installments, which provided that on failure to make any payment the mortgagor might realize and from the proceeds pay the whole amount specified in the note; *Adams v. Rutherford*, 13 Oreg. 89, holding that a provision that interest shall be paid at stated periods, and that in case of default the creditor might insist on payment of his whole debt at his option, is not illegal; *Chase v. National Bank*, 1 Tex. Civ. App. 598, holding that no declaration by a mortgagee of his option to treat the

principal debt as due, on default of payment of interest, was necessary before proceeding to sell.

**60 Cal. 301-304. TROBOCK v. CARO.**

Service of Notice of Appeal on adverse party being required by section 974 of the Code of Civil Procedure; without such service the appeal is ineffectual, and the appellate court acquires no jurisdiction, pp 303, 304.

Cited in *Dalzell v. Superior Court*, 67 Cal. 454, holding that service of notice of appeal is a jurisdictional fact, and, if statutory service has not been made, the appellate court obtains no jurisdiction and the appeal is dismissible ex mero motu, or, on motion of respondent, for want of jurisdiction; *Matthews v. Superior Court*, 70 Cal. 528, also to same effect.

**60 Cal. 308-313. ESTATE OF EASTMAN.**

**Corporation.**—Statutes with reference to will be continued in force by code, p. 309.

Cited in *Home etc. Assn. v. Nolan*, 21 Mont. 214, construing local statutes similarly.

**60 Cal. 314-318. HARNEY v. CORCORAN.**

**Amendment of Answer** is within the discretion of court. When the complaint alleged, and answer admitted, ownership, it is not error to refuse to allow an amended answer denying ownership "on information and belief," pp. 316, 317.

Cited in *Harney v. McLeran*, 66 Cal. 36, where it was held that an answer which denied ownership only on the ground that defendant had not sufficient information or belief to answer the allegation of ownership was a sufficient denial to support a motion for nonsuit where the plaintiff produced no evidence in support of his allegation; *Bank of Woodland v. Heron*, 122 Cal. 110; and note to 76 Am. Dec. 540.

**Amendment of Complaint by Erasing Names** of certain defendants not served is not such amendment as need be served on defendants, p. 317.

Approved in *Curtis v. Bunnell etc. Co.*, 6 Idaho. 305, applying rule when amendment merely stated that certificate of acknowledgment by married woman by inadvertence failed to show privy examination.

**60 Cal. 341-349. MORGAN v. MENZIES.**

**Allegation of Demand** of payment of and nonpayment by principal in action against sureties is absolutely necessary when the undertaking

of the sureties is that the principal will pay. The breach of the contract, being an essential part of the cause of action, must in all cases be stated in the declaration, pp. 348, 349.

Cited in *Pierce v. Whiting*, 63 Cal. 542, where the rule is stated that where the duty to pay does not arise until after demand, there must be a demand in fact before suit is brought; (this case was brought against sureties to an undertaking given under section 555 of the Code of Civil Procedure, which provides specifically for a demand, and the rule announced in the principal case was held not to be of universal application); *De Costa v. Comfort*, 80 Cal. 506, holding that a party suing upon a life insurance policy must show a breach of the contract, and that the policy is unpaid, else his complaint states no cause of action, p. 106; *People v. Clough*, 16 Colo. App. 128, in action on bond given by purchaser of state lands, when bond was in alternative either to pay or vacate premises, plaintiff must allege and prove failure of performance of both alternative conditions. Distinguished in *Coburn v. Brooks*, 78 Cal. 445, holding that demand was not necessary to be alleged or proved in an action against sureties to a bond given for the purpose of taking possession of property sought to be condemned for public use under section 1254 of the Code of Civil Procedure. The general rule is stated to be that no notice or demand is necessary where one guarantees the act of another unless the contract requires it. Referred to in *Coburn v. Brooks*, 78 Cal. 448, where it is shown that the undertaking mentioned in the case of *Pierce v. Whiting* (*supra*) was given under a code section specifically providing for a demand. Distinguished in *State v. Biesman*, 12 Mont. 13, where the point of appeal was that complaint had failed to state facts sufficient to constitute a cause of action by failing to allege demand of payment on the sureties.

Omission to Allege a Breach cannot be aided or cured even by a verdict, p. 349.

Referred to in *Morgan v. Menzies*, 65 Cal. 243 (a retrial of the principal case), holding that a demand could not be made after the commencement of the action, except as the basis of a new action. Cited in *Richards v. Travelers' Ins. Co.*, 80 Cal. 507, holding that the doctrine that a defective pleading may be absolutely cured by verdict has no application where there is an entire absence of a material allegation; *Ballentine v. Willey*, 2 Idaho, 1207, to same effect; *Miller v. Pine Co.*, 2 Idaho, 1206, 35 Am. St. Rep. 290, where the caption of the complaint shows that defendant is a corporate body, there must be an allegation that the defendant is a corporation.

City and county need not give undertaking on attachment, p. 346.

Cited in *San Luis Obispo Co. v. Greenberg*, 120 Cal. 304, sustaining similar statutory waiver of bond from county.

**60 Cal. 349-351. PEOPLE v. SAN FRANCISCO GAS LIGHT CO.**

Dockage, Wharfage and Tolls can only be collected by the state board of harbor commissioners upon wharves, which constitute portion of a street ending or fronting upon the waters of the bay. The gas works' (Potrero) wharf is not such a wharf, pp. 350, 351.

Referred to in People v. San Francisco Gas Light Co., 60 Cal. 358, which decides the same point on an agreed case. Cited in Soule v. Pope, 60 Cal. 569, affirming the same principle as to Berry street, between Second and Third streets.

**60 Cal. 358-360. JOSEPH v. DOUGHERTY.**

Acknowledgment of a Mortgage by a married women is necessary to its complete execution, and is part of the execution; Civil Code, sections 1186 and 1187, p. 360.

Cited in Tolman v. Smith, 74 Cal. 350, holding that a mortgage by a married woman is an "instrument and conveyance" which must be acknowledged, as provided by section 1186 of the Civil Code, in order to become valid; Moore v. Hopkins, 83 Cal. 273, holding that the certificate of acknowledgment of a notary to a release and receipt is, by section 1948 of the Code of Civil Procedure, made *prima facie* evidence only, and can be contradicted, but the notary's certificate to a mortgage by a married woman is conclusive evidence, the acknowledgment being a part of and essential to due execution; Smith v. Biscailuz, 83 Cal. 358, holding that a recital in a decree of sale that the guardian "duly executed a bond" involves the performance of all acts required by the statute in relation thereto, including its delivery to the judge; Banbury v. Arnold, 91 Cal. 608, holding that a contract by a married woman to sell her separate real estate is not valid unless duly acknowledged; Banbury v. Arnold, 91 Cal. 611, holding that the attaching of a notarial certificate of acknowledgment of a deed by a married woman was a purely ministerial act, and did not form part of the execution of the deed; Le Mesnager v. Hamilton, 101 Cal. 539, holding that the word "execute," as used in section 1186 of the Civil Code with regard to acknowledgments of deeds by married women, does not import the "delivery" of the instrument.

**60 Cal. 360-361. DURKIN v. BURR.**

Sale Under Deed of Trust will not be enjoined, p. 361.

Cited in Partridge v. Shepard, 71 Cal. 478, holding that a deed of trust given to secure the payment of money passed the legal estate; Savings Society v. Burnett, 106 Cal. 528, to same effect; First Nat. Bank v. Bell Co., 8 Mont. 45, holding that a deed by trustees under a deed of trust was valid without foreclosure; Sacramento Bank v. Alcorn, 121 Cal. 382 (quoted in note, 73 Am. St. Rep. 100), noted under Bateman

v. Burr, 57 Cal. 480. Distinguished in Brown v. Bryan, 6 Idaho, 16, trust deed executed to secure given debt payable at specified time is a mortgage and cannot be foreclosed by notice and sale under power of sale in such trust deed.

**60 Cal. 361-362. LE BLANC v. CRAWFORD.**

Holding Over upon a written lease implies a promise to pay same rent, but there is no such implication when there is an express contract from year to year, p. 362.

Cited in note to 91 Am. Dec. 565.

**60 Cal. 362-367. SWEENEY v. STANFORD.**

Judicial Notice.—Appellate court does not take judicial notice of rules of superior court, p. 367.

Cited in note to 89 Am. Dec. 689.

**60 Cal. 367-372. McCOPPIN v. McCARTNEY.**

Mortgage Tax is payable in the first instance by the mortgagee, whether the mortgage was executed before or after the adoption of the constitution, p. 371.

Cited in Hay v. Hill, 65 Cal. 384, holding that a mortgagor should be allowed sums paid by him after the constitution for mortgagee's taxes as payments on the mortgage debt, where there is no contract that he shall pay all taxes; Sanford v. Savings Society, 80 Fed. Rep. 59, holding that the provision of the constitution requiring separate assessment and taxation of the interests of mortgagor and mortgagee applied to mortgages made before the adoption of the constitution, where the only stipulation was for a fixed rate of interest; and note to 79 Am. Dec. 496.

Taxes on Mortgage.—When a mortgagor contracts to pay all taxes, a mortgagee may, notwithstanding he is obliged, under the new constitution, to pay the tax in the first instance, enforce his contract against the mortgagor, p. 371.

Cited in dissenting opinion in Germania Trust Co. v. San Francisco, 128 Cal. 603, noted under Central Pac. etc. Co. v. Board, 60 Cal. 35; New England Co. v. Vader, 12 Saw. 74, 28 Fed. Rep. 273, holding it was the duty of the mortgagee under the Oregon tax laws to pay the mortgage taxes irrespective of any agreement with the mortgagor on the subject.

**60 Cal. 372-376. NEWMAN v. BIRD.**

Verification of Pleading by a person not a party to the action can only be made when the facts are within the knowledge of the verifier, p. 373.

Cited in *Silcox v. Lang*, 78 Cal. 123, holding that as a person not a party can only verify by reason of the fact that he has personal knowledge of the facts, therefore he cannot verify from information and belief.

#### 60 Cal. 380-381. **PARKER v. ALTSCHUL.**

All presumptions not contradicted by or inconsistent with the record are in favor of correctness of judgment, p. 381.

Cited in *Lyons v. Roach*, 84 Cal. 29, holding that a recital in a judgment that a defendant appeared by an attorney who was present on the trial thereof, must be taken as *prima facie* true; *Paige v. Roeding*, 96 Cal. 391, holding that where two sets of findings and judgment of different dates are brought before the appellate court, then, in the absence of any showing to the contrary, it must be presumed circumstances arose which justified the trial court in setting aside the first findings and judgment and in filing the second set; *Cockrill v. Clyma*, 98 Cal. 126, holding that if an order of the trial court is warranted by any possible state of facts not contradicted by the record, it must be presumed in justification of the action of the court that such state of facts existed; *Von Schmidt v. Von Schmidt*, 104 Cal. 550, holding that upon an appeal from a judgment upon the judgment-roll alone, all intendments will be made in support of the judgment; *Schmidt v. Oregon Co.*, 28 Or. 25, 52 Am. St. Rep. 762, holding that where a decree was entered at the express request of plaintiff and with consent of defendant it will be presumed that plaintiff consented to the form of the decree as entered; *Galvin v. Palmer*, 134 Cal. 429, noted under *Drake v. Duvnick*, 45 Cal. 455; *State v. Perry*, 4 Idaho, 243, following rule; *State v. Preston*, 4 Idaho, 223, unless record affirmatively shows otherwise, presumption is that reporter took down all oral instructions.

#### 60 Cal. 387-396. **FARMERS' BANK v. STOVER.**

Sureties, in defending an action on a joint note, must aver and prove that the obligee not only knew of the fact of suretyship as between them and their co-obligor, but consented to deal with them in that capacity, p. 392.

Cited in *Leeke v. Hancock*, 76 Cal. 130, holding that one of two joint makers of a note may be a surety only as between himself and his copromisor, while as to the payee, his apparent and real character is that of principal; *Casey v. Gibbons*, 136 Cal. 371, but holding evidence insufficient to prove suretyship; *Bank v. De Shorb*, 137 Cal. 692, noted under *Harlan v. Ely*, 55 Cal. 340.

Rate of Interest charged by national banks, if greater than that allowed by the law of the state, does not constitute a defense to the action, and in California any agreed rate of interest may be charged, p. 393.

Approved in *California Bank v. Ginty*, 108 Cal. 151, 152, to same effect. Cited in *Rockwell v. Bank*, 4 Colo. App. 569, noted under *Hinds v. Marmolejo*, 60 Cal. 229.

**Amendment of Pleadings** should be allowed at any stage of the trial when it is necessary for the purposes of justice, p. 396.

Cited in *Riverside Co. v. Jensen*, 73 Cal. 553, as to the filing of an amended complaint; *Walsh v. McKeen*, 75 Cal. 521, to same effect as the principal case; *Sharon v. Sharon*, 77 Cal. 105, holding that the appellate court will not interfere with the exercise of the discretion of the trial court in allowing amendments unless it has been manifestly abused; *Chatfield v. Williams*, 85 Cal. 521, holding that where the complaint alleged tender of the balance of purchase money which the answer failed to properly deny, the court should have allowed the answer to be amended by denying that any tender was made, when there was nothing in the record to show that the application to amend was not made in good faith; *Guidery v. Green*, 95 Cal. 633, holding that if defendants could establish the facts presented in the proposed amendments, they would constitute a defense and the amendments should be allowed; *Burns v. Scooffy*, 98 Cal. 276, holding there should be liberality in permitting amendments to facilitate the production of all the facts; and note to 85 Am. Dec. 231.

**Novation.**—Evidence tending to prove that an individual note and mortgage had been accepted as a substitute for the note sued upon, for the purpose of extinguishing the obligation arising from it or of releasing the parties to it, should be admitted, as the transaction constitutes a defense by way of novation, p. 395.

Cited in *Guidery v. Green*, 95 Cal. 635, holding that an offer to prove orally an agreement to substitute a subsequent written agreement for the original agreement was in effect an offer to prove a novation, and should have been allowed.

**60 Cal. 396-399. HAYES v. WETHERBEE.**

**Additional Findings** filed by the court of its own motion prior to the entry of judgment, to supply an omission in finding on all the issues raised, are within the authority of the trial court, p. 399.

Cited in *Spaulding v. Howard*, 121 Cal. 199, permitting modification of findings before judgment; *O'Brien v. O'Brien*, 124 Cal. 428, discussing remedies in case of omitted findings; *McGuire v. Lamb*, 2 Idaho, 350, holding that the court had power to amend its findings, after exception taken thereto, and to file further and amend findings before judgment; *Thompson v. Connecticut Co.*, 139 Ind. 353, holding that after entry of judgment the court could supply additional findings of fact, until an appeal is taken or a bill of exceptions is settled and signed by the judge; *North v. Peters*, 138 U. S. 283, holding that the court may make additional findings to cure omissions or imperfect statements.

**60 Cal. 400-403. PEOPLE v. COWELL.**

**Tide Land.**—Frontage of the bay of Monterey in part permanently beneath the waters of the bay, and as to the whole covered by the waters of ordinary high tides, and none of it of any value for agricultural purposes, is not land "reclaimable" within the sense of the law authorizing the sale of reclaimable land, p. 402.

Cited in *Upham v. Hosking*, 62 Cal. 258, holding that land on the shore of the ocean below high-water mark, and including a wharf extending to deep water, cannot be purchased under an application for swamp and overflowed land; and defining tide lands which are subject to sale; *Wilson v. Welch*, 12 Oreg. 359, holding that the channel of a navigable stream below any ordinary stage of high water is not subject to sale by the state.

**County Surveyor.**—His determination as to character of tide land is not binding unless his survey is made officially and for a proposed purchaser, p. 403.

Cited in *Maddux v. Brown*, 91 Cal. 525, holding that a certified copy of a survey of swamp lands on record in the office of the county surveyor cannot be used in lieu of a certificate of survey made at the request of proposed purchaser as required by section 3445 of the Political Code; *Heath v. Wallace*, 138 U. S. 587, holding that surveys made for an intending purchaser of swamp lands cannot be acted upon as "segregation surveys," unless made by the state officers.

**60 Cal. 403-406. SWAMP ETC. DISTRICT v. FECK.**

If complaint fails to show that plaintiff had legal capacity to sue, it is not demurrable on the ground that it fails to state facts sufficient to constitute a cause of action, and the omission can only be attacked by answer, p. 405.

Cited in *Los Angeles Ry Co. v. Davis*, 146 Cal. 182, 183, in action by corporation to quiet title failure to aver that plaintiff is corporation is not available on demurrer for want of cause of action or for want of capacity to sue; *Phillips v. Goldtree*, 74 Cal. 155, holding that where the objection to the complaint is as to the legal capacity of plaintiff to sue, it must be taken by demurrer if the grounds for it appear on the face of the complaint, or by the answer if they do not; *Miller v. Luco*, 80 Cal. 280, to same effect as the principal case; *Wilhoit v. Cunningham*, 87 Cal. 459, 460, holding that where an act necessary to complete the plaintiff's title to sue was omitted to be stated in the complaint, the omission must be set up in the answer; *Locke v. Klunker*, 123 Cal. 239, holding complaint not demurrable therefor; *Hardin v. Sweeney*, 14 Wash. 132, holding that in an action by a receiver the question of his legal capacity to sue cannot be raised by general demurrer when the want of capacity does not appear from allegations in the complaint.

Distinguished in *Tibbets v. Cohn*, 116 Cal. 367, holding that in an action by a sheriff as receiver in an insolvency, the contention that the action was one which the statute had specifically authorized the assignee and not the sheriff receiver to bring, did not raise the question of the legality of the sheriff's appointment.

**60 Cal. 406-408. WHITE v. NUNAN.**

The continuance or dissolution of an injunction is a matter within the sound discretion of the court that issues the injunction, and will not be interfered with except in a case of palpable error or abuse of discretion, p. 407.

Cited in *Marks v. Weinstock*, 121 Cal. 55, noted under *Patterson v. Board*, 50 Cal. 344; *Hiller v. Collins*, 63 Cal. 238, holding that a refusal to dissolve an injunction, where averments in an answer "upon information and belief" were set against the positive oath of plaintiff in his affidavit, was not an abuse of discretion; *Bigelow v. Los Angeles*, 85 Cal. 618, supporting an order dissolving an injunction; *Grannis v. Lorden*, 103 Cal. 473, the like in another case; *Washington Co. v. Coeur d'Alene Co.*, 2 Idaho, 407, holding that the granting of a preliminary injunction resting in the sound discretion of the court, the appellate court will not disturb the same, where there is no abuse of discretion.

**60 Cal. 408-410. LOWER KINGS RIVER ETC. DITCH CO. v. CANAL COMPANY.**

The right to have water flow in a river to the head of a watercourse is an incorporeal hereditament appertaining to the watercourse, p. 410.

Cited in *Standart v. Round Valley Co.*, 77 Cal. 403, holding that a water pipe used for conveying water from a reservoir to a mill is an artificial watercourse, and the right to have water flow upon lands through it is a right appurtenant to the real estate, and both are of the nature of real estate and proper subjects of an action to quiet title; *Hayes v. Fine*, 91 Cal. 398, holding that an interest in a ditch and water rights is real property, and within the statute of frauds; *Last Chance etc. Co. v. Emigrant etc. Co.*, 129 Cal. 278, and *Deseret etc. Co. v. McIntyre*, 16 Utah, 406, 407, discussing venue in action for diversion of water from ditch in two counties; *South Tule etc. Co. v. King*, 144 Cal. 452, on point that water right is real property; *Smith v. Denniff*, 24 Mont. 25, 81 Am. St. Rep. 414, on point that such rights pass with the land to which they are appurtenant; *Geddis v. Parrish*, 1 Wash. 590, holding as in the principal case, and that the owner of lands upon which water runs cannot materially divert the water so as to injure others below him who were prior in point of use.

Where Action for Diversion of Water from plaintiff's ditch was commenced in Tulare county and ditch was partly in Fresno and partly in Tulare counties, and point of diversion was in latter, motion to change

venue to Fresno county where defendant had principal place of business was properly denied, pp. 409, 410.

Approved in *Postal Tel. Cable Co. v. O. S. L. Ry.*, 23 Utah, 478, telegraph company may bring action to condemn railroad's right of way which extends through several counties, for construction of its lines in one of such counties.

#### 60 Cal. 412. *BROADRIB v. TIBBETS.*

**Order not Appealable.**—An order denying motion for judgment by default is not one of those enumerated in section 963 of the Code of Civil Procedure, and is therefore not appealable, p. 412.

Cited in *Sharon v. Sharon*, 67 Cal. 201, holding that the remedy by appeal is purely statutory, and therefore an interlocutory order, if not specified in the code, cannot be appealed.

#### 60 Cal. 414-425. *KIDDER v. STEVENS.*

A presumption of law that is disputable, when not changed by evidence, becomes to the court a rule indisputable for the case, and a status once established is presumed by the law to remain until the contrary appears, p. 419.

Cited in *Eltzroth v. Ryan*, 89 Cal. 140, holding it was not necessary for a plaintiff to prove that he had not parted with his title or that he was entitled to the possession; *Bush v. Barnett*, 96 Cal. 204, holding that proof by plaintiff that he was injured while being carried as a passenger raised the presumption that the injury was caused by the negligence of the carrier, and, in the absence of any other evidence, necessitated a verdict in favor of the plaintiff; *Spaulding v. Sones*, 11 Ind. App. 564, as to status under mortgage; *Hobenshell v. South Riverside etc. Co.*, 128 Cal. 631, as to ownership of realty; *Borchard v. Supervisors*, 144 Cal. 16, applying rule to continuance of residence of electors for city incorporation; *Janssen v. Stone*, 60 Mo. App. 407, holding that possession or ownership of either realty or personalty, non-possession or loss, debts, and other conditions, once proved to exist, is presumed to continue until the contrary is shown.

**Allegation of Possession.**—In an action of ejectment it is not material to allege possession at commencement of action; it is only required that seisin should be alleged to exist before the commencement of the action, p. 420.

Dissented from in *Vance v. Anderson*, 113 Cal. 536, holding that a complaint which failed to aver that plaintiff was seised at the date of the suit brought lacked an essential allegation; *Lettelier v. Mann*, 79 Fed. Rep. 82, 83, holding that a complaint which failed to show that letters patent alleged to have been issued to Lettelier were owned by him at the date of filing the complaint was properly demurrable.

**Allegation of Time of Ouster** is not material, and a denial of it raises no material issue, except when mesne profits are in question; it is only required that the ouster should be alleged to exist before the commencement of the action, p. 420.

Cited in *Amador Mine, Limited, v. Amador Mine*, 114 Cal. 348, holding that in an action for unlawful entry and detainer under section 1160 of the Code of Civil Procedure, it was immaterial what particular date was proved as the day of entry, provided that entry was shown at any time within one year next before the commencement of the action; within that period no variation from the date alleged in the complaint was material.

**General Citation.**—*McAfee v. Montgomery*, 21 Ind. App. 202.

#### 60 Cal. 425-427. **SANBORN v. SUPERIOR COURT.**

**Jurisdiction of Justice's Court** is governed by the damages claimed or the value of the property, and if these are less than the damages shown by the complaint, the prayer for judgment is a waiver of the difference, p. 427.

Cited in *Bailey v. Sloan*, 65 Cal. 388, holding that the "ad damnum" clause in the complaint is the test of jurisdiction. Notes to 83 Am. Dec. 103, 98 Am. Dec. 584.

**Jurisdiction.**—Demand is amount stated in ad damnum clause, p. 427.

Cited in *Hoban v. Ryan*, 130 Cal. 98, noted under *Solomon v. Reese*, 34 Cal. 33.

**Writ of Prohibition** will not be granted to prevent the superior court trying an appeal prosecuted by the petitioner for the writ, p. 426.

Distinguished in *Curtis v. Superior Court*, 63 Cal. 435, 436, holding the principal case did not apply when the appeal was not prosecuted by the party applying for the writ.

#### 60 Cal. 428-431. **TIBBETS v. BLADE.**

**Damages for Public Nuisance.**—Complaint must aver special damage to entitle a private person to maintain an action, p. 431.

Cited in *Hogan v. Central Pacific*, 71 Cal. 87, holding that where plaintiff suffered no injury different in character or kind from that which other persons affected by the alleged nuisance had suffered, judgment should go for the defendant.

#### 60 Cal. 431-432. **SCHREIBER v. WHITNEY.**

**Statement on Motion for New Trial** must be signed and certified by the judge of the lower court as required by subsection 4, section 659 of the Code of Civil Procedure, and the defect cannot be cured by stipulation, p. 432.

Cited in Adams v. Dohrmann, 63 Cal. 418, holding that the signature and certificate of the judge are indispensable; Raymond v. Thexton, 7 Mont. 304, holding that the requirement was imperative; Scherrer v. Hale, 9 Mont. 64, holding that no implied authentication by waiver will be recognized; Cited in Slater v. U. P. Ry. Co., 8 Utah, 180, noted under Villac v. Biven, 28 Cal. 410.

#### 60 Cal. 432-435. EX PARTE BALDWIN.

**Punishment by Justice's Court.**—The power of a justice to impose imprisonment for a misdemeanor punishable only by fine is derived from section 1446 of the Penal Code, and is dependent on the nonpayment of the fine, p. 434.

Cited in Ex parte Miller, 82 Cal. 455, holding that a judgment imposing a fine, with the alternative of imprisonment in case the fine was not paid, was in accordance with the code, although the ordinance under which the prisoner was prosecuted did not provide for imprisonment; Ex parte Soto, 88 Cal. 631, Garoutte, J., in his dissenting opinion holding that there was no discretion in the judge as to the terms of the alternative imprisonment under the code. Notes to 55 Am. St. Rep. 267, 268.

#### 60 Cal. 436-438. SOTO v. IRVINE.

**Findings on All Issues.**—When the court fails to make findings on all issues, the decision is against law, and a new trial should be granted on motion for which no statement or bill of exceptions is required, p. 438.

Cited in Cummings v. Conlan, 66 Cal. 414, to same effect as principal case; Reese v. Mining Co., 133 Cal. 288, reversing judgment for omission of material finding; Kaiser v. Dalto, 140 Cal. 170, noted under Knight v. Roche, 58 Cal. 17.

#### 60 Cal. 438-439. EX PARTE BULGER.

**Punishment in Excess of that provided by law is void as to the excess,** p. 439.

Cited in State v. Sheriff, 48 La. Ann. 70, 55 Am. St. Rep. 261, holding that the whole sentence is not void because of an excess; it is invalid only as to the excess. Note to 55 Am. St. Rep. 268.

**Habeas Corpus** is the proper proceeding for procuring discharge of a prisoner under an excessive sentence at the end of the legal term, p. 439.

Cited in Ex parte Cox, 3 Idaho, 534, following rule; Ex parte Degener, 30 Tex. App. 576, holding that the court could, under a writ of habeas corpus, inquire and determine whether the court had jurisdiction to render the particular judgment. Notes to 55 Am. St. Rep. 269, 270.

**60 Cal. 439-443. HARMON v. ASHMEAD.**

Appeal lies from default judgment, p. 442.

Cited in Rhode Island etc. Co. v. City, 19 Wash. 619, noted under Hallock v. Jaudin, 34 Cal. 167.

**60 Cal. 443-447. HALL v. BOYD.**

Judgment in Ejectment does not bind a defendant where the plaintiff deraigns title through a judgment recovered by him in an action against defendant's grantor, commenced after defendant's purchase and to which he was not a party, p. 446.

Cited in Warnock v. Harlow, 96 Cal. 307, 31 Am. St. Rep. 215, holding that a judgment is conclusive only between the parties and their successors in interest by title subsequent to the commencement of the action, so that if it was not adjudged that a grantor was a trustee, his subsequent grantee was not bound.

**60 Cal. 454-458. CHICAGO COMPANY v. LOWELL.**

Pledge by Consignee of goods not in his actual possession is invalid when consignee is a mere factor for sale; the pledgee is bound to require evidence of title, p. 458.

Cited in Ryan v. Stowell, 31 Neb. 123, holding the general rule to be that an agent with authority to sell goods cannot mortgage them. Note to 45 Am. St. Rep. 204.

**60 Cal. 458-467. REDDY v. TINKUM.**

Legislative Authority cannot extend beyond territorial limits of state, p. 467.

Cited in Bennett v. Beadle, 142 Cal. 244, denying right to impose maritime lien on vessel constructed outside of state.

**60 Cal. 467-481; 44 Am. Rep. 61. SCHROEDER v. SCHWEITZER-GESELLSCHAFT.**

New Trial should be ordered by the appellate court when the judgment of the lower court is reversed, except only in cases where it is plain that the party succeeding in the lower court cannot prevail in the suit, pp. 471, 472.

Cited in Oakland Paving Co. v. Bagge, 79 Cal. 441, exemplifying a case when it was proper to order the judgment to be reversed and judgment entered for the appellant; In re Richardson, 94 Cal. 63, holding that where it was doubtful whether the construction placed by the lower court upon one of its findings was the same as that of the appeal court, it was proper to order a new trial; Kingston v. Jubilee Co., 16 Mont. 383, holding that when the appellate court doubted the correctness Cal. Rep.—190.

ness of its order for entry of a judgment for plaintiff, instead of a new trial, it had power to order a rehearing "ex propria motu" within the time fixed by its rules; Coughran v. Wilson, 7 S. Dak. 157, holding that appellate courts were very reluctant to direct a final judgment unless it appeared with reasonable certainty that the respondent would not be able to make a different case on a new trial; Le Saulnier v. Krueger, 85 Wis. 218, where, on a motion for rehearing, the appellate court, on the authority of the principal case, modified its order directing judgment to be rendered for plaintiff, so as to permit the lower court to grant a new trial upon a proper showing.

**Marine Insurance.**—Voluntary deviation from the voyage changes the risk, pp. 476-481.

Referred to in the retrial of the principal case, Schroeder v. Gesellschaft, 66 Cal. 296, holding the law to be as stated in the principal case, and that the terms of the bill of lading did not tend to rebut the existence of invariable practice and usage as to voyages as proved.

#### 60 Cal. 484-496. **McDONALD v. McELROY.**

Covenant does not Bind Heirs of covenantor unless they are named in the covenant, p. 495.

Cited in Maynard v. Polhemus, 74 Cal. 143, holding that this was also the rule at common law.

**Claim for Breach of Covenant.**—In order to reach the heirs for breach of a personal covenant, a claim must be presented, as required by the Code of Civil Procedure, relating to the settlement of the estates of deceased persons, p. 495.

Cited in Maddock v. Russell, 109 Cal. 425, applying the ruling of the principal case to a loss arising within the meaning of a personal indemnity given by a party deceased on a sale of land and in which the heirs were not named.

#### 60 Cal. 497-512. **PEOPLE v. BLAKE.**

The elements constituting a dedication are a clearly indicated intention by the owner to dedicate the land to public use, and an acceptance by the public established by user, p. 503.

Cited in London etc. Bank v. City of Oakland, 90 Fed. 697, holding dedication established under facts stated. Distinguished in City v. Croghan, 81 Cal. 526, on the ground that the circumstances of the cases varied. Cited in notes to 15 Am. St. Rep. 31, 91 Am. Dec. 546, as to what constitutes a valid dedication. Note to 58 Am. Rep. 147, as to how acceptance of dedication may be shown. Note to 57 Am. St. Rep. 752.

**Evidence**—Declarations of owners while in possession are admissible as to extent of ownership, p. 503.

Cited in Williams v. Harter, 121 Cal. 52, noted under Stanley v. Green, 12 Cal. 148. Western Union Oil Co. v. Newlove, 145 Cal. 775, evidence of declarations of lessor under whom plaintiff claims as owner, made in own favor, is inadmissible in action involving boundary.

**Abatement of Nuisance** by obstruction of a public street; action brought by the people of the state is a proper procedure, pp. 497-512.

Cited in People v. Beaudry, 91 Cal. 220, holding that the attorney general may bring an action in the name of the people to enjoin or abate the obstruction of a public street as a public nuisance.

**60 Cal. 513-516. WHITING v. HAGGARD.**

**Statutea.**—The provisions of the act of 1878, relating to fees of county officers in Plumas county (Stats. 1877-78, p. 547), never went into effect, p. 513.

Cited in Whiting v. Plumas County, 64 Cal. 66, and People v. Whiting, 64 Cal. 68, holding that such portions of the act as were not in force at the adoption of the constitution of 1879 never had and never would take effect.

**60 Cal. 517-526. YOUNGER v. PAGLES.**

**Presumption in Finding.**—When an appeal has been taken, it is a conclusive presumption that it is still pending in the absence of a direct finding to the contrary, p. 519. Evidence tending to prove the dismissal of the appeal, but which does not conclusively prove it, will not help to overcome presumption, as the finding of the probative fact cannot be substituted for a finding of the ultimate fact, p. 520.

Cited in Bull v. Bray, 89 Cal. 293, holding that if the facts found do not absolutely exclude all possibility of the absence of fraudulent intent, then the want of a finding of such intent cannot be dispensed with; the ultimate fact must follow necessarily—that is, as a matter of law—from the other facts.

**Juridical Possession.**—Where this has been delivered under a Mexican grant, the grantee may recover to the exterior lines of such possession and grant; but when the limits of the grant have been ascertained in the method provided by law, the lines of juridical possession must yield to the established lines (from dissenting opinion of Myrick, J.), p. 525.

Cited in Valentine v. Sloss, 103 Cal. 220, holding that the patent was conclusive evidence of the survey, and that evidence of the delivery of juridical possession was properly excluded.

**Statute of Limitations** does not begin to run against lands included in Mexican grants until after they have been confirmed and a patent issued, pp. 520-522.

Cited in note to 85 Am. Dec. 172.

**60 Cal. 526-532. MOORE v. MOORE.**

Family Allowance is for benefit of children as well as of widow, p. 530.

Cited in Gorkow's Estate, 20 Wash. 572, noted under Estate of Moore, 57 Cal. 437.

**60 Cal. 532-551. AURRECOECHEA v. SINCLAIR.**

Quieting Title to Patented Lands.—All the facts essential to confer on plaintiff a better right than the patentee must be specifically alleged in the complaint and proven and found in order to lead the court of equity to control the right of a patentee, pp. 548-551.

Cited in Plummer v. Brown, 70 Cal. 546, holding what things must be alleged and proven in order to entitle the alleged owner to equitable relief; Buckley v. Howe, 86 Cal. 601, holding that the state of facts which gave the claimant the prior right would be shown; Pierce v. Sparks, 4 Dak. Ter. 3, holding it must appear affirmatively that claimant's equity is superior to that of the holder of the legal title; that the patent alone stood between him and the legal title, and that if that were out of the way, he would be entitled to the patent.

Pleading.—Conclusions of law are insufficient, p. 549.

Cited in Callahan v. Broderick, 124 Cal. 83, holding complaint insufficient for want of statement of issuable facts.

Selection by State of Lieu Lands cannot be made until the lands are surveyed and become part of the public domain of the United States, p. 546.

Approved in United States v. Curtner, 14 Saw. 546, 38 Fed. Rep. 9, holding to same effect.

**60 Cal. 551-555. DYER v. PARROTT.**

Street Assessment.—Appeal under section 12 of the Street Law of 1871-72 is the only remedy for correction of an error in an assessment which the board had power to correct, p. 555.

Cited in Blanchard v. Ladd, 135 Cal. 215-217, but held inapplicable to error in description of property, and also holding description sufficient; Jennings v. Le Breton, 80 Cal. 12, applying the ruling to an alleged failure of the contractor to complete the work, or misconduct of the superintendent of streets in accepting the work before completion; Girvin v. Simon, 116 Cal. 611, applying the same ruling to section 11 of the act of 1885, which corresponded with section 12 of the act of 1871-72, when it was alleged that a contract for street work had not been properly performed.

**60 Cal. 555-567. NEILSON v. LEE.**

Broker's Commission.—A broker's right to commission on sale is not

lost by the owner's refusal to ratify an agreement for sale made by the broker upon the terms fixed by the owner, p. 565.

Cited in Smith v. Schiele, 93 Cal. 149, holding that the commission is earned by production of a bona fide purchaser for the property on the vendor's terms; Buckingham v. Harris, 10 Colo. 460, to same effect.

**Broker's Commission** is not earned unless he strictly performs the services required of him according to the authority conferred upon him (dissenting opinion of McKee J.), p. 565.

Approved in Wilson v. Sturgis, 71 Cal. 229, in same language.

#### 60 Cal. 569-576. **VOLL v. HOLLIS.**

In an action for forcible entry and detainer testimony as to title should not be admitted, p. 573.

Cited in Knowles v. Crocker Estate Co., 125 Cal. 265, on point that actual possession must be established; Holland v. Green, 62 Cal. 68, holding that evidence of a lease to one of the defendants was properly excluded; Lachman v. Barnett, 18 Nev. 277, the court saying: "If it be true that defendants were entitled to unobstructed passage over the land, they were not justified in attempting to obtain their rights by forcible means. Note to 77 Am. Dec. 552.

Under section 1172 of the Code of Civil Procedure, all entries on the actual possession of another are unlawful, and the question of good or bad faith on the part of the defendant no longer affects the right of recovery, in actions for unlawful entry, pp. 574, 575.

Cited in Kerr v. O'Keefe, 138 Cal. 421, holding forcible entry shown under facts stated; Carteri v. Roberts, 140 Cal. 168, but permitting evidence that entry was permissive; Gore v. Altice, 33 Wash. 337, following rule; Bank of California v. Taaffe, 76 Cal. 630, the court saying: "The question of good or bad faith does not arise under the code in this kind of action (forcible entry and detainer); Giddings v. Land and Water Co., 83 Cal. 101, to same effect. Note to 77 Am. Dec. 554.

**Dismissal of Motion for New Trial.**—When a motion for new trial is dismissed for want of prosecution, it is equivalent to a denial of the motion, and the order is subject to appeal, p. 572.

Cited in Lang v. Superior Court, 71 Cal. 492, to same effect as principal case when a motion for new trial was stricken off the calendar; Winchester v. Black, 134 Cal. 127, applying rule to order dismissing demurrer; Credit Com. Co. v. Superior Court, 140 Cal. 83, noted under Warden v. Mendocino Co., 32 Cal. 655; Galbraith v. Lowe, 142 Cal. 299, discussing review upon appeal of order dismissing motion; Wyman v. Jensen, 26 Mont. 240, ruling upon objection to introduction of evidence because complaint does not state facts sufficient to constitute cause of action may be reviewed on appeal from order denying new trial; United States v. Trabing, 3 Wyo. 146, the court saying: "In other

states it is held that the ruling on a motion for new trial, when that motion is based on errors of law, is reviewable, and is not a matter of discretion."

**60 Cal. 576-578. CUNNINGHAM v. SUPERIOR COURT.**

Petition for Certiorari to Review Judgment rendered in superior court for one hundred dollars must show that court has not jurisdiction, p. 577.

Approved in Fisher v. Union Co., 43 Or. 234, petition for review of action of county court in vacating road, alleging that the road described in notice of application for vacation posted was not same road described in petition for vacation, is sufficient to show want of jurisdiction in county court.

**60 Cal. 578-579. JOHNSON v. SUPERIOR COURT.**

Substitution of Administrator.—Order for may be made ex parte on suggestion of death, p. 579.

Cited in Strong v. Eldridge, 8 Wash. 600, to same effect.

**60 Cal. 579-580. BROWN v. BROWN.**

Divorce.—Appeal from decree awarding community property. Section 148 of the Civil Code gives the appellate court power to review the decision of the lower court as to the disposition of the community property, p. 580.

Cited in Gorman v. Gorman, 134 Cal. 379, noted under Eslinger v. Eslinger, 47 Cal. 62; Sharon v. Sharon, 67 Cal. 213, holding that this appeal is limited to the distribution of the community property; Strozynski v. Strozynski, 97 Cal. 192, holding that the intention of the section was to allow an appeal for any apparent degree of error in the order, though not amounting to an abuse of discretion; Reid v. Reid, 112 Cal. 278, holding that, under the section, the supreme court could deal separately with that part of a decree in a divorce case which disposed of the community property, without disturbing other parts of the decree.

Distribution of One-half of community property on a divorce granted for extreme cruelty modified on appeal to a distribution of three-fourths, p. 580.

Distinguished in Bovo v. Bovo, 63 Cal. 78, where a decree of distribution was not disturbed in view of the facts.

**60 Cal. 581-594; 44 Am. Rep. 70. PEOPLE v. WHEELER.**

Counsel cannot, as part of his argument, read from standard authorities, when not proved to be of recognized authority, not offered as evidence in the case, nor made part of the testimony of any of the wit-

nesses examined; and quotations from medical books are not admissible as testimony when offered independently or when read by witnesses, p. 584-594.

Cited in *People v. Mitchell*, 62 Cal. 412, holding that counsel could not be permitted to argue from the existence of facts as to which no evidence had been offered or introduced; *Gallagher v. Market St. Ry. Co.*, 67 Cal. 14, holding that medical books are not admissible in evidence to prove the nature of the injuries sustained and their probable effect, but qualifying the rule as to books referred to by an expert to sustain his opinions; *People v. Goldenson*, 76 Cal. 348, holding that a medical witness cannot be asked to name the circumstances of the cases he had read bearing on the subject of his testimony; *Bailey v. Kreutzmann*, 141 Cal. 521, holding such evidence improperly admitted; *Eggart v. State*, 40 Fla. 538, but permitting reading when in rebuttal; and to same effect, cf. *Bixby v. Omaha etc. Co.*, 105 Iowa, 300, 67 Am. St. Rep. 304; *Burt v. State*, 38 Tex. Cr. App. 437, sustaining rejection of such reading; *Brady v. Shirley*, 14 S. Dak. 450, on issue as to identity of horse, work on veterinary science is not admissible to determine horse's age from examination of the teeth; *State v. Coleman*, 20 S. C. 451, holding that counsel might use a medical authority for the purpose of framing proper questions, but that he could not read what was said and then ask the witness whether or not he concurred in those views; and explaining the principal case; *Boyle v. State*, 57 Wis. 480, 46 Am. Rep. 45, to same effect as principal case. Note to 59 Am. Dec. 182, 186, on medical works as evidence and authority. Note to 51 Am. Rep. 681, 682.

#### 60 Cal. 594-601. CHAQUETTE v. ORTET.

There is no provision in the statute for the settlement of the account of an administrator who dies before rendering an account; the right and duty to compel such accounting belongs to a court of equity, p. 600.

Cited in *Slater v. McAvoy*, 123 Cal. 439, noted under *Bush v. Lindsey*, 44 Cal. 125; *In re Allgier*, 65 Cal. 230, holding that a settlement of the account of a deceased guardian can only be had in a court of equity, the probate court being without jurisdiction; *Estate of Curtiss*, 65 Cal. 574, holding to same effect as to accounts of a deceased executrix; *Weihe v. Stratham*, 67 Cal. 85, holding that the accounts of an administrator could only be settled in the probate court; *In re Smith*, 108 Cal. 122, holding that on the death of an executor it was the duty of the surviving coexecutor to compel an accounting of the deceased's trust in equity; *Moulton v. Smith*, 16 R. I. 129, 27 Am. St. Rep. 730, holding that, in the United States, probate courts have only the jurisdiction given them by statute, and referring to the principal case and its ruling; *Hubbard v. Urton*, 67 Fed. Rep. 421, holding that where an administrator fraudulently concealed part of the deceased's estate and failed to administer upon it, and the probate court finally settled the

estate brought in, discharged the administrator and distributed the estate to the heirs, the heirs could compel an accounting in equity from the administrator without having another administrator of the estate. Notes to 51 Am. Dec. 534, 73 Am. Dec. 559, and 8 Am. St. Rep. 684. Distinguished in *Trumpler v. Cotton*, 109 Cal. 255, holding that the probate court had power to compel the settlement of the account of an absconding guardian, and it was not necessary to proceed in equity. *Herren's Estate*, 40 Or. 95, county court has jurisdiction of suit by administrator de bonis non to compel representatives and sureties of first administrator, who had died, to settle the accounts of their principal.

**Liability of Sureties** attaches when the liability of the principal is fixed and determined by a court of competent jurisdiction, p. 599.

Cited in *Nickals v. Stanley*, 146 Cal. 726, sureties of administrator not liable to widow for proceeds of insurance policy payable to her and appropriated by administrator and applied to debts of estate; *Evans v. Gerken*, 105 Cal. 313, holding that the decree of distribution had fixed the liability of the executor and was conclusive alike upon the sureties; *Treweek v. Howard*, 105 Cal. 445, holding that the decree of distribution and order of the court approving the account of the executor were binding on the executor and his sureties, though the latter were not parties to the proceeding; *Berkin v. Marsh*, 18 Mont. 155, and 56 Am. St. Rep. 566, holding that the liability of sureties upon a guardian's bond only arose upon the confirmation of the guardian's final report; *Botkin v. Kleinschmidt*, 21 Mont. 6, noted under *Brodrib v. Brodrib*, 56 Cal. 563; *Reither v. Murdock*, 135 Cal. 198, and *Cook v. Ceas*, 143 Cal. 225, 234, noted under *Allen v. Tiffany*, 53 Cal. 16; cited also at p. 201, as to proper remedy against surety of defaulting or dead guardian.

**Sureties Dismissed** at their own request from an action for an accounting against their principal, are bound by the judgment against him and the maxim "allegans contraria non est audiendus" applies, p. 600.

Cited in *Biggins v. Raisch*, 107 Cal. 213, holding that a judgment against the executrix of a deceased executor was conclusive against the sureties on a bond of the deceased executor, though they had been, on their demurrer of improper joinder, dismissed from the action.

#### 60 Cal. 603-604. **WEIL v. BENT.**

**Affidavit of Service** of summons is defective if it fails to state that affiant was over eighteen at the time of service of summons, p. 603.

Cited (under the erroneous title of *Weise v. Bennett*, 9 P. C. L. J. 626), in *Lyons v. Cunningham*, 66 Cal. 43, holding that service of summons by a party other than the sheriff must be proved as required by statute; *Barney v. Vigoureux*, 75 Cal. 377, and *Horton v. Gallardo*, 88 Cal. 582, holding to the same effect.

**60 Cal. 604-610. COOK v. CLAY STREET HILL RAILROAD COMPANY.**

**Measure of Damages.**—Under section 377 of the Code of Civil Procedure, testimony as to the domestic relations of the deceased, is admissible, p. 609.

Cited in Railway Company v. Leverett, 48 Ark. 344, 3 Am. St. Rep. 236, holding that under a statute providing that damages might be awarded with reference to the pecuniary injuries resulting from the death to the wife and next of kin, it was right to show the pecuniary damage suffered by plaintiff (mother) as next of kin; Nehrbas v. Central Pacific Co., 62 Cal. 336, holding that the jury is not limited to the actual pecuniary injury sustained by a father by reason of the loss of services of his children; Wolford v. Mining Co., 63 Cal. 484, setting aside a verdict of one dollar as "grossly absurd," and holding plaintiff entitled, if at all, to reasonable damages; Cincinnati etc. Co. v. Altemeier, 60 Ohio St. 18, sustaining instructions on damages; Webb v. Denver etc. Co., 7 Utah, 20, and Pool v. S. P. R. R. Co., 7 Utah, 311, noted under Beeson v. Green Mt. etc. Co., 57 Cal. 20; Cleary v. City R. R. Co., 76 Cal. 241, holding that the reasonable damages to which a father was entitled for the killing of his minor child might include not only loss of services, medical attendance, and funeral expenses, but also mental anguish and suffering of the parents; Morgan v. Southern Pacific Co., 95 Cal. 518, 29 Am. St. Rep. 146, setting aside a verdict for twenty thousand dollars for the loss of a female child two years old, and holding that the main element of damage was the probable value of the services of deceased to majority; that sorrow and mental anguish were not elements of damage. Distinguished in Munro v. Dredging Co., 84 Cal. 525, 18 Am. St. Rep. 255, holding that the question of the sorrow, grief, and mental suffering caused a mother by the death of her son did not arise in the principal case. Cited in note to 12 Am. St. Rep. 376.

**60 Cal. 617-622. MEREDITH v. SANTA CLARA MINING ASSOCIATION OF BALTIMORE.**

**Judgment Against Sureties** to an undertaking given to stay execution may be rendered without notice to the sureties, p. 621.

Cited, but doubted, in Mowry v. Heney, 86 Cal. 477, holding the like as to a judgment on an undertaking on appeal; Levy v. Magnolia Lodge, 110 Cal. 309, holding that the constitutional right to notice is waived by signing an appeal bond as surety. Dissented from in Davis v. Heimbach, 75 Cal. 263, the court saying: "It is to be observed that the statute construed in the principal case did not in terms dispense with notice; it was simply silent on the subject"; and suggesting that in view of the importance of an opportunity to be heard, "a right which almost always exists," it ought not to be presumed that the parties contracted with reference to that right; Hitch v. Caruthers, 100 Cal.

102, holding that after a judgment had been entered as satisfied, but afterward revived, the revived judgment could not be enforced against the sureties without notice to them. Cited in note to 38 Am. St. Rep. 714.

**60 Cal. 622-624. OSBORNE v. CLARK.**

**Probative Facts Found.**—When, in such case, the ultimate fact necessarily results, a finding of the probative facts is sufficient, p. 624.

Cited in McCray v. Burr, 125 Cal. 638, noted under *Coveny v. Hale*, 49 Cal. 552; *Water Co. v. Richardson*, 72 Cal. 601, applying the ruling to a finding upon the issue raised by a plea of the statute of limitations; *Bull v. Bray*, 89 Cal. 288, the like in an action to set aside deeds as void against creditors.

**60 Cal. 624-626. REILLY v. REILLY.**

**Alimony Pending Appeal.**—Jurisdiction lies with the superior court; the supreme court has no original jurisdiction therein, p. 626.

Cited in *Grannis v. Superior Court*, 143 Cal. 633, sustaining allowance of counsel fees in proceedings to vacate interlocutory judgment; *O'Brien v. O'Brien*, 36 Or. 95, denying petition made to supreme court pending appeal; *Ex parte Winter*, 70 Cal. 294, holding that after appeal taken from an order for counsel's fees, the trial court had jurisdiction to order defendant to pay further counsels' fees on appeal; but *Ross, J.*, in his dissenting opinion holding that the jurisdiction lay in the appellate court; *Colbert v. Rankin*, 72 Cal. 198, holding that the trial court had jurisdiction of the settlement of a bill of exceptions, although an appeal from the judgment had been taken; *Bohnert v. Bohnert*, 91 Cal. 431, holding that under section 137 of the Civil Code, the power to allow alimony or counsels' fees is not exhausted upon the rendition of the judgment of the trial court; *Bordeaux v. Bordeaux*, 26 Mont. 535, *arguendo*; *Rosenfeld v. Rosenfeld*, 63 Mo. App. 413, holding that before trial temporary alimony was awarded as a matter of course, and after decision and an appeal, the trial court might make additional allowances. Dissented from in *State v. Philips*, 32 Fla. 406, holding that, pending an appeal, the trial court had no such jurisdiction (see comments on the principal case, p. 408); *Prine v. Prine*, 36 Fla. 687, holding that power to award alimony pending appeal lay with the appellate court; *Lake v. Lake*, 17 Nev. 242, holding that only the supreme court had jurisdiction upon appeal to make an allowance for counsels' fees. Note to 60 Am. Dec. 674, as to the granting of alimony pending an appeal.

**60 Cal. 628-630. CROWLEY v. CITY RAILROAD COMPANY.**

An objection that a written release was not denied in manner pro-

vided by the code (section 448 of the Code of Civil Procedure) cannot be raised in the court of appeal, p. 630.

Cited in *Moore v. Copp*, 119 Cal. 432, noted under *Sloan v. Diggins*, 49 Cal. 38; *Kimball v. Richardson-Kimball Co.*, 111 Cal. 397, holding that objection to a defective pleading of a material fact is waived by failure to demur, and cannot be raised for the first time on appeal; *Rankin v. Newman*, 114 Cal. 643, holding that where the question of mental incapacity was not even suggested by the pleadings, but some evidence came before the trial court without objection, that evidence should be considered as bearing on the question; *Quimby v. Boyd*, 8 Colo. 200, holding that where there is a defect in pleading not excepted to in the trial court and treated as raising a proper issue, it cannot for the first time be objected in the appellate court that there was no issue to try; *Teitig v. Boesman Co.*, 12 Mont. 429, explaining the provisions of the Montana code to a defense to an action founded on a written instrument, under the ruling of the principal case; note to 95 Am. Dec. 162.

**Contributory Negligence** is not a defense where defendant had clear opportunity to avoid the accident, p. 630.

Cited in *Harrington v. Los Angeles etc. Co.*, 140 Cal. 522, noted under *Needham v. San Francisco etc. Co.*, 37 Cal. 409.

#### 60 Cal. 631-632. ORIGINAL COMPANY v. WINTHROP MINING COMPANY.

**Local Mining Customs** are not binding if they conflict with the laws of the state or of the United States, p. 632.

Cited in note to 63 Am. Dec. 104. Denied in *Northmore v. Simmons*, 97 Fed. 389 (but cf. 391, 392), as to regulation of prescribed work on location.

#### 60 Cal. 632-639. REDINGTON v. NUNAN.

**Possession of Personal Property**.—Whether property seized by sheriff was, at the time, the property of the plaintiff, is a question for the jury or for the court sitting in place of a jury to determine; it is an inference of fact, and not a presumption of law, p. 639.

Cited in *Dubois v. Spinks*, 114 Cal. 294, holding that what constitutes an immediate delivery or an actual change of possession is a question of fact.

**Expenses in Pursuit of Property** cannot be recovered when the action is for recovery of possession and not for its conversion, p. 639.

Cited in *Harris v. Smith*, 132 Cal. 319, and *Pacific etc. Co. v. Bank*, 109 Fed. 378, noted under *Kelly v. McKibben*, 54 Cal. 192. Distinguished in *Arzaga v. Villalba*, 85 Cal. 103, limiting the ruling to cases where

the complaint seeks only a recovery, and does not allege damages; otherwise if plaintiff makes proper allegations of damage.

**General Citation.**—*Loughlin v. Barnes*, 76 Mo. App. 266.

**60 Cal. 640-642. PEOPLE v. CADD.**

**Reasonable Doubt.**—Full definition of, p. 642.

Approved in *State v. Bridges*, 29 Kan. 141, as a clear definition of the term.

**60 Cal. 645-648. ESTATE OF MONTGOMERY.**

**Delay in Selling.**—There is no statutory time for the sale after the order; if valid reasons for the failure to sell are given, a subsequent petition and an order will be considered as in effect a continuation of the first application and of the proceedings then instituted. p. 648.

Cited in note to 26 Am. Dec. 28, as to what will or will not constitute reasonable delay.

**60 Cal. 651-652. TAYLOR v. McCLAIN.**

**Redemption and Foreclosure.**—The mortgagor's right to redeem and the mortgagee's right to foreclose are reciprocal, and both are, under the statute of limitations, barred at the same time, p. 652.

Held to be the law of the case in *Taylor v. McClain*, 64 Cal. 513, being an appeal from a retrial of the principal case when the complaint was not amended. Cited in *Henderson v. Grammar*, 66 Cal. 338, the concurring opinion of McKee, J., holding that the right of a second mortgagee to redeem property in the hands of first mortgagee expired contemporaneously with his right of action upon his security. Referred to in *Raynor v. Drew*, 72 Cal. 311, on the point that section 346 of the Code of Civil Procedure had not been cited to the court in the principal case.

**60 Cal. 653-664. DASHIELL v. SLINGERLAND.**

In actions brought to recover money, the amount sued for in the complaint exclusive of interest is the test of jurisdiction, pp. 654-657.

Cited in *Lehnhardt v. Jennings*, 119 Cal. 199, on point that prayer alone does not determine jurisdiction; *Harron v. Harron*, 123 Cal. 511, on point that amount involved in appeal from order after judgment does not affect appellate jurisdiction; *Miller v. Carlisle*, 127 Cal. 330, but holding jurisdiction not shown where each of several united claims was for less than jurisdictional amount; *Hoban v. Ryan*, 130 Cal. 98, noted under *Solomon v. Reese*, 34 Cal. 33; *People v. Madden*, 134 Cal. 612, sustaining appeal where judgment was below three hundred dollars, although prayer was far in excess of that amount. Distinguished in

Tyler v. Connolly, 65 Cal. 30, holding the ruling did not apply to a judgment imposing a fine for a contempt. Cited in Bailey v. Sloan, 65 Cal. 388, holding that the "ad damnum" clause in the complaint was the test of jurisdiction; Lord v. Goldberg, 81 Cal. 599, 15 Am. St. Rep. 84, holding to the same effect; Greenbaum v. Martinez, 86 Cal. 461, holding, in an action for recovery of property under three hundred dollars in value and one hundred dollars expended in pursuit, if the total amount claimed exceeded three hundred dollars the court had jurisdiction; Sellick v. De Carlow, 95 Cal. 645, affirming the ruling, but doubting if it applied to a separate, independent order made after final judgment involving money only in an amount less than three hundred dollars; Henigan v. Ervin, 110 Cal. 40, approving the principal case. Note to 83 Am. Dec. 103, as to jurisdiction of supreme court in California. Cited in note to 98 Am. Dec. 664.



## VOLUME LXI.

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### 61 Cal. 1-2. HAGGIN v. CLARK.

**Law of Case.**—When the appellate court indicates data from which amount due plaintiff can be ascertained, it is equivalent to finding the amount due, and establishes the law of case, p. 2.

Referred to in *Haggin v. Clark*, 71 Cal. 445, 448, 449, retrial of the principal case.

### 61 Cal. 3-17. SPRING VALLEY WATER WORKS v. SAN FRANCISCO.

**Constitution of 1879** did not, by changing the mode of appointing the agents for fixing water rates, impair the charter of the company, nor interfere with any of its vested rights; and is not in conflict with the constitution of the United States, pp. 7, 9.

Cited in *Spring Valley W. W. v. San Francisco*, 61 Cal. 27, to same effect, and that under the authority of the principal case the company were relieved from any obligation to furnish water to the city for any purpose free of charge. Same case, p. 30, in concurring opinion of Ross, J., to the same effect; same case, p. 31, in concurring opinion of Sharpstein, J., holding that the provisions of the constitution of 1849 entered into the contract between the state and the company when the latter accepted its charter under the general law of 1858; same case, p. 36, in dissenting opinion of McKinstry, J., holding that the sole change made by the new constitution was that the rates were to be fixed by the supervisors instead of by a mixed commission; same case, p. 39, in dissenting opinion of McKinstry, J., propounding the rule as to the interpretation of a law (or constitution) claimed to confer franchises upon individuals or corporations; same case, pp. 41, 42, 43, in dissenting opinion of McKinstry, holding that the constitution did not relieve corporations formed under the act of 1858 of any duty imposed by the law under which they were organized; same case, p. 46, in dissenting opinion of McKee, J., holding that the power to regulate the use of property dedicated to a public use is governmental. not

contractual. Referred to in same case, p. 50, in opinion of Ross, J. (upon denying petition for rehearing), repeating that there was no such thing as free water under section 19 of article XI of the constitution of 1879. Cited in Jacobs v. Board, 100 Cal. 137, holding that water rates could only be fixed by the board of supervisors. Referred to in 16 Fed. Rep. 632, as a case then pending; San Joaquin etc. Co. v. Stanislaus Co., 90 Fed. 521, on point that irrigation company is a quasi public corporation.

**61 Cal. 18-53. SPRING VALLEY WATER WORKS v. SAN FRANCISCO.**

**Water Rates.**—The duty of fixing water rates is imposed by the constitution on the board of supervisors, or other governing body of the municipality, p. 28.

Approved in Jacobs v. Board, 100 Cal. 137.

**61 Cal. 53-54. PEOPLE v. GIESEA.**

**Bigamy.**—Information need not state where the defendant was first married, p. 54.

Cited in note to 93 Am. Dec. 257, on indictment.

**61 Cal. 54-56. GARRETSON v. SUPERVISORS.**

**Certiorari.**—The return should include nothing but a transcript of the record and proceedings to be reviewed. General rules regulating the manner of giving notice should not be included, p. 55.

Cited in Spring Valley W. W. v. Schottler, 62 Cal. 100, holding that the point that no notice had been given in accordance with a rule prescribed by the board could not be considered; Schwarz v. County Court, 14 Colo. 49, holding that whether a statutory requirement as to the contents of a written statement had been observed could be reviewed on certiorari; Hunter v. Eddy, 11 Mont. 257, holding certiorari did not apply to disputed question of fact (dissenting opinion of De Witt, J.); note to 40 Am. St. Rep. 44, on certiorari, as to assessment and equalization of taxes.

**61 Cal. 59-64. CITY OF LOS ANGELES v. SOUTHERN PACIFIC.**

**Taxation of Occupations within a City.**—Where a city can impose a license tax "for every steam railroad company having a depot in said city," a company whose business extends beyond the city limits is not relieved from the tax, p. 64.

Cited in City of Los Angeles v. Southern Pacific, 67 Cal. 434, as having established the validity of the license tax ordinance; In re Guerrero, 69 Cal. 91, holding that under the constitution of 1879 the city of Los Angeles had power to impose licenses for the purposes of both

revenue and regulation; *Western Union Telegraph Co. v. City of Fremont*, 39 Neb. 701, holding to same effect as principal case; *City of Leavenworth v. Smith*, 5 Kan. App. 171, noted under *City v. Stage Co.* 12 Cal. 134. Distinguished in *Western Union Telegraph Co. v. City of Fremont*, 39 Neb. 710, in dissenting opinion of Irvine, C., holding that the tax referred to in the principal case seemed to be rather upon the privilege of maintaining a depot than a tax upon the occupation, and holding, further (p. 715), that the business of transmitting messages between a city and points without such city is not a business within the city; and *Smith v. Leavenworth*, 5 Kan. App. 171, construing local ordinance. Overruled in *San Benito Co. v. Southern Pacific*, 77 Cal. 520, in view of the decision of the supreme court of the United States in 127 U. S. 1.

**Recovery of License Tax.**—It is constitutional for the charter of a city to prescribe a penalty for violation of an ordinance, and to authorize the bringing of a civil action for recovery of the tax, p. 64.

Referred to in *Mendocino Co. v. Bank*, 86 Cal. 258, as distinguishing *City of Santa Cruz v. Railroad*, 56 Cal. 143, from the principal case. Cited in *Western Union Telegraph Co. v. City of Fremont*, 39 Neb. 703, holding that where an ordinance authorized the collection of taxes by suit, payment might be enforced by an ordinary action at law.

#### 61 Cal. 65-70. CITY OF LOS ANGELES v. WATER COMPANY.

**Taxation in Derogation of Grant.**—Where a city reserves a consideration for privileges granted, it cannot subsequently, without the consent of the grantee, increase the amount agreed to be paid, p. 67.

Cited in *City of Los Angeles v. Los Angeles etc. Co.*, 177 U. S. 577, construing contract between city and water company. Distinguished in *Los Angeles v. Southern Pacific*, 67 Cal. 435, holding that the grantees of right of way over city property, where no compensation was received for the grant, were liable to a license tax for operating the road.

#### 61 Cal. 70-71. HANCOCK v. BURTON.

**Venue.**—Actions for recovery of real property must be commenced in the county where the property is situated, but, under section 397 of the Code of Civil Procedure, may be tried elsewhere, p. 71.

Cited in *Staacke v. Bell*, 125 Cal. 314, further holding prayer of complaint not conclusive as to purpose of action; *Warner v. Warner*, 100 Cal. 15, holding that sections 128, 395, and 397 of the Code of Civil Procedure, must be read together, and were not inconsistent; *Duffy v. Duffy*, 104 Cal. 604, as to place of trial of an action relating to real estate.

#### 61 Cal. 72-80. COOK v. PENDERGAST.

**Change of Venue.**—When a motion for change of venue, on the ground Notes Cal. Rep.—191.

that the county designated is not the proper county, is made before issue joined, it cannot be resisted on the ground of convenience of witnesses, p. 76.

Cited in *Armstrong v. Superior Court*, 63 Cal. 411, to same effect, motion being made before answer; *Heald v. Hendy*, 65 Cal. 322, holding that a motion for change demanded at the time of demurrer cannot be postponed by the court until the answer is filed; *Smith v. People*, 2 Colo. App. 105, holding that where the complaint showed that the property was in another county the court could not retain jurisdiction after motion to change the venue was made; *McDonnell v. Collins*, 19 Mont. 373, holding that an action on account should be brought in the county in which both defendants resided; *Smail v. Gilruth*, 8 S. Dak. 290, holding that the right to change venue, if motion duly made, was absolute; *McSherry v. Mining Co.*, 97 Cal. 641, to same effect; *Wallace v. Owlesley*, 11 Mont. 221, to same effect, and holding that defendant's right must be determined by conditions existing at the time he first appeared, and the convenience of witnesses could not be considered until after answer; note to 74 Am. Dec. 243, on action not brought in proper county. Denied in *Allis v. White*, 70 Minn. 189, under local statutes.

**Convenience of Witnesses.**—A motion for change of venue on this ground will not be granted before answer; the question cannot be determined until issue of fact is joined, p. 79.

Cited in *Thomas v. Placerville Mining Co.*, 65 Cal. 801, holding that neither party can move until after answer.

**Waiver of Right to Change of Venue** is implied by section 396 of the Code of Civil Procedure, if defendant do not, when he first appears either by answer or demurrer, file an affidavit and make demand in writing, p. 78.

Cited in *Wadleigh v. Phelps*, 147 Cal. 543, following rule; *Hearne v. De Young*, 111 Cal. 376, holding that the right may be waived, but, when the venue is properly laid as to real defendant, he cannot, by waiving his right, force a change of venue on the plaintiff; *Scott v. Hoover*, 99 Fed. 249, applying rule to case under federal statute, where demurrer alone is filed.

**Change of Venue.**—Motion on the ground that an impartial trial cannot be had must be made after answer, p. 79.

Cited in notes to 74 Am. Dec. pp. 244, 245, on impartial trial in county impossible.

#### 61 Cal. 88-89. **ANDERSON v. HANCOCK.**

**Description of Land** in tax deed sufficient if described by name and metes and bounds capable of identification, p. 89.

Referred to in *Anderson v. Hancock* (being an appeal from a new

trial of the principal case), 64 Cal. 455, holding that the former appeal only established the "law of the case" as to the sufficiency of the description.

**61 Cal. 90-92. CALIFORNIA SOUTHERN RAILROAD v. KIMBALL.**

**Condemnation of Land for Railroad Purposes.**—Section 1249 of the Code of Civil Procedure is consistent with section 14 of article 1 of the present constitution, p. 91.

Cited in Tehama County v. Bryan, 68 Cal. 65, holding that the value of land to be condemned for a public highway was to be ascertained as at the date of the summons in the case; San Jose R. R. Co. v. Mayne, 83 Cal. 568, to the like effect as the principal case.

**Condemnation for railroad purposes may precede grant of right to operate road by city,** p. 91.

Cited in Stoughton v. Paul, 173 Mass. 150, applying rule to condemnation for water supply; Union Pacific R. R. v. Colorado Postal Tel. Co., 30 Colo. 143, in proceeding to condemn right of way for telegraph line over railroad right of way, fact that petitioner has not obtained permission to erect line through cities along route is immaterial.

**61 Cal. 92-100; 44 Am. Rep. 542. DE THOMAS v. WITHERBY.**

**Replevin.—Alternative Judgment** is unnecessary where defendant would not be prejudiced by judgment for value only, p. 97.

Cited in Faulkner v. Bank, 130 Cal. 266, and Erreca v. Meyer, 142 Cal. 311, noted under Brown v. Johnson, 45 Cal. 76.

**Replevin.**—A plaintiff, not the owner, who takes goods out of the possession of the real owner, holds them at his own risk, and is not excused from satisfying a judgment for return of the property or its value by a plea that the property has been lost, even by the act of God, p. 100.

Cited in Whetmore v. Rupe, 65 Cal. 238, holding that, under the California code, judgment for the value of property wrongfully taken operates only in case a return cannot be had; Claudius v. Aguirre, 89 Cal. 504, holding that a judgment under section 667 of the Code of Civil Procedure must be in the alternative, return or value; Blaker v. Sands, 29 Kan. 555, to same effect as principal case; Byrne v. Lynn, 18 Tex. Civ. App. 260, quoting Whetmore v. Rupe, 65 Cal. 238; note to 35 Am. St. Rep. 630, as to destruction of property sued for in replevin.

**61 Cal. 101-103. ORENA v. SHERMAN.**

**Assessment.**—"Neglected to return statement" is a sufficient entry by the assessor under section 3629 of the Political Code, p. 103.

Cited in People v. Pittsburg R. R. Co., 67 Cal. 627, holding that the entry was equivalent to a declaration that the assessor had made a demand for the statement, and that it had been refused.

**61 Cal. 104-107. RECLAMATION DISTRICT v. EVANS.**

**Reclamation Districts.**—The provisions of the Political Code relating to the assessment of lands within reclamation districts are not unconstitutional. Because of the necessary suit, the owner is provided with notice and opportunity of contesting the assessment before it becomes a lien, and may, by way of defense, show that the assessment is not in proportion to benefits, pp. 106, 107.

Cited in *Reclamation District v. Goldman*, 65 Cal. 638, holding to same effect as to the fourteenth amendment of the constitution of the United States; *Lent v. Tillson*, 72 Cal. 413, holding, on same grounds, that the act of 1876 for the widening of Dupont street in San Francisco was not unconstitutional; holding, also, same case, p. 420, that the claim that there should have been a hearing by the commissioners before the assessment was made had been disposed of by the principal case; *Gwynn v. Dierssen*, 101 Cal. 566, holding that under a swamp-land assessment an action against the person assessed does not bind the real owner if not a party to it; *Reclamation District v. Phillips*, 108 Cal., pp. 310, 312, 313, holding that the rule of the principal case depended on the finding that the landowner had opportunity to be heard; further, p. 321, that evidence should be admitted to prove that defendant's land was not benefited and was arbitrarily assessed; also, page 322, that the constitutional question of due process of law had been disposed of by the principal case; *Reclamation District v. Sels*, 117 Cal. 163, holding that an action under section 3493½ of the Political Code is not an action in personam, but one of the steps by which the lien of the tax is fixed upon the property; *Reclamation Dist. v. McCullah*, 124 Cal. 177, quoting *Reclamation Dist. v. Sels*, 117 Cal. 164; *Garvin v. Daussman*, 114 Ind. 437, 3 Am. St. Rep. 643, holding that an assessment under a city ordinance, which could only be enforced by a suit in foreclosure, was constitutional; *City of St. Louis v. Ranken*, 96 Mo. 506, holding that when a tax was to be assessed according to benefits, the apportionment was a quasi judicial proceeding, in which, at some stage, the owner had a right to be heard before a charge finally attached to the property; *Hagar v. Reclamation District*, 111 U. S. 711, holding that in an action to enforce a reclamation assessment under the laws of California any defense going either to its validity or amount could be pleaded.

**61 Cal. 108-109. BOWER v. RANKIN.**

**Keepers' Fees** under attachment are not recoverable, unless fixed or taxed by the court, p. 109.

Cited in *Shumway v. Leakey*, 73 Cal. 262, to same effect.

**Complaint to Recover keeper's fees must allege that they have been allowed by the court**, p. 109.

Cited in *National Bank v. Kickbush*, 78 Wis. 222, holding that the sheriff could not legally claim the further statutory compensation in the absence of the required certificate.

#### 61 Cal. 109-116. **NATIONAL BANK v. GUERRA.**

**Homestead.**—Adverse possession cannot be claimed by a wife as against her husband, or those claiming under him, so long as he remains the head of the family, p. 113.

Cited in *Mauldin v. Cox*, 67 Cal. 391, holding that during coverture, and while he remains head of the family, the husband could not claim the homestead adversely to his wife; *Harper v. Budd*, 89 Ala. 372, holding that adverse possession could not exist between husband and wife as to personal property while the marital relation continued; *Neilson v. Grignon*, 85 Wis. 555, holding that the claim of a widow who continued in possession of property after the death of her husband was subordinate to that of the husband's mortgagee; note to 18 Am. St. Rep. 115, as to title by adverse possession as between husband and wife.

**Undivided Interest in Land** cannot be made subject to homestead rights, p. 111.

Cited in *Estate of Carriger*, 107 Cal. 620, holding it could not be set aside as a probate homestead; *Rosenthal v. Merced Bank*, 110 Cal. 202, holding land held in cotenancy or tenancy in common could not be homesteaded in favor of one of the cotenants; note to 63 Am. Dec. 124, as to whether homestead rights can attach to an undivided interest in lands.

#### 61 Cal. 116-119. **FRIEDLANDER v. MINING COMPANY.**

**Contempt of Court.**—The employment of language by counsel in the appellate court, manifestly disrespectful toward a judge of the superior court, constitutes contempt of the supreme court, p. 117.

Cited in *Sears v. Starbird*, 75 Cal. 92, 7 Am. St. Rep. 124, example of ruling. Brief ordered stricken from the file.

#### 61 Cal. 119-121. **HUTCHINSON v. SUPERIOR COURT.**

**Verdict Responsive to Issue** will be sustained, although irregular in form, if it can be made certain by reference to the pleadings, pp. 120, 121.

Cited in *Johnson v. Visher*, 96 Cal. 313, sustaining a judgment for possession and for a given sum as a general verdict, with a special finding of the value of the rents and profits; *Josephi v. Mady Co.*, 13 Mont. 202, holding that when the answer admitted the indebtedness and the amount, a general verdict was sufficient.

**61 Cal. 122-128. CASE OF LOWENTHAL.**

**Disbarment of Attorney.**—The remedy is by certiorari in the nature of a writ of error, or by an appeal or other appropriate proceeding, pp. 126, 127.

Cited in note to 52 Am. Dec. 302, on mandamus, the proper remedy for reinstatement.

**Revocation of Attorney's license to practice,** when admitted in another state, will be justified by the supreme court of its own motion, should it appear that the license was obtained by means of fraudulent artifices or concealment, p. 123.

Cited in note to 45 Am. St. Rep. 83, on unprofessional conduct.

**61 Cal. 128-131. PEOPLE v. SPENCER.**

**Misconduct of Attorney.**—To appear both for plaintiff and defendant in the same action is a violation of attorney's professional duty, p. 130.

Cited in *In re Cowdery*, 69 Cal. 50, 58 Am. Rep. 550, holding that the court will restrain such action, and that it was the duty of the court to disbar the attorney; *In re O-*—, 73 Wis. 621, holding to same effect, and that the penalty is disbarment; *Ex parte Ditchburn*, 32 Or. 543, discussing misconduct generally and decreeing suspension under facts stated; *In re Voss*, 11 N. Dak. 551, disbarring states' attorney for neglecting to prosecute proceedings for abatement of nuisance and rendering professional assistance to defendant; note to 95 Am. Dec. 340, on "Suspension"; note to 45 Am. St. Rep. 81, on "Unprofessional conduct."

**61 Cal. 131-134. PARNELL v. HAHN.**

**Estoppel by Judgment.**—A plaintiff in an action for damages for breach of an alleged contract is estopped by an adverse judgment in a former case, in which he, as a defendant, pleaded title under the same contract, p. 133.

Cited in *McLennan v. McDonnell*, 78 Cal. 278, applying the ruling to a judgment in an action to quiet title; *Wolverton v. Baker*, 86 Cal. 594, holding that a decree in equity may, in a proper case, be pleaded as an estoppel or bar to a subsequent action at law; *Hardy v. Hardy*, 97 Cal. 131, sustaining the estoppel of a previous judgment in an action for permanent alimony; note to 54 Am. St. Rep. 225, on equitable defenses to former action.

**Judgment is Conclusive upon all the questions involved in an action,** and upon which it depends, or upon matters which, under the issues raised, might have been litigated and decided in the case, and the presumption of law is that all such issues were actually heard and decided, p. 132.

Cited in Benson v. Shotwell, 87 Cal. 60, applying the ruling to an action to quiet title; Woolverton v. Baker, 98 Cal. 632, to same effect as the principal case; Crew v. Pratt, 119 Cal. 149, holding that a probate decree of final settlement and distribution, which incidentally involved the determination of the validity of a trust, was an adjudication on the point which, in the absence of an appeal, was conclusive; Phelan v. Quinn, 130 Cal. 379, holding judgment in prior action a bar under facts stated; dissenting opinion in Newhall v. Hatch, 134 Cal. 276, main opinion holding former judgment not a bar; Wells v. Edmison, 4 Dak. Ter. 51, holding that within the general principle of res adjudicata the judgment of a court of competent jurisdiction was final and conclusive, not only as to any matter of defense actually determined, but as to every other defense or remedy which might have been interposed.

#### 61 Cal. 134-136. PEOPLE v. DE COURSEY.

Indictment Charging Two Offenses of larceny and embezzlement is forbidden by section 95 of the Penal Code, pp. 135, 136.

Cited in State v. Smith, 2 N. Dak. 518, applying same ruling to burglary and larceny; note to 58 Am. Dec. 248, 249, on rule as to felonies.

#### 61 Cal. 136-137. PEOPLE v. HARRIS.

**Peremptory Challenges.**—When a prisoner is charged with an offense, and, having been previously convicted of a similar crime, the offense is punishable at the discretion of the court with imprisonment for life, he is entitled to twenty peremptory challenges, p. 137.

Approved in People v. O'Neil, 61 Cal. 436.

#### 61 Cal. 137-140. PEOPLE v. ALECK.

Plea of Not Guilty puts in issue all the material averments in the indictment, p. 138.

Cited in Craig v. State, 49 Ohio St. 417, to same effect, and that thereby the burden is on the prosecution to prove all the material facts alleged.

**Confession of Confederate,** made after the act was fully accomplished, cannot be admitted in evidence, p. 138.

Followed in People v. Uwahah, 61 Cal. 142. Cited in People v. Gonzales, 71 Cal. 575, holding the like as to declarations by an eye-witness, made in the absence of the defendant; People v. Irwin, 77 Cal. 505, the like as to declarations of a co-conspirator; Lamb v. Harbaugh, 105 Cal. 696, to same effect, where there could be no severing of damages, as to evidence of conversations had with certain of the defendants; State v. Johnson, 40 Kan. 268, to same effect as to conspiracy or crime involving conspiracy; State v. Hinkle, 33 Or. 98, noted under People v.

Moore, 45 Cal. 19; Williams v. State, 40 Tex. Cr. App. 569, holding such evidence improperly admitted.

**61 Cal. 140-141. PEOPLE v. ALLEN.**

**Variance.**—Where an accused has been acquitted on the ground of variance in the name of the party injured, the court could and should order a new information, although the order of the court is not necessary, p. 141.

Distinguished in People v. Jordan, 63 Cal. 220, holding that, under section 1008 of the Penal Code, after a judgment sustaining a demurrer, a new prosecution requires an order of the court. Cited in People v. Oreileus, 79 Cal. 180, holding that an acquittal on the ground of variance cannot be pleaded as a former acquittal of the same offense, upon a new and correct information; People v. Ammerman, 118 Cal. 27, holding that under section 1117 of the Penal Code the district attorney may, without the order of the court, file a new information; State v. Sullivan, 9 Mont. 496, holding that where there is a material variance in the name of the party injured, both as to sound and spelling, and the offense is not described with sufficient certainty in other respects to identify the act, the former acquittal was not a defense to the second prosecution.

**61 Cal. 145-147. LOS ANGELES BANK v. RAYNOR.**

**Sheriff's Deed** proves the sale under execution, and estops the defendant from controverting the title acquired under it, p. 147.

Cited in Reilly v. Wright, 117 Cal. 80, holding, in an action to quiet title, it was only necessary for the plaintiff in making out a prima facie right to recover to show judgment of a court of competent jurisdiction, the execution and the sale thereunder, and transmission of the title to plaintiff; notes to 83 Am. Dec., pp. 64 and 129, and 99 Am. Dec. 448, as to validity of title of purchaser at sheriff's sale.

**Validity of a Judgment** does not depend upon its entry or placing on the docket, p. 147.

Cited in James v. Bullard, 107 Cal. 132, sustaining an order of sale in foreclosure subsequently amended as to the amount of costs; Otto v. Long, 144 Cal. 146, applying rule to entry of homestead order; McGrew v. Bank, 60 Neb. 721, applying rule to order allowing probate claim; dissenting opinion in Bell v. Staacke, 137 Cal. 311, defining "within five years after entry"; Lowenstein v. Caruth, 59 Ark. 592, holding the enforcement of a judgment does not depend on its entry; Ward v. Urmsom, 40 Neb. 698, holding there is no lien until entry of decree; but the judgment is valid, though not entered; Union etc. Co. v. Railroad Co., 8 N. Mex. 167, sustaining judgment against clerical error.

**61 Cal. 148-149. McFADDEN v. MITCHELL.**

Cross-examination cannot extend beyond matters adduced on direct, p. 149.

Cited in Fisher v. Porter, 11 S. Dak. 316, holding such cross-examination improper.

**61 Cal. 149-151. MEEKS v. SOUTHERN PAC. R. R. CO.**

**Statute of Limitations.**—Amended complaint is subject to, when introducing new cause of action, p. 151.

Cited in Nellis v. Bank, 127 Cal. 168, noted under Atkinson v. Amador etc. Co., 53 Cal. 102; Frost v. Witter, 132 Cal. 428, 84 Am. St. Rep. 59, and Tully v. Tully, 137 Cal. 68, noted under Anderson v. Mayers, 50 Cal. 525.

**61 Cal. 151-154. MESMER v. JENKINS.**

**Creditor of Deceased Debtor** cannot sue to set aside a deed of deceased as fraudulent, before allowance of or judgment for his claim, p. 153.

Cited in Ohm v. Superior Court, 85 Cal. 548, 20 Am. St. Rep. 247, to same effect, and holding that a claimant whose claim had been disallowed, and who had not obtained a judgment, was not a creditor within the meaning of sections 1589 and 1590 of the Code of Civil Procedure. Referred to in Field v. Andrada, 106 Cal. 110, and also in Murphy v. Clayton, 114 Cal. 536, as having been cited in Ohm v. Superior Court, *supra*; Matteson etc. Co. v. Conley, 144 Cal. 486, on point that creditor's bill must show insufficiency of legal remedies; Hofmann v. Tucker, 58 Neb. 462, noted under McMinn v. Whelan, 27 Cal. 300; Fehringer v. Bank, 23 Utah, 397, creditors of insolvent estate cannot bring action in own names to set aside deed, made by decedent in lifetime, without demand on and refusal by administrator to sue.

**Right to Equitable Relief** will not be granted to a creditor of a deceased debtor until he has exhausted his legal remedies, pp. 153, 154.

Cited in Herrlich v. Kaufmann, 99 Cal. 277, 37 Am. St. Rep. 55, holding to same effect where the statute provides a mode of procedure; note to 90 Am. Dec. 288, as to prerequisites to creditor's suit.

**Embezzlement and Surrender.**—The powers of a probate judge in relation to the discovery and recovery of property of a decedent by an administrator are analogous to those exercised by courts of chancery upon bills of discovery, p. 154.

Cited in Levy v. Superior Court, 105 Cal. 608, holding that sections 1459 and 1460 of the Code of Civil Procedure were purely remedial, and a person proceeded against thereunder could be compelled to testify.

**61 Cal. 155-157. RALPH v. LOCKWOOD.**

Failure to file certificate of partnership as required by section 2468 of the Civil Code, does not prevent partner from maintaining an action for tort, p. 158.

Cited in *In re Dennery*, 89 Cal. 106, holding that the section did not apply to a proceeding in insolvency; *Pedroni v. Eppstein*, 17 Colo. App. 420, Session Laws of 1897, page 248, does not apply to tort actions.

**61 Cal. 157-160. SHEILS v. HALEY.**

**Mutual Mistake as to Boundary** between adjoining lots does not affect the actual title, and the statute of limitations does not commence to run until the mistake is discovered and demand of possession made, p. 160.

Distinguished in *Austin v. Andrews*, 71 Cal. 100, holding that where there was no mutuality of mistake, the record title would not be disturbed; *Breen v. Donelly*, 74 Cal. 304, defining the rule where coterminous owners established a mutual boundary line; holding that such rule was not definitely settled even in cases of mutual mistake, and did not apply to a suit to reform a deed. Cited in note to 24 Am. St. Rep. 389, on possession taken and held through ignorance or mistake.

**61 Cal. 160-163. ESTATE OF CORWIN.**

**Probate Order** for conveyance of real estate by administrator, under section 969 of the Code of Civil Procedure, is appealable (this section was repealed by the legislature in 1880 and replaced by section 963), p. 163.

Cited in *Estate of Leonis*, 138 Cal. 197, applying rule to order refusing to hear evidence or to confirm sale; *Estate of Potter*, 141 Cal. 351, as to appeal from amended judgment in proceedings under section 1602, Code of Civil Procedure, and see S. C., 141 Cal. 425; *Stuttmeister v. Superior Court*, 71 Cal. 323, to same effect, and holding that certiorari will not lie when there is a remedy by appeal; note to 68 Am. Dec. 761, as to contracts to convey real estate.

**61 Cal. 164-188; 44 Am. Rep. 549. PEOPLE v. GRAY.**

**Dying Declaration—When Admissible—Rule Defined.**—Is not admissible if it appears in any mode that there was a hope of recovery, however faint, in the mind of the declarant, p. 175.

Cited in *People v. Lee Sare Bo*, 72 Cal. 625, example of admissible declaration; *Johnson v. State*, 102 Ala. 14, holding that a declaration made before, but reaffirmed after deceased had given up all hope, was admissible; *Lester v. State*, 37 Fla. 385, to same effect as principal case, and that the absence of all hope might be gathered from the circumstances of the case.

**Misconduct of Jury.**—Use of intoxicating liquors by, when allowable, and its effect on the verdict, pp. 185, 186.

Cited in People v. Lee Chuck, 78 Cal. 332, setting aside a death sentence where the jury drank while actually deliberating upon their verdict; People v. Deegan, 88 Cal. 607, where a juror during a recess and out of court drank to excess; People v. Leary, 105 Cal. 492 and 493, where some of the jurors had pocket flasks of whiskey, but there was no general drinking; Sanitary District v. Cullerton, 147 Ill. 392, a civil case; Grottkau v. State, 70 Wis. 469, where the drinking was known to the accused and his counsel three days before submission of the case, and was not brought to the attention of the court until four days after verdict, holding the misconduct must be deemed to have been waived; note to 41 Am. Rep. 315, as to use of intoxicating liquor by jury.

**Suitable Food,** required by section 1136 of the Penal Code to be furnished to the jury, does not include intoxicating liquor (concurring opinions of Myrick, J., and of McKinstry and Ross, JJ.), p. 186, and concurring opinion of Sharpstein, J., p. 188.

Approved in People v. Lee Chuck, 78 Cal. 338.

Affidavits of jurors to impeach their own verdict will not be considered, p. 183.

Cited in People v. Pratt, 78 Cal. 350, to same effect; People v. Murphy, 146 Cal. 507, upholding refusal to consider affidavits as to declarations of jurors in case where their own affidavits are not permissible by statute for that purpose; People v. Deegan, 88 Cal. 604, holding the like as to an affidavit by a juror that he had been drinking to excess; People v. Azoff, 105 Cal. 634, holding that the sole exception to the general rule is that provided by subsection 2 of section 657 of the Code of Civil Procedure, where the verdict has been arrived at by a resort to chance; Siemsen v. Oakland etc. Ry., 134 Cal. 497, noted under Boyce v. Stage Co., 25 Cal. 463; Griffiths v. Montandon, 4 Idaho, 379, affidavit of jurors is not receivable to impeach verdict unless verdict was obtained by resort to chance. Distinguished in Flood v. McClure, 3 Idaho, 593, affidavit of juror is competent to show verdict obtained by resort to chance; State v. Crutchley, 19 Nev. 369, approving the ruling of the principal case; People v. Ritchie, 12 Utah, 194, holding that the rule in Utah was the same as in California and with the like sole exception of a verdict determined by chance.

Where an erroneous instruction is followed by others qualifying it, and the intention of the court can, without straining their language, be gathered from the combined instructions, it must be presumed that the jury were not misled and understood the ruling, pp. 181-183.

Cited in People v. Clark, 84 Cal. 583, applying the ruling; People v. Bruggy, 93 Cal. 483, to same effect; State v. Bartmess, 33 Or. 126, noted under People v. Doyell, 48 Cal. 85.

**61 Cal. 191-195. PEOPLE v. CENTER.**

An appeal cannot be taken from parts of two judgments, and from a special order made after judgment by one notice of appeal, and on one undertaking, p. 194.

Approved in Carter v. Butte etc. Co., 131 Cal. 351, quoting Estate of Heydenfeldt, 119 Cal. 346; Sharon v. Sharon, 68 Cal. 333, as to the undertaking on appeal, holding that the sole exception was an appeal from a judgment and from an order denying a new trial, for which one undertaking was sufficient. Distinguished in Sharon v. Sharon, *supra*, p. 336, as to notice of appeal, holding that if the notice of appeals is in one and the same paper, in which the appeals are distinctly designated, it was sufficient. Approved in Sharon v. Sharon, *supra*, p. 339, as to the necessity for a separate appeal from each judgment or a specific part of it. Cited in Corcoran v. Desmond, 71 Cal. 103, following the principal case; Home and Loan Associates v. Wilkins, 71 Cal. 626, holding that on appeals from two orders, a single undertaking, not distinctly referring to either appeal, was so ambiguous that it must be regarded as if none had been filed; Forni v. Yoel, 95 Cal. 442, holding that, on an appeal from a judgment and an order on motion for new trial, an undertaking which made no reference to the appeal from the order was ineffectual for any purpose; Centerville v. Bachtold, 109 Cal. 113, a case where all the appeals were dismissed on the ground of ambiguity in the undertaking; Estate of Heydenfeldt, 119 Cal. 348, holding that an ambiguous undertaking is entirely invalid; Estate of Dewar, 10 Mont. 424, sustaining an appeal taken by an administrator both from an order sustaining objection to a final account, and also from an order of distribution, holding such orders were not actions in a legal sense (here the principal case was noticed in a citation from Sharon v. Sharon, *supra*).

**Separate Appeals.**—Every judgment and order subsequent to judgment entered against a party is the subject of a distinct and separate appeal, and must be appealed from as an entirety, p. 194.

Doubted in Sharon v. Sharon, 68 Cal. 338, the court saying this is not exactly correct, as there can be an appeal from parts of a judgment or order, under section 940 of the Code of Civil Procedure.

**Separate Transcripts.**—On appeal from a judgment and an order subsequent to judgment, each should be reviewed on a complete record of its own; if the undertaking and transcript belonging to each are not filed in due time, the respondent is entitled to a dismissal of the appeal, p. 195.

Explained in Sharon v. Sharon, 68 Cal. 339, as not meaning that the record of each appeal might not be in one transcript, and further than an undertaking belonging to each appeal was filed in time, though there were several appeals, and (p. 340) the undertaking for each was in one

paper, and the transcript of each appeal was filed in time, though one transcript contained the record of several appeals.

**Confusion of Transcript** is ground for dismissal of an appeal, p. 195.

Doubted in *Sharon v. Sharon*, 68 Cal. 340, not a general rule, but applicable only to the transcript in the principal case. Disapproved in concurring opinion of Ross, J., in *Sharon v. Sharon*, *supra*, p. 343.

**Second Motion for New Trial.**—After order disposing of first motion, a new notice of motion cannot be filed; the remedy is by appeal, p. 194.

Cited in *Lang v. Superior Court*, 71 Cal. 493, in support of a ruling that, after a motion for new trial has been passed upon, it is not competent for the court to set its ruling aside and make another order in the cause. (It will be observed the principal case does not bear upon the question of the power of the court, but upon that of the litigants.) Cited, also, to the same point, and erroneously, in *Carpenter v. Superior Court*, 75 Cal. 597; *Burnham v. Spokane Mercantile Co.*, 18 Wash. 208, holding that after the denial of a motion for a new trial, there is no jurisdiction in the court to consider another like motion.

**Delay in Prosecuting** a motion for new trial for nine months after the notice is ground for denial, and the party cannot be heard to complain of the order on appeal, p. 194.

Cited in *State v. Central Pac. Co.*, 17 Nev. 267, holding that the mere failure of the moving party to appear at the hearing is not an abandonment of, nor ground for overruling, the motion for want of prosecution.

#### 61 Cal. 196-199. LOS ANGELES COMPANY v. LAMB.

**Casus Statuti.**—A statute may go into effect, but its operation may be postponed for want of a case for it to operate on, p. 198.

Cited in *Oakland Paving Co. v. Hilton*, 69 Cal. 484, which ruled upon section 19, article 11, of the constitution of 1879, which section was amended and entirely changed February 14, 1883, ratified at the general election November 4, 1884.

#### 61 Cal. 199-205. LOS ANGELES GAS COMPANY v. TOBERMAN.

The charter is the source of power of a municipal corporation to contract, and when this prescribes the mode of contracting, the mode becomes the measure of the power, p. 201.

Cited in *Earl v. Bowen*, 146 Cal. 761, under Los Angeles charter initial steps for letting city printing contract may be taken by order of council without an ordinance; *Blanchard v. Hartwell*, 131 Cal. 266, noted under *Argenti v. San Francisco*, 16 Cal. 283. *Frick v. Los Angeles City*, 115 Cal. 516, holding that when the required formalities were not

in conflict with the general laws of the state concerning the manner of creating contracts, equity would not interfere to support a city contract not executed as required by its charter; *McCloud and Geigle v. Columbus City*, 54 Ohio St. 454, holding that the omission of a step in letting a contract for street work required by the law rendered the contract void.

**Same.**—Record must show names and votes of members on final passage, p. 202.

Cited in *Goodyear R. Co. v. Eureka*, 135 Cal. 615, but holding provision sufficiently complied with.

Contract signed by clerk is valid when so ordered by city council, p. 203.

Approved in *Earl v. Bowen*, 146 Cal. 784, upholding printing contract signed by clerk on order of council.

#### 61 Cal. 205-208. **RECLAMATION DISTRICT v. GOLDMAN.**

**Taxation.**—An assessment for a reclamation district organized under the act of 1868 is a tax for local purposes, and not a public tax, and the act of 1868 was not repealed by the Political Code, p. 208.

Cited in *Swamp District v. Haggins*, 64 Cal. 209, 210, reconciling the principal case with *Hagar v. Board of Supervisors*, 51 Cal. 474, and holding that a district organized under the act of 1868 cannot levy assessments under the Political Code. Retried in *Reclamation District v. Goldman*, 65 Cal. 636, but upon points other than those raised in the principal case. Cited in *Lima v. Cemetery Assn.*, 42 Ohio St. 131, 51 Am. Rep. 811, 812, as to the exemption of burying grounds from taxation under the laws of Ohio.

#### 61 Cal. 209-211. **WILSON v. SMITH.**

Separate Counts under one cause of action are allowed by section 426 of the Code of Civil Procedure, when there is a fair and reasonable doubt by the plaintiff of his ability to safely plead them in one mode only, and the plaintiff cannot be compelled to elect on which count he will proceed to trial, p. 211.

Cited in *Rucker v. Hall*, 105 Cal. 429, applying the ruling to an action to recover commission on sale of real estate, where it was doubtful what rate of commission plaintiff was entitled to; *Leonard v. Roberts*, 20 Colo. 90, the like in an action for broker's commission, where the double statement was used for the purpose of meeting the exigencies of the proof; note to 72 Am. Dec. 589, as to stating same cause of action in different counts under code.

#### 61 Cal. 211-216. **PAIGE v. CARROLL.**

**Limitation.**—Action on sheriff's bond for unlawful attachment is barred in two years, p. 213.

Cited in *Sonoma County v. Hall*, 132 Cal. 591, 594, holding action on official bond to be one on liability created by statute; *Lambert v. McKenzie*, 135 Cal. 103, applying rule to action against sheriff for negligence, and holding statute to run from time of act and not of its discovery; *Oregon v. Davis*, 42 Or. 36, action on official bond of public officer for defalcation is barred in six years.

**Change of Place of Trial.**—An order for change for convenience of witnesses cannot be resisted on the ground of disqualification of the judge, when it is not claimed that the judge making the order was not qualified, nor shown that he was not ready and willing to try it, p. 216.

Cited in *Upton v Upton*, 94 Cal. 28, sustaining the ruling referring to the provisions of the constitution authorizing the judge of one superior court to call in a judge of another superior court to hear and determine any matter. Distinguished in *Krumdick v. Crump*, 98 Cal. 119, holding that when the application was made to the judge whose disqualification was alleged and admitted, it was his duty to grant it, and he could be compelled by mandate.

**Change of Place of Trial**, on the ground that all the defendants resided in another county, cannot be resisted for an alleged disqualification of the judge of the county to which it is sought to transfer the case, p. 216.

Cited in *McDonnell v. Collins*, 19 Mont. 373, holding that where both defendants were shown to reside in another county the transfer must be made.

#### 61 Cal. 216-220. **HOLBROOK v. McCARTHY.**

Agent acting under a limited authority must strictly pursue its terms in order to bind the principal, p. 220.

Cited in *Stephens v. Soule*, 83 Cal. 438, where an agent was to sell at a "net price," complaint must show that the sale was for not less than the required price; *Monson v. Kill*, 144 Ill. 254, holding that an authority to sell for a fixed net price, one-half to be paid in cash, was not complied with by a sale on ninety days' time; *Coulter v. Portland Trust Co.*, 20 Oreg. 479, holding that a general authority to buy, sell, transfer, or mortgage real estate did not authorize a deed for consideration showing it was not a real sale.

#### 61 Cal. 238-242. **WHITTIER v. STEGE.**

**Ejectment.**—A purchaser in possession under a contract, not fully completed, has an equitable title, and is not liable to ejectment; but if he refuses to comply with the terms of his contract he is divested of his equitable estate, and ejectment will lie, pp. 241, 242.

Cited in *Hicks v. Lovell*, 64 Cal. 20, 49 Am. Rep. 682, to same effect; *Gates v. McLean*, 70 Cal. 50, holding that a purchaser in possession

under a contract can only retain possession on the condition of compliance with the contract; Southern Pacific Co. v. Terry, 70 Cal. 486, holding that a purchaser rightfully in possession and ready to perform the contract cannot be ejected by vendor; Hannan v. McNickle, 82 Cal. 126, holding that improvements made by a purchaser in possession are not the equivalent of installments in arrear; Rhorer v. Bila, 83 Cal. 55, holding that if the title fails, or the vendor refuses to convey, an action on the contract will give the purchaser the relief to which he is entitled, but he cannot hold possession and at the same time defend an action for the balance of the purchase money; Hyde v. Mangan, 88 Cal. 325, holding that it is not the law of this state that in an action of ejectment the legal title must control; Woodard v. Hennegan, 128 Cal. 302, noted under Thorne v. Hammond, 46 Cal. 531; Sievers v. Brown, 34 Or. 459, holding defaulting vendee in possession liable for use and occupation.

**61 Cal. 244-246. PEOPLE v. KERN.**

Evidence of Previous Conduct of a defendant toward the deceased is admissible, as tending to show his state of feelings toward and treatment of the deceased, and in some degree to show a motive for the killing, p. 245.

Cited in United States v. Cannon, 4 Utah, 138, holding in action for cohabiting with more than one woman, that it was proper to adduce evidence of what had previously occurred between the parties; People v. Barthleman, 120 Cal. 14, admitting that testimony of a witness to the general effect that appellant on several occasions had used language expressing hostility and dislike of the deceased; and People v. Chaves, 122 Cal. 143, admitting similar evidence; State v. Shafer, 28 Mont. 19, in prosecution for homicide, evidence of previous conflict is admissible to show motive where cause and details are excluded and court expressly confines jury in consideration of such evidence to question whether it showed malice at time of homicide.

**61 Cal. 246-250. PEOPLE v. MESSERSMITH.**

The burden of showing insanity is on the defendant by a preponderance of evidence, p. 248.

Approved in People v. Travers, 88 Cal. 238, to same effect, and that sanity is presumed; People v. McNulty, 93 Cal. 443, holding to the same effect; People v. Ward, 105 Cal. 343, holding that the doctrine of "reasonable doubt" has no application to the question of insanity, which must be established affirmatively by a preponderance of proof; Danforth v. State, 75 Ga. 627; 58 Am. Rep. 482, to same effect; note to 83 Am. Dec. 239, on burden of proof. Notes to 97 Am. Dec. 176, 44 Am. Rep. 436, as to preponderance of evidence in defense of insanity.

Jury are exclusive judges of credibility of witness, p. 248.

Cited in People v. Compton, 123 Cal. 409, noted under People v. Eckert, 16 Cal. 111; People v. Owens, 123 Cal. 489, holding instruction properly refused; People v. Putnam, 129 Cal. 263, on point that court may instruct as to facts when the facts are admitted; People v. Matthai, 135 Cal. 448, noted under People v. Williams, 17 Cal. 142.

**Instructions.**—An instruction verging on error, if favorable to defendant, will not be considered as ground for reversal, p. 250.

Cited in Territory v. Evans, 2 Idaho, 398, holding in a charge of murder an instruction which would sustain a verdict of murder in the second degree was not a cause of complaint by defendant.

**Instruction on Facts.**—Instruction is not erroneous if fact assumed is not controverted by evidence, p. 249.

Cited in People v. Allen, 144 Cal. 301, sustaining instruction in rape case.

#### 61 Cal. 250-258. SACRAMENTO COUNTY v. CENTRAL PACIFIC COMPANY.

**State and County Taxes.**—The judgment in an action for recovery of state and county taxes must specify the several amounts for which it is rendered, pp. 256-258.

Cited in Lake County v. Sulphur Mining Co., 66 Cal. 25, holding that a judgment for a gross sum is insufficient.

**Taxes, Collection of.**—Under the law of California, a tax duly levied becomes a judgment upon which an action in the nature of an action "in debt" will lie, p. 254.

Cited in note to 42 Am. St. Rep. 656, on recovery of personal judgment for taxes.

**Attorney General** possesses powers of control over district attorneys, of which courts should take judicial notice, p. 254.

Cited in People v. Gold Run Co., 66 Cal. 152, 56 Am. Rep. 88, holding that the attorney general may proceed in equity in the name of the people to compel the abatement of a public nuisance; note to 89 Am. Dec. 683, that courts take notice of their own officers.

#### 61 Cal. 259-262. HIMES v. JOHNSON.

**Water Rights.**—A person who appropriates the waters of a public stream in the manner recognized by the laws or decisions of the courts of this state, and uses the same for some useful purpose, acquires a vested right therein against every one except a prior appropriator; persons who subsequently acquire the land over which the waters flow take subject to such right, p. 260.

Notes Cal. Rep.—192.

Cited in *South Yuba Co. v. Rosa*, 80 Cal. 337, where the riparian rights of a homestead claimant were held subject to a prior appropriation of the water flowing across the same by the owner of a ditch which tapped the stream below the homestead claim; *De Necochea v. Curtis*, 80 Cal. 407, holding that water rights acquired by appropriation, after the passage of the act of Congress of July 16, 1866, were valid against one who subsequently obtained title to the land over which the water flowed; *Geddis v. Parrish*, 1 Wash. 591, applies the ruling even where the land in fee is subsequently acquired from the government.

A judgment refusing an injunction, but giving damages for less than three hundred dollars, does not carry costs, p. 262.

Approved on same point in *Brown v. Delavan*, 63 Cal. 304. Distinguished in *McCarthy v. Gaston etc. Co.*, 144 Cal. 546, allowing damages in action for abatement of nuisance under facts stated.

A plea in abatement that a cotenant should have been joined as plaintiff raises an immaterial issue, having regard to section 384 of the Code of Civil Procedure, p. 262.

Cited in *Moulton v. McDermott*, 80 Cal. 630, holding that in an action of ejectment one tenant in common may recover the possession of the entire tract; *Hewitt v. Story*, 64 Fed. Rep. 524, holding that one tenant in common may prosecute a suit in equity for diversion of water; *Rodgers v. Pitt*, 129 Fed. 937, where number of owners in common of irrigating ditch by agreement divide waters flowing therein between them, one alone may sue to enjoin diversion by subsequent appropriator of any portion of water; *Union Mill and Mining Co. v. Dangberg*, 81 Fed. Rep. 87, holding in a similar case to *Hewitt v. Story*, supra, that it was not necessary to join the cotenant.

#### 61 Cal. 262-268. **PEOPLE v. CHAPMAN.**

**Prison Director's Compensation.**—Money paid to a prison director by the treasurer without authority of law is recoverable by the state, and it does not become the property of the receiver, p. 267.

Cited in *Colusa Co. v. Glenn Co.*, 117 Cal. 436, holding that one county can sue another for money had and received.

#### 61 Cal. 268-269. **NICKERSON v. CALIFORNIA RAISIN COMPANY.**

**Affidavit of Merits** must aver that defendant has fully and fairly stated the facts of the case to his counsel, pp. 268, 269.

Cited in *Buell v. Dodge*, 63 Cal. 553, holding an averment that defendant had stated "the case" to counsel is insufficient; *People v. Larue*, 66 Cal. 236, averment that defendant had fully stated his case and the facts constituting his defense held insufficient; *Morgan v. McDonald*, 70 Cal. 33, averment that defendant had stated the facts of his defense fully to counsel held insufficient; *Palmer & Rey v. Barclay*, 92 Cal. 201, to same effect as *Morgan v. McDonald*, supra.

**61 Cal. 271-275. TRANTER v. SACRAMENTO CITY.**

**Municipal Corporation—Liability for Injuries.**—At common law, there is no liability for injuries by reason of defective ways, any liability must arise under statute, p. 275.

Cited in Chope v. City of Eureka, 78 Cal. 590, 12 Am. St. Rep. 114, sustaining the ruling as settled law; same case, p. 591 (dissenting opinion of Works, J., in which Beatty, C. J., concurred), holding that the decision of the principal case was for mere negligence in keeping ways in repair, and should not be held to apply to a case of injury in consequence of an obstruction which was the direct act of the city; notes to 63 Am. Dec. 354, and 30 Am. St. Rep. 384, as to liability of municipalities for neglect of streets.

**61 Cal. 276-282. DONAHUE v. GRAHAM.**

**Street Law of San Francisco of 1872.**—The superintendent of streets cannot contract for street work in advance of the levy and collection of the assessment since the adoption of the new constitution of 1879, i. e., January 1, 1880, p. 277.

Affirmed in Thomason v. Ruggles, 69 Cal. 473, holding that, on the day the constitution went into effect, it by its own terms became the supreme law of the state, and that subsequently the legislature carried out the constitutional provisions by enacting the street law of 1883. Cited in same case, p. 479 (dissenting opinion of McKinstry and Sharpstein, JJ.), holding that the street law of 1872 was part of the charter of San Francisco, which was not repealed by the constitution of 1879; Oakland Paving Co. v. Hilton, 69 Cal. 483, reaffirming the decision of the principal case as to the street law of San Francisco, and (p. 485) extending it to the street law of 1864 for the city of Oakland; Thomason v. Ashworth, 73 Cal. 75, holding that the question whether the provisions of the street law of 1872, as regards entering into a contract in advance of the collection of the money, had been finally disposed of by the principal case; same case, dissented from by McKinstry, J. (pp. 80 and 81), holding to his former opinion in the principal case that the constitution forbade the passage of any statute enacting that street work could be done until after the cost had been collected.

Section 19 of article 11 of the constitution of 1879 is not a provision which requires legislation to enforce it, p. 277.

Cited in Russel v. Ayer, 120 N. C. 196, as to an instance of a self-executing constitutional provision.

**Charter of San Francisco** and laws incorporated therewith were not repealed by the adoption of the constitution of 1879, pp. 281, 282.

Cited in Staude v. Election Commrs., 61 Cal. 324, in dissenting opinion of Sharpstein, J., holding that the act known as the "Hartson Act,"

did not override the provisions of the charter of San Francisco (the prevailing opinion held the contrary view); Huntington v. City of Nevada, 75 Fed. Rep. 61, holding that the legislature was not restrained by the constitution of 1879 from exercising control over municipal corporations created prior to its adoption but only from passing special laws affecting such corporations.

**61 Cal. 282-288. EBY v. FOSTER.**

**Sale of Homestead** under alleged judgment lien will be enjoined when the judgment is shown to have been docketed, p. 287.

Cited in Lubbock v. McMann, 82 Cal. 230, 16 Am. St. Rep. 111, holding that though the sale of a homestead under execution conveys no title, it may create a cloud, and involve the homestead claimant in litigation, and will therefore be enjoined.

**Judgment Lien is Created** by the docketing of the judgment; it commences on the day of docket and it runs for two years from and after that time; if the time expires after the issue of execution but before the time appointed for sale, the lien is gone and no sale can be had, p. 287.

Cited in Beaton v. Reid, 111 Cal. 486, holding that the lien of the execution was not that of the judgment; the execution neither created a judgment lien nor extended it when once created; Savings etc. Co. v. Irrigation Co., 89 Fed. Rep. 39, denying right to extend by stipulation; Smith v. Schwartz, 21 Utah, 139, noted under Bagly v. Ward, 37 Cal. 121; note to 76 Am. Dec. 518, on when judgment lien attaches in California; note to 99 Am. Dec. 271, as to effect of levy of execution.

When a homestead is sold, or exchanged for another property, and a declaration of homestead on the new property filed, and the three transactions are simultaneous acts, the moment the title vests in the homesteader the homestead right attaches, and the premises are exempt from execution, p. 287.

Cited in Freiberg v. Walzein, 85 Tex. 267, 34 Am. St. Rep. 811, to same effect, and giving example; note to 34 Am. St. Rep. 503, as to lands purchased for homestead not subject to lien.

**61 Cal. 288-292. WOLFING v. RALSTON.**

**Lease of Mine on Royalty** is unobjectionable, and an action for recovery of the amount due and for restitution of the premises is maintainable, p. 292.

Cited in Higgins v. California Co., 109 Cal. 308, holding that a joint lease of contiguous mining properties of different owners, reserving a rent in the shape of royalty, is valid.

**61 Cal. 296-301. LAPHAM v. CAMPBELL.**

Judgment may be Vacated in equity when procured by extrinsic frauds upon courts rendering them, p. 298.

Cited in People v. Perris Irr. Dist., 142 Cal. 606, vacating for fraud judgment confirming organization of irrigation district; Freeman v. Wood, 11 N. Dak. 8, in judgments which are void for want of jurisdiction remedy either by motion or by action is available to suitor, and one year limitation is no bar.

**Equitable Action** for relief against judgment on the ground of fraud, where the complaint shows sufficient reasons why the statutory remedy by motion has not been resorted to, is maintainable, pp. 299, 301.

Cited in Sugar Co. v. Porter, 68 Cal. 372, holding that a judgment taken by fraud is not taken through mistake, inadvertence, surprise, or inexcusable neglect, within the meaning of section 473 of the Code of Civil Procedure, and the losing party has the right to an original action in equity to have it annulled; Brackett v. Banegas, 116 Cal. 285, 58 Am. St. Rep. 167, holding that a plaintiff in foreclosure who has joined as parties all persons shown by the abstract to have an interest in the property, may have relief in equity against the wife of the mortgagor, who sets up a claim of homestead more than six months after sale of the property.

If judgment is taken without due process of law against a defendant over whom no jurisdiction has been obtained, he has no duty to perform in relation to the proceeding, and can defend an action on the judgment by showing that he had not been served, notwithstanding the record of the judgment showed the contrary, p. 300.

Cited in note to 23 Am. St. Rep. 117, on collateral attacks on judgment; note to 54 Am. St. Rep. 244, 245, on want of jurisdiction.

**General Citation.**—Lees v. Freeman, 19 Utah, 485.

**61 Cal. 305. DOUGHERTY v. HAGGIN.**

**Miscellaneous.**—Longmire v. Smith, 26 Wash. 450, as to discussion of value of evidence as to amount of water in ditch.

**61 Cal. 309-313. MAPPA v. CITY COUNCIL OF LOS ANGELES.**

Query whether extension by council of time for completion of contract after time had expired, is valid, pp. 312-313.

Approved in dissenting opinion in Chase v. Front, 146 Cal. 375, majority holding under curative clause of Street Bond Act objection that time for completion of work was extended after time first fixed had expired, is immaterial after bonds issued.

**Street Assessment** is invalid, unless based on valid contract, p. 313.

Cited in *State v. Coad*, 23 Mont. 137, noted under *Zottman v. San Francisco*, 20 Cal. 97.

**61 Cal. 313-326. STAUDE v. ELECTION COMMISSIONERS.**

**City and County of San Francisco** is subject to all general laws except those for the incorporation, organization, and classification in proportion to population of cities and towns, p. 321. It is subject to the act of March 7, 1881, providing for a uniform system of elections for the elective officers in the even-numbered years, p. 321.

Cited in *People v. Hill*, 125 Cal. 20, but sustaining charter provisions as to manner of elections; concurring opinion in *Fragley v. Phelan*, 126 Cal. 393, holding special election act of 1878, as to San Francisco, superseded by later amendments to Political Code; *Ex parte Helm*, 143 Cal. 556, noted under *Desmond v. Dunn*, 55 Cal. 242; *Thomason v. Ruggles*, 69 Cal. 475, in concurring opinion of Ross, J., holding that the Vrooman act of 1885 applies to the city and county of San Francisco; *Kahn v. Sutro*, 114 Cal. 322, defining and explaining the position of San Francisco as a city and a county, and the powers and terms of office and times of election of its officers; *Huntington v. City of Nevada*, 75 Fed. Rep. 61, as to power of the city of Nevada to issue bonds.

**General Laws** applicable to municipal corporations, Sharpstein, J. (dissenting from prevailing opinion), holding that the act of March 7, 1881, did not apply to San Francisco, because it did not purport to be anything more than an amendment of a section of the Political Code; also because, under the constitution, general laws did not apply to cities and towns organized before the adoption of the constitution unless a majority of the electors should so determine, p. 325.

Cited in *Thomason v. Ruggles*, 69 Cal. 475, in opinion of McKinstry and Sharpstein, JJ., holding, contrary to the prevailing opinion, that the Vrooman act of 1885 did not apply to San Francisco; *Thomason v. Ashworth*, 73 Cal. 92, in dissenting opinion of McKinstry and Sharpstein, JJ., again holding that the Vrooman act of 1885 did not apply to San Francisco; *People v. Henshaw*, 76 Cal. 449, in dissenting opinion of McKinstry, J., holding that the act of March 18, 1885, providing police courts in cities having thirty and under one hundred thousand inhabitants, did not apply to the city of Oakland, contrary to the prevailing opinion in the case.

**Police Commissioners** of San Francisco were appointed under the act of April 1, 1878. Their office is not elective, p. 322.

Approved in *People v. Pond*, 89 Cal. 143, on same point, and holding also that as to the election of supervisors San Francisco is governed by the Consolidation act; *People v. Menzies*, 110 Cal. 452, holding that the power of the governor of the state was confined to filling a vacancy

in the office of police commissioner, when lawfully caused; *State v. Simon*, 20 Oreg. 375, holding that under the constitution a member of the board of police commissioners held office until his successor was duly elected or appointed under some existing provision of law.

**First Police Commissioners.**—The act for the appointment of the first police commissioners was not in conflict with the constitution, pp. 322, 323.

Cited in *Sawyer v. Dooley*, 21 Nev. 396, holding that the power of the state board of assessment to raise the entire roll did not conflict with the powers of the county assessors and the county commissioners; *City of Terre Haute v. Evansville R. Co.*, 149 Ind. 182, holding that a power given to circuit judges to appoint city commissioners did not infringe on the right of local self-government.

#### 61 Cal. 326-331. **STRONG v. SACRAMENTO R. R. CO.**

**Negligence.**—The engine bell must be rung at crossings; it will be presumed that it was not done unless shown by the record; plaintiff had a right to rely upon the performance by those on the locomotive of every act imposed by law upon them when approaching a crossing, p. 328.

Cited in *Kernan v. Market St. Ry. Co.*, 137 Cal. 327, holding plaintiff not guilty of contributory negligence in street-car collision; *Peck v. Oregon etc. R. R.*, 25 Utah, 33, where track was obstructed by trees and on approaching crossing plaintiff slackened speed to slow walk and looked and listened, not error to instruct that if plaintiff could not see track and noise of wagon lessened opportunity to hear train, it was his duty to stop and listen; *Birmingham R. R. Co. v. Jacobs*, 101 Ala. 158, 159, holding that one about to cross a railroad track has the right to presume that those operating the railroad will not violate their legal obligations, but will do their duty; *Randall v. Railroad*, 104 N. C. 417, holding an engineer, to relieve the company from negligence, bound to give warning at a reasonable distance from the crossing of a public highway or a station; *Hinkle v. Railroad*, 109 N. C. 473, 26 Am. St. Rep. 582, holding that to omit to give warning when nearing a highway and when the train is hidden from the view of travelers, is negligence per se; *Ry. Co. v. Wilson*, 60 Tex. 145, same as in principal case.

The rule is that if the plaintiff's negligence, amounting to the absence of ordinary care, contributes proximately in any degree to the injury, he can not recover, p. 328.

Cited in *Jerolman v. Chicago etc. Co.*, 108 Iowa, 179, holding instruction erroneous; *Bowers v. Union Pacific Co.*, 4 Utah, 223, to same effect. Note to 55 Am. Dec., pp. 670 and 672, on negligence must amount to want of ordinary care; note to 90 Am. Dec. 784, as to duty of traveler on highway.

**Ordinary Appearance or Movement.**—When damage caused by, all the circumstances must be considered by the jury, p. 336.

Cited in *Carraher v. San Francisco B. Co.*, 100 Cal. 180, holding that where plaintiff's horse was frightened by ordinary appearance or movement of the cars, all the surrounding circumstances must be considered by the jury.

**61 Cal. 331-332. PERHAM v. KUPER.**

**Time for Redemption—Sheriff's Deed.**—Property being redeemable within six months from the date of sale, the sheriff's deed cannot be executed until the six months has fully passed, p. 332.

Cited in *California Imp. Co. v. Quinchard*, 119 Cal. 87, holding that a contract for street work cannot be signed until the period within which the property owners have the right to elect to do the work has fully expired.

**61 Cal. 333-334. BETTIS v. TOWNSEND.**

**Enforcement of Trust by Beneficiaries.**—The advance of money by a friendly society to A for the purpose of paying off a mortgage on property belonging to B, the surplus of the proceeds of sale of the property in case it should be sold to belong to the children of B, creates a trust under section 2251, of the Civil Code, which can be taken advantage of by the children as beneficiaries, pp. 333, 334.

Cited in *McBrown v. Dalton*, 70 Cal. 97, holding that when certain tenants in common agreed to buy in for their use and benefit certain undivided interests in a property in course of partition, a trust was created, which any member of the compact could enforce; *Tyler v. Mayre*, 95 Cal. 168, holding that the assignment of a note, then being sued on, in trust to secure inter alia the claims of the assignor's attorney, created an enforceable trust in favor of the attorney; *Robertson v. Burrell*, 110 Cal. 575, holding that the heirs of deceased partner cannot sue the surviving partner for an accounting.

**Appeal After Sixty Days** from a judgment.—On such appeal the sufficiency of the evidence to justify the findings cannot be reviewed, p. 334.

Cited in *Forni v. Yoell*, 99 Cal. 178, holding that on late appeal an exception to the judgment, because not supported by the evidence, could not be heard.

**Deed Absolute in Form** can be shown by testimony to be intended as a mortgage, p. 334.

Note to 4 Am. St. Rep. 707, as to deed absolute in form.

**61 Cal. 337-338. GRAY v. SUPERIOR COURT.**

**New Undertaking on appeal.**—Upon an appeal from a justice's court

the superior court may authorize the appellant to file a new undertaking in lieu of one insufficient in form, p. 338.

Cited in McCracken v. Superior Court, 86 Cal. 77, holding that this power did not extend to allow sureties to the undertaking to justify after the time fixed; McDonald v. Paris, 9 S. Dak. 314, holding that justification by sureties to an undertaking on appeal, without the required statutory notice, conferred no jurisdiction on the appellate court.

**61 Cal. 338-341. HOSKINS v. SWAIN.**

**General Superintendent and Manager** to conduct a business and do everything necessary or proper and usual in the ordinary course of the business, has authority to assign a business credit as security for a business loan, p. 341.

Cited in Tevis v. Savage, 130 Cal. 416, noted under Hayes v. Campbell, 55 Cal. 424; Thayer v. Nehalen Mill Co., 31 Oreg. 441, holding that agent "with full power to manage and control the business of the corporation" had power to mortgage the company's property for corporation purposes; note to 44 Am. Rep. 578, on superintendent's power to contract.

**61 Cal. 341-346. RECLAMATION CO. v. COOK.**

**Swamp Lands.**—The donation of such lands by the United States to the states in which such lands were situated on September 28, 1850, was a grant "in praesenti" by which the title passed at once to the states, and any patent afterward issued to the state relates back to the date of the grant, p. 345.

Cited in Tubbs v. Wilhoit, 73 Cal. 63, to same effect as to the swamp land act being a grant in praesenti, and ruling that the patent was to furnish documentary evidence of character of the land. Wells v. Pennington Co., 2 S. Dak. 9, 39 Am. St. Rep. 763, holding, with respect to lands taken by a county road supervisor, that the words "is hereby granted" in section 2477, R. S. U. S., transferred the fee, and related back to the date of the act; Wright v. Roseberry, 121 U. S. 505, holding that the grant of 1850 was one in praesenti passing the title to the lands as of its date, but requiring identification of the lands to render the title perfect; same case 521, to the same effect.

**61 Cal. 346-347; 44 Am. Rep. 553. DRUKE v. HEIKEN.**

**Gift, Mortis Causa.**—Promissory note payable to order and not indorsed is the subject of a gift mortis causa, and carries the mortgage by which it is secured, p. 347.

Cited in Leyson v. Davis, 17 Mont. 283, holding that a gift of certificates of bank stock, accompanied by expressions of apprehension of death and intent to pass title, constitute a valid donatio mortis causa

(see the exposition of the law on this head at p. 290 of this case), and that the law applies to shares of a national bank; note to 46 Am. Dec. 332, 75 Am. Dec. 445, on the case of Overton v. Sawyer, 7 Jones' Law, 6, which was decided in 1859 and held the opposite view; Edwards v. Wagner, 121 Cal. 377, as to such gift of unindorsed bills of exchange.

**61 Cal. 348. PARKER v. SAVAGE MINING COMPANY.**

Mechanic's Lien can be filed against property by persons employed by an agent of the owner; complaint may properly allege the work was done at the request of the owner defendant, and that he agreed to pay, p. 348.

Cited in Rosina v. Trowbridge, 20 Nev. 118, citation doubtful as to point and purport.

**61 Cal. 349-356. GERMANIA BUILDING AND LOAN ASSOCIATION v. WAGNER.**

Mechanic's Liens are paramount to a mortgage executed after the lienors commenced to furnish their materials, p. 354.

Cited in Schwartz v. Knight, 74 Cal. 434, as incidentally authority for holding that when it was made to appear that the building was intentionally left uncompleted, the lien could, nevertheless, be filed; Lumber Co. v. Gottschalk, 81 Cal. 648, holding that the ruling applied, whether the contract was made with the owner directly or with his contractor.

A mechanic's lien can be set up by answer as well as by a cross-complaint in a foreclosure suit, p. 354.

Cited in Islais etc. Co. v. Allen, 132 Cal. 435, quoting Miller v. Luco, 80 Cal. 261, holding that in an action to quiet title, where defendant relies upon title in himself, a cross-complaint is unnecessary; Mining Co. v. Mining Co., 83 Cal. 599, holding, in an action to quiet title, if a defendant claims ownership, and asks for affirmative relief as to other property, a cross-complaint is improper; Mills v. Fletcher, 100 Cal. 149, holding, in an action of ejectment, that matter constituting a complete defense should not be pleaded as a cross-complaint.

**Lien not Lost by recovery of judgment for the debt, pp. 355, 356.**

Cited in Bates v. Santa Barbara Co., 90 Cal. 548, holding, conversely, that enforcing the lien does not waive the right to a money judgment; Mareau v. Stanley, 5 Colo. App. 339, holding that the proceeding to enforce a mechanic's lien was only in rem, and the remedy was cumulative; Salt Lake Lith. Co. v. Ibex Co., 15 Utah, 444, 62 Am. St. Rep. 946, holding that the lien claimed by a cross-complaint was not waived by the institution of an attachment suit and subsequent levy; note to 41 Am. Dec. 224, and 41 Am. St. Rep. 762, as to waiver of mechanic's lien.

**61 Cal. 356-359. FERGUSON v. NEVILLE.**

**Aliens may Hold Mining Claims.**—Aliens, bona fide residents of the state, cannot locate, but may purchase mining claims properly located; they can only be dispossessed by the state after "office found"; they can also convey the title. Claims acquired by resident aliens are not open to relocation, pp. 358, 359.

Distinguished in Lee Doon v. Tesh, 68 Cal. 49, holding that aliens were not competent to make a valid location of mines. Cited in Tibbitts v. Ah. Tong, 4 Mont. 548, in dissenting opinion of Galbraith, J., sustaining the ruling of the principal case. But the prevailing opinion was that the possessory title to a mining claim was held by representing the claim according to law; that the right to locate and the right to represent were kindred rights and could not exist apart, and that, therefore, the disabilities were equal; hence, if an alien could not locate he could not represent so as to hold against a qualified locator; German Mining Co. v. Alexander, 2 S. Dak. 566, disapproving of the decision in Tibbitts v. Ah Tong, *supra*, and holding that after a mining claim had been located according to law, a subsequent transfer to an alien by the locators, and a further transfer by him to other parties passed the title, and that the transfer to the alien was not in law an abandonment of the claim so as to render it subject to relocation; Wilson v. Triumph etc. Co., 19 Utah, 73, 75 Am. St. Rep. 722, holding objection not assertable in action of ejectment; Strickley v. Hill, 22 Utah, 267, sustaining location by alien, after declaration of intention; Lohmann v. Helmer, 104 Fed. 180, sustaining right of alien to inherit located claims under local (Oregon) statutes.

**61 Cal. 360-361. EDE v. HAZEN.**

A judgment will not be set aside in equity so long as the remedy by motion in the court rendering the judgment exists, p. 360.

Cited in Zellerbach v. Allenberg, 67 Cal. 290, stating what is necessary before equity will grant relief from a judgment attacked on the ground of fraud; Luco v. Brown, 73 Cal. 6, 2 Am. St. Rep. 774, holding that enforcement of an execution on a judgment void on its face will not be enjoined; Moulton v. Knapp, 85 Cal. 390, holding that a sale under an execution, in fraud of an agreement not to proceed to sale for a year, will not be enjoined; Norton v. Atchison R. R. Co., 97 Cal. 397, holding that a judgment of court of general jurisdiction was open to direct attack by motion to set it aside; Baer v. Higson, 26 Utah, 83, where summons served by publication and defendant defaulted, and after returning to jurisdiction he failed to move to set aside default, he cannot maintain equity suit to set aside proceedings and declare mortgage void.

**Equity Will Interfere** when the time within which a motion may

be made has expired, and no laches or want of diligence is imputable to the party asking relief, p. 361.

Cited in Sugar Co. v. Porter, 68 Cal. 372, exemplifying a proper case for interference in equity; Brackett v. Banegas, 116 Cal. 284, holding a proper case for new suit in foreclosure after decree on discovery of a homestead on the property; Denton v. Baker, 93 Fed. 49, but holding action barred by laches; Long v. Eisenbeis, 18 Wash. 429, holding that a party seeking the aid of equity for the vacation of a judgment after the period allowed by statute for execution upon motion, must show that he is without fault or negligence.

#### 61 Cal. 361-362. DU PRAT v. JAMES.

**Forfeiture of Mining Claim.**—In an action for possession averments in the answer of entry and location by defendants, and that plaintiffs had failed to perform the necessary work, create a material issue, p. 362.

Cited in Wulf v. Manuel, 9 Mont. 287, holding that when defendant relies on forfeiture by plaintiff, it must be specially pleaded and proved.

#### 61 Cal. 362-363. BECKMAN v. SKAGGS.

**Mortgage Foreclosure.**—Counsel fees allowed by lower court for purposes of appeal will be allowed on the appeal, p. 363.

Distinguished in Fender v. Robertson, 135 Cal. 27, refusing to grant such fees on appeal when not so fixed by trial court.

#### 61 Cal. 364-365. MONT BLANC ETC. CO. v. DEBOUR.

**Mining Claims.**—Intervention in action under section 2326, United States Revised Statutes, is maintainable only by those who have properly filed claims, p. 365.

Cited in Youle v. Thomas, 146 Cal. 544, in contest by settler for purchase of half section as fit for cultivation against holder of certificate of purchase by prior claimant of whole section as unfit for cultivation, another settler on same half section whose application pending contest was rejected cannot intervene; Murray v. Palglase, 23 Mont. 417, denying right under facts stated.

#### 61 Cal. 366. PEOPLE v. LEWIS.

**Information.**—Charge of a crime in the language of the statute is sufficient, p. 366.

Cited in People v. Lewis, 61 Cal. 367, to same effect; People v. Villarino, 66 Cal. 229, instance of a sufficient charge of an assault with intent to commit murder; People v. Rogers, 81 Cal. 209, holding an information for burglary, omitting the word "feloniously," was not subject to demurrer; People v. Keeley, 81 Cal. 212, holding that omitting

the word "feloniously" and the name of the poisonous substance from an information charging malicious mischief did not render it void; People v. Russell, 81 Cal. 617, sustains the ruling as to arson; People v. Harrold, 84 Cal. 570, the same as to forgery; Tilly v. State, 21 Fla. 244, follows the same ruling; note to 94 Am. Dec. 253, on what crime may be charged in language of statute.

#### 61 Cal. 367. PEOPLE v. LEWIS.

**Information.**—Charge of a crime in the language of the statute is sufficient, p. 367.

Cited in People v. Russell, 81 Cal. 617, to same effect as to charge of arson.

#### 61 Cal. 367-374. PEOPLE v. MORINE.

If the charge as a whole correctly presents the law applicable to the case the judgment will not be reversed, pp. 370, 372.

Cited in People v. Clark, 84 Cal. 583, holding to same effect on a charge of murder; People v. Bruggy, 93 Cal. 483 and 485, holding to the same effect as to an instruction on the doctrine of "apparent danger" in a case of homicide; People v. Armstrong, 114 Cal. 573, holding, in a case of larceny, that the danger was to be taken as a whole, and it was not necessary that each paragraph should contain all the conditions and limitations expressed in the others; State v. Bartmess, 33 Or. 126, noted under People v. Doyell, 48 Cal. 85. See note 74 Am. St. Rep. 720.

**Reporter's Notes** by the official reporter, although not certified as correct, yet, if sworn to as correct on a subsequent trial, may be used in evidence and read to the jury, p. 373.

Distinguished in Jenkins v. State, 35 Fla. 814, 48 Am. St. Rep. 280, holding that written statements of evidence made by the state attorney, given in the ex parte examination of witnesses by him before the grand jury, are not admissible. Cited in State v. Freidrich, 4 Wash. 210, holding that under the laws of Washington state a stenographer's notes of evidence taken at a former trial cannot be introduced at a second trial.

#### 61 Cal. 374-375. IN RE STUART.

**Retail Liquor Licenses.**—The supervisors of San Francisco have power, under section 11 of article 11 of the constitution of 1879, to fix the amount of liquor licenses, p. 375.

Cited in Ex parte Wolters, 65 Cal. 271, in concurring opinion of Thornton, J., holding that the 11th and 12th sections of article 11 of the constitution taken together put the question beyond doubt, and applying the principal case to county boards of supervisors generally.

**61 Cal. 377-378. PEOPLE v. FUQUA.**

When more than one plea in bar is interposed, there must be a verdict on each plea to justify conviction, and it will not be presumed that defendant withdrew or waived either plea, p. 377.

Cited in People v. Tucker, 115 Cal. 338, applying the principal case to pleas of "not guilty" and "once in jeopardy"; but see on same point State v. Childers, 32 Oreg. 128; Territory v. Barrett, 8 N. Mex. 73, applying rule to pleas in abatement.

Plea of former jeopardy must be submitted to jury, p. 377.

Cited in Kinkle v. People, 27 Colo. 463, reversing conviction for failure so to submit plea.

**61 Cal. 378-380. PEOPLE v. HARDISSON.**

**Circumstantial Evidence.**—Instructions contrasted and reconciled, p. 380.

Cited in People v. Winters, 93 Cal. 282, to same effect, instance of correct instructions; People v. Ward, 105 Cal. 342, as to when circumstantial evidence is sufficient.

**Order on Appeal which Reverses a judgment and order refusing a new trial is equivalent to granting a new trial,** p. 380.

Cited in People v. Lee Look, 143 Cal. 220, holding defendant in criminal case not entitled to discharge on such reversal; Commonwealth v. Brown, 167 Mass. 148, holding that when a verdict is set aside on prisoner's own motion and for his benefit he can be tried anew; State v. Thompson, 10 Mont. 562, holding that if a new trial be granted the defendant is in same position as if no trial had ever been had; note to 77 Am. Dec. 697, that plea of once in jeopardy is not applicable where the verdict is set aside and new trial ordered on defendant's motion.

**61 Cal. 382-387. OLIVAS v. OLIVAS.**

**Involuntary Trust.**—When a deed is obtained by fraud, the grantee will be held to be an involuntary trustee of the property granted for the benefit of the grantors, p. 385.

Cited in More v. More, 133 Cal. 493, holding such trust created under facts stated, citing main case also at page 495, on question of conclusiveness of decree of distribution fraudulently obtained; Wingarter v. Wingarter, 71 Cal. 110, holding that a mortgagee who fraudulently obtains from the heir of his mortgagor a conveyance of the equity of redemption is an involuntary trustee of the property for the heir.

**61 Cal. 387-396. PEOPLE v. HONG AH DUCK.**

**Self-Defense.**—What is a correct instruction as to burden of proof, and how it does not deprive defendant of the doctrine of reasonable doubt, pp. 394-396.

Approved in *People v. Raten*, 63 Cal. 423, where the instruction was in the same words as in the principal case. Cited in *People v. Tureott*, 65 Cal. 128, holding that the addition of the words, "and this he may show 'by preponderance of evidence merely,'" rendered the instruction erroneous, but, as the error was in favor of the defendant, he had no cause of complaint; *People v. Rodrigo*, 69 Cal. 605, holding that section 38 of the act of 1850 and section 1105 of the Penal Code did not change the rule as to the burden of proof, but fixed the quantum of evidence which is necessary to overcome the proof on the part of the prosecution; *People v. Knapp*, 71 Cal. pp. 8 and 9, holding that defendant must prove justification by a preponderence of evidence. Overruled in *People v. Bushton*, 80 Cal. 165 (Thornton, J., dissenting), holding that the jury should be instructed that the burden of proving justification devolved on the defendant, but that if, upon the whole case, they entertained a reasonable doubt of guilt, he should be acquitted. Cited in *People v. Elliott*, 80 Cal. 306, in concurring opinion of Thornton, J., holding instruction to the effect that defendant must prove justification by a preponderance of evidence are prejudicially erroneous; *State v. Yokum*, 11 S. Dak. 557-559, sustaining instruction as to burden of proof. Overruled in *People v. Lanagan*, 81 Cal. 143, on the authority of *People v. Bushton*, *supra*; *People v. Marshall*, 112 Cal. 423, also on the authority of *People v. Bushton*.

**Prior Life Sentence** may be brought to the notice of the jury, but only as a guide as to the punishment to be inflicted, pp. 391, 393.

Cited in *People v. Majors*, 65 Cal. 147, holding that the fact that prisoner was under a life sentence did not affect the jurisdiction of the court to try him for murder; and see *People v. Flynn*, 7 Utah. 383, sustaining conviction for crime committed during escape from jail under prior sentence.

**Clothing Deceased** wore at the time of the homicide is admissible as part of the *res gestae*, p. 391.

Cited in *People v. Knapp*, 71 Cal. 3, to same effect; *People v. O'Brien*, 78 Cal. 44, to same effect, also holding that it is often important evidence tending to prove the violence of the blow, and the course or direction of the bullet or knife; *Levy v. State*, 28 Tex. App. 209, 19 Am. St. Rep. 828, to same effect as to admissibility.

**Sufficiency of Information.**—It is not necessary to set forth the wound inflicted, or the weapon or other means employed to take human life, p. 389.

Cited in *People v. Rozelle*, 78 Cal. 90, holding that no indictment is to be held insufficient for defect of form not tending to the prejudice of a substantial right of the defendant; *People v. Hyndman*, 99 Cal. 3, to same effect as principal case, a charge of murder; note to 87 Am. Dec. 101, on indictment for murder.

Description of Wound may be given by a witness who saw it, though not an expert, pp. 390, 391.

Approved in People v. Gibson, 106 Cal. 476, to same effect.

Evidence of Threats made by defendant against deceased are competent to show malice, p. 390.

Cited in Painter v. People, 147 Ill. 463, holding that the principle was well established; People v. Chaves, 122 Cal. 143, admitting like evidence.

**Witness.**—Allowing to remain in court is in the discretion of the court, pp. 393, 394.

Cited in People v. McCarty, 117 Cal. 65, sustaining the ruling.

#### 61 Cal. 396-401. CHANDLER v. BANK.

**Waiver of Right to Marshal Securities.**—An exclusive lienor on personal securities, by selling and applying the proceeds of the collateral toward satisfaction of his prior lien, waives his right to first resort to the personal security, and, if there be any surplus in the personal security, it passes to an assignee of the mortgagor, p. 400.

**Note.**—On appeal this judgment was affirmed; the principal case is referred to in Chandler v. Bank, 61 Cal. 401, which was an appeal by an intervenor in the same action, but in no way cited; also referred to, but not cited in Chandler v. Bank, 65 Cal. 499, which was an appeal by the same plaintiff from the judgment rendered on a retrial of the case; also referred to in Chandler v. Bank, 73 Cal. 317, 318, 2 Am. St. Rep. 813, being a further appeal by the plaintiff from the judgment on the retrial of the intervenor's case, as containing a statement of the facts of the case.

#### 61 Cal. 401-403. CHANDLER v. BANK.

Settlements of accounts made at regular intervals without charging interest are considered conclusive, unless impeachable for mistake or fraud, p. 402.

Approved in Ryan Drug Co. v. Hvambsahl, 92 Wis. 63, to same effect; dissenting opinion in De La Cuesta v. Montgomery, 144 Cal. 121, main opinion holding account stated established. Note: The principal case was the appeal of an intervenor, and is referred to, but not cited, in Chandler v. Bank, 65 Cal. 499, which was an appeal of the plaintiff from the judgment on the retrial of the case; also, in Chandler v. Bank, 73 Cal. 318, 319, 2 Am. St. Rep. 813, being a further appeal of the same plaintiff in the matter of the intervention. Waller v. Kingston Coal Co., 191 Pa. 202.

#### 61 Cal. 404-405. PEOPLE v. CHEE KEE.

**Objection to Evidence.**—A general objection is insufficient; the ob-

jection must specify the grounds of objection, or it will be overruled, and an exception to the ruling is not revisable on appeal, p. 405.

Cited in *People v. Nelson*, 85 Cal. 428, to same effect.

The court takes judicial notice of the time of sunrise, and may resort to a book of reference to satisfy its recollection, p. 404.

Cited in *People v. Mayes*, 113 Cal. 625, holding to same effect as to the time of moonrise; *State v. Magers*, 35 Or. 524, holding instruction as to hour of sunset improperly refused; note to 59 Am. Dec. 185, as to miscellaneous scientific works as evidence and authority; note to 89 Am. Dec. 601, as to time and coincidence of days of week and month; note to 49 Am. Rep. 206, as to what matters will be noticed judicially.

#### 61 Cal. 405-430. DODGE v. MEYER.

Followed in *McMahan v. Meyer*, 61 Cal. 431, and *Upton v. Meyer*, 61 Cal. 432, causes in which all the material points were the same as the principal case.

Power of control and transfer exercised in exclusion or defiance of the owner's rights, and without the manual taking of the thing into possession, is in law a conversion, and a combination between parties to exercise dominion over the thing, in exclusion of the rights of the owners, makes the conversion by one the conversion of all, pp. 420, 421.

Cited in *Loughborough v. McNevin*, 74 Cal. 255, 5 Am. St. Rep. 438, holding that a refusal to redeliver stock pledged as security or tender of the amount due was a conversion; *People v. Van Ness*, 79 Cal. 83, 12 Am. St. Rep. 137, holding that a denial by a collector of possession of any state property then or at any time during his term of office, when the facts were that he had collected more than his salary and expenses of his office, was a conversion of the balance; *Ralston v. Bank of California*, 112 Cal. 213, holding that where a corporation refuses to allow a transfer of shares upon its books the assignee may treat this as a conversion of the shares. Approved in *London, Paris & American Bank v. Aronstein*, 117 Fed. 605, refusal of corporation without lawful excuse to transfer shares of stock on its books to one entitled to such transfer is conversion of stock. Distinguished in *Walker v. First Nat. Bank*, 43 Or. 107, neither indorsement nor delivery of bill of lading passes title, except as result of contract between parties, and real transaction may be shown by parol; *Leuthold v. Fairchild*, 35 Minn. 110, where a bank, named as a consignee in bills of lading to hold until drafts were paid, on payment delivered the bills of lading to a person indicated by the depositor, and had no knowledge of the depositor's wrongful title.

A bailee cannot in an action brought against him by his bailor set up the title of a third person, without his authorization, p. 423.

Cited in *Bull v. Houghton*, 65 Cal. 425, holding, in an action by a creditor's assignee to recover moneys paid in fraud of creditors, that

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they could not set up the title of the assignee of the same debtor in a bankruptcy under the federal laws; *Whetherly v. Straus*, 93 Cal. 287, holding that a bailee of a certificate of deposit by a married woman, and in whose hands it was garnisheed under an attachment in an action against the husband, could not plead that the money represented by the certificate had been transferred to the wife in fraud of creditors, and was therefore subject to garnishment; *Tindall v. McCarthy*, 44 S. C. 491, holding that a defendant sued in damages for withholding property received under promise of return could not set up a defense of no title in plaintiff.

A bill of lading represents the property for which it has been given, and the property in the goods passes by its indorsement or by delivery without indorsement when the intent is thereby to pass title, p. 416.

Cited in note to 55 Am. Dec. 299.

#### 61 Cal. 432-435. **BROWN v. MOORE.**

Disobedience to a void order is not contempt, p. 435.

Cited in *State v. Langhorne*, 12 Wash. 595, holding that an order on motion to set aside a judgment made by one not a party to the proceedings is a void order, to which the ruling applied; *Smith v. People*, 2 Colo. App. 108, holding the like as to a mandatory writ of injunction void because issued without notice; *Chambers v. Oehler*, 107 Iowa, 158, applying rule to subpoena improperly issued; *State v. District Court*, 21 Mont. 160, 69 Am. St. Rep. 648, noted under *People v. O'Neil*, 47 Cal. 109; *Hebb v. County Court*, 48 W. Va. 283, noted under *Ex parte Rowe*, 7 Cal. 175; *State v. Downing*, 40 Or. 321, if it is admitted that an order directing judgment debtor to appear for examination in supplemental proceedings is voidable, that will not relieve him from contempt proceedings for failure to comply therewith where court had jurisdiction of proceedings at their inception.

#### 61 Cal. 436-437; 44 Am. Rep. 554. **EX PARTE McCLAIN.**

**Constitutionality of Prohibition Law.**—Under the constitution it is competent for the legislature to pass laws prohibiting the sale of intoxicating liquors within specified distances of the state prison, the insane asylum, the University of California, or in the state capitol, p. 437.

Cited in *Ex parte Campbell*, 74 Cal. 24, 5 Am. St. Rep. 421, extending the ruling of the principal case to municipal authorities, which can prevent tippling houses, dramshops, and barrooms. Semble: whether this power extends to county boards.

#### 61 Cal. 438-454. **IN RE GROVE STREET.**

An inferior board may determine conclusively its own jurisdiction by adjudicating the existence of the facts upon which its jurisdiction

depends, but the question of the sufficiency of the facts found to confer the jurisdiction is open to review, pp. 453, 454.

Cited in *Grannis v. Superior Court*, 146 Cal. 255, where divorce decree entered without previous interlocutory decree, court may, after lapse of one year, vacate so much thereof as awards absolute decree without affecting decree in so far as it may determine right to divorce; *People v. Recd. Dist.*, 130 Cal. 613, applying rule to sufficiency of petition for formation of reclamation district; *Estate of Camp*, 131 Cal. 470, 82 Am. St. Rep. 372, to question of abandonment in adoption proceedings; *People v. Los Angeles*, 133 Cal. 342, to sufficiency of petition in annexation proceedings; *Borchard v. Supervisors*, 144 Cal. 14, noted under *Roe v. Superior Court*, 60 Cal. 93; *Humboldt Co. v. Dinsmore*, 75 Cal. 607, applying the ruling to determine the validity of an order for a road survey; and, same case, p. 609, holding that the order approving the viewer's report was a judgment as to the necessity for the road; *Ex parte Sternes*, 77 Cal. 163, 11 Am. St. Rep. 255, holding that a finding of the superior court upon a return to a writ of habeas corpus that the prisoner was in custody of the officer when the writ was issued was a conclusive adjudication of that fact; *De Pedrorena v. Superior Court*, 80 Cal. 146, holding the function of a writ of review was confined to testing the question of jurisdiction on the facts appearing on the face of the record; *Ex parte Noble*, 96 Cal. 364, applying the ruling to justice's courts; *Farmers' Bank v. Board*, 97 Cal. 326, applying the ruling to an order for a new assessment made by a board of equalization; *Levee District v. Farmer*, 101 Cal. 181, holding that a board of supervisors exercised judicial functions as to all facts tending to show whether it had power to order the laying out of a new road, and its judgments were final, but might be reviewed on certiorari where the jurisdiction of the board had been exceeded; *Scottenham v. City of Detroit*, 106 Mich. 570, holding that, under a statute contemplating a judicial determination of certain facts in proceedings for opening a street, a judgment of confirmation necessarily included a determination by the court that the proceedings were properly instituted, and such judgment was not open to collateral attack; *Lingo v. Burford*, 112 Mo. 155, holding that where the county court was only authorized to entertain a proceeding to condemn upon notice being given as required by statute, its decision was conclusive as against collateral attack; *Godchaux v. Carpenter*, 19 Nev. 420, holding that when it appeared from the record that certain jurisdictional facts required to give jurisdiction to a board to perform an act were lacking, the action of the board in performing the act was void.

#### 61 Cal. 455-461. ORNBAUM v. HIS CREDITORS.

Residence within an inclosed part of a tract with title, and the exercise of control over the whole, are sufficient to support a claim of homestead, p. 438.

taking which removed the female from the care, custody, and control of the parent, and placed her under the control of another.

**Consent of the Female** is no defense to a charge of abduction, p. 479.

Cited in *State v. Gibson*, 111 Mo. 110, to same effect.

**Previous Unchastity** of the female is no defense, as the law is silent as to chastity, p. 479.

Approved in *State v. Johnson*, 115 Mo. 492, holding that the Missouri statute was intended to apply to all girls under eighteen and living under the parental roof.

#### 61 Cal. 481-487. **WELTON v. COOK.**

**Lis Pendens.**—The effect of the filing of a lis pendens by a plaintiff is to give notice of the pendency of the action to all subsequent purchasers from him, and if defendants in the action seek affirmative relief they are also bound to file a lis pendens, pp. 486, 487.

Cited in note to 56 Am. St. Rep. 858, as to the rule of lis pendens.

#### 61 Cal. 489-494. **DAY v. SUPERIOR COURT.**

**Attachment of Property** is, under the state law, subject to be defeated by the death of the debtor or by his adjudication as insolvent, p. 493.

Cited in note to 89 Am. Dec. 57, on attachment lien dissolved by death.

#### 61 Cal. 498-507. **MUIR v. GALLOWAY.**

**Extending Time.**—Under section 1054 of the Code of Civil Procedure, the court may grant extension of time for the doing of some act not exceeding thirty days. The court made three orders of extension, the first two being for ten days each, and, as the last day of the second order fell on a Sunday, the court on the third order gave an extension of ten days from the following Monday. Held, the total extension did not exceed thirty days, p. 506.

Doubted in *Reay v. Butler*, 99 Cal. 480, and left as an open question; but see *Frassi v. McDonald*, 122 Cal. 402, where reaffirmed. Cited in note to 46 Am. Rep. 416, but not referring to the case of *Reay v. Butler*, *supra*, which probably had not been decided when the note was written.

#### 61 Cal. 507-508. **CUNNINGHAM v. WARNEKEY.**

**Service by Mail.**—An essential to proper service by mail is that the person making service and the person served must reside or have their offices in different places, otherwise the service must be personal, p. 508.

Cited in *Linfirth v. White*, 129 Cal. 191, noted under *People v. Alameda etc. Co.*, 30 Cal. 182; *Hogs Back Co. v. New Basil Co.*, 63 Cal. 122, to same effect; *Murdock v. Clarke*, 73 Cal. 26, but not in point; *Life Ins. Co. v. Shepardson*, 76 Cal. 377; *Thompson v. Brannan*, 76 Cal. 620, both to the like effect.

#### 61 Cal. 509-521. CITY OF NAPA v. EASTERBY.

When an ordinance is read and put in evidence in the trial court, without objection, it will be presumed on appeal that it was proved to have been duly passed, but the fact of due publication cannot be presumed in the absence of the statutory proof, p. 517.

Cited in *Ellis v. Witmer*, 134 Cal. 251, noted under *Meuser v. Riordon*, 36 Cal. 239; *Carpenter v. Shinners*, 108 Cal. 364, holding that courts could not take judicial notice of the ordinances of municipal corporations, or of the time when, if passed, they take effect; *Chase v. Treasurer*, 122 Cal. 545, 546, holding void a publication of notice of street work not in accordance with resolution; note to 89 Am. Dec. 668, on municipal corporation.

**Municipal Charter**, which provides that the cost of establishing grades shall be assessed on the frontages, prohibits the establishment of any grade unless provision is made for payment of the expense by means of an assessment on the fronting property, p. 502.

Overruled in *City of Napa v. Easterby*, 76 Cal. 223 (being a second appeal in same case), and holding that the board could pass an ordinance establishing grades without laying an assessment for the cost.

#### 61 Cal. 522-524. MULREIN v. KALLOCH.

Judicial Notice cannot be taken of the class and quality of material selected by commissioners for a public building, even if they had power to make a selection, p. 524.

Cited in note to 89 Am. Dec. 697, on judicial notice of scientific and similar facts.

#### 61 Cal. 524-526. HALL v. THEISEN.

**Injunction against Execution Sale.**—The party seeking to enjoin must show that he has full right to protection, that everything has occurred which would be necessary to occur in order to vest in him the right claimed, p. 526.

Limited in *Tibbetts v. Fore*, 70 Cal. 246, holding that to obtain the injunction it was only necessary for plaintiff to show that a conveyance under the execution sale would have compelled her when bringing ejectment to show that she had full title.

**61 Cal. 527. HALL v. THEISEN.**

A second case between same parties as Hall v. Theisen, 61 Cal. 524. Same facts, same points, similar decision.

Cited by reference in Tibbetts v. Fore, 70 Cal. 246.

**61 Cal. 527-529. PEOPLE v. CHEONG FOON ARK.**

**Larceny.**—A definition of the crime which omits the word "feloniously" lacks one of the main elements of the crime, and is error, p. 528.

Cited in People v. Devine, 95 Cal. 229, holding that where the evidence was insufficient to support a finding that defendant "feloniously stole," a verdict of guilty of larceny would be reversed; note to 57 Am. Dec. 273.

**Burden of Proof.**—Section 1105 of the Penal Code applies only to the crime of homicide; in all other criminal charges the burden of proof is on the prosecution to prove the crime beyond a reasonable doubt, pp. 528, 529.

Cited in People v. Rodrigo, 69 Cal. 605, holding that an instruction was correct, on a charge of assault with a deadly weapon, that "if defendant confined his defense to the original transaction the burden of proof never shifted from the prosecution to prove the act a crime beyond a reasonable doubt"; People v. Knapp, 71 Cal. 9, holding that when the burden of proof is transferred, under section 1105, the rule as to reasonable doubt is not applicable; People v. Mize, 80 Cal. 45, holding that in homicide cases where the killing is proved, it rests on the defendant to show justification; People v. Gordon, 88 Cal. 423, holding that the principle in section 1105 of the Penal Code is not applicable to a charge of assault with intent to commit murder.

**Instruction.**—It is error to refuse to instruct a jury, in a criminal case, that the evidence must satisfy them to a moral certainty and beyond a reasonable doubt, that is, it must entirely satisfy the jury of the guilt of the defendant before they can convict, p. 529.

Cited in People v. Kaiser, 119 Cal. 460, to same effect; note to 48 Am. St. Rep. 573, as to "entirely satisfied."

**61 Cal. 530-536. VICTOR SEWING MACHINE COMPANY v. SCHEFFLER.**

Sureties cannot be held when a new contract has been substituted for that on which they were liable, and the alleged breach occurs after the change, p. 534.

Cited in Roche v. Baldwin, 135 Cal. 525, and People's etc. Co. v. Gillard, 136 Cal. 62, noted under O'Connor v. Gingley, 26 Cal. 21; Roberts v. Donovan, 70 Cal. 110, holding that sureties were released

when the contract had been changed without their consent, and where, after a breach, the contract was continued without notice of the breach to the sureties; *Weed S. M. Co. v. Winchel*, 107 Ind. 266, holding that when the breach is of new obligations, different in character from those guaranteed, the sureties are not liable; *Kimball v. Baker*, 62 Wis. 531, holding that whenever it is found from the whole instrument taken together that it was the intention of the parties that the liability of the surety should be limited to a specific advance, the surety is released if the limit is exceeded; notes to 6 Am. St. Rep. 458, 459, as to release of sureties.

#### 61 Cal. 536-538. PEOPLE v. DAVIS.

**Perjury, Evidence to Support.**—The charge must be supported by two witnesses, or by one witness and corroborating circumstances, pp. 537, 538.

Cited in note to 85 Am. Dec. 499, on evidence in case of perjury.

#### 61 Cal. 538-540. PEOPLE v. SING LUM.

If a defendant is entitled to be present in court on any proceeding, it will be presumed that he was present, unless the record shows to the contrary, pp. 539, 540.

Cited in *Bond v. State*, 63 Ark. 509, 58 Am. St. Rep. 132, holding that where the record could have shown the fact, defendant's voluntary absence, or his presence when the verdict was returned, will be presumed; *Lewis v. United States*, 146 U. S. 382, holding that, where the entry in the journal of the court once states the presence of defendant, it will be presumed to have continued throughout the entire day, unless the contrary is shown; *State v. Daugherty*, 63 Kan. 479, under presumption of validity of judgment.

It is the duty of a defendant, who has any objections to the proceedings, to present them to the trial court; if not so presented, they cannot be subsequently considered, p. 540.

Cited in *People v. Goldenson*, 76 Cal. 346, holding that when a challenge to the entire panel of jurors has been made, but the transcript showed no evidence offered in support of it, if the denial was error it should be affirmatively shown in the record.

#### 61 Cal. 540-544. PEOPLE v. ROLFE.

**Motion to Strike Out** must be preceded by a formal objection to the evidence when offered, p. 542.

Cited in *People v. Fitzgerald*, 137 Cal. 549, holding motion properly denied; *People v. Nelson*, 85 Cal. 426, holding that an objection to testimony cannot be taken for the first time by a motion to strike out; *Estate of Wax*, 106 Cal. 347, holding that, when an objection to a ques-

tion is withdrawn, the right to subsequently move to have it stricken out is lost.

Evidence of circumstances, more or less direct, tending to connect a defendant with the crime and to establish his guilt, is competent, pp. 542, 543.

Cited in *People v. Armstrong*, 114 Cal. 574, holding that evidence to corroborate that of an accomplice must be of a nature to tend to connect the defendant with the crime; *People v. Ebanks*, 117 Cal. 663, is an example of admissible testimony under the rule.

Prior Conviction.—Identity of accused held sufficiently established to sustain plea, p. 543.

Cited in *People v. Hettick*, 126 Cal. 428, holding evidence similarly sufficient; *Dunn v. State*, 58 Neb. 810, on point that identity of name indicates identity of person *prima facie*.

#### 61 Cal. 544-547. PEOPLE v. HERBERT.

To justify a homicide there must be a necessity, actual or apparent; instructions conveying this meaning correctly state the law, p. 546.

Cited in *People v. Raten*, 63 Cal. 425, sustaining an instruction as to the right of self-defense substantially the same as in the principal case; *People v. Turcott*, 65 Cal. 129, holding it was not error to refuse an instruction not applicable to the facts of the case; *People v. Bruggy*, 93 Cal. 484, holding that one instruction may be helped out by another on the same point, and the court will look at the instructions as a whole to see if the law has been correctly given to the jury; *People v. Hecker*, 109 Cal. 463, laying down the rule in precise language as to justification, and (p. 467) applying it to cases where the assailed is not required to look to escape, but may stand his ground; *State v. Rolla*, 21 Mont. 585, holding instructions erroneous.

#### 61 Cal. 548-554. PEOPLE v. COCHRAN.

An instruction asked, referring to facts which there is no evidence to prove, should be refused, but, if given, it is not ground for reversal of judgment, unless it is manifest the jury were misled by it to the defendant's prejudice, p. 551.

Cited in *Bosqui v. Sutro R. R. Co.*, 131 Cal. 401, holding similar instruction not prejudicial error; *Traver v. Spokane St. Ry. Co.*, 25 Wash. 246, on point that giving of erroneous instruction favorable to appellant is not reversible error; dissenting opinion in *Coates v. Union Pac. R. R.*, 24 Utah, 312, majority reversing judgment in action for personal injuries where instruction on contributory negligence was not based on evidence; *Territory v. Evans*, 2 Idaho, 396, holding that where there appeared in the record no evidence to justify instructions, it was not necessary to consider them.

After the court has given an instruction which substantially covers a question involved in the case, all other instructions on the same subject may be refused, p. 550.

Cited in Flint v. Nelson, 10 Utah, 265, holding that, where the correctness of the charge is not shown to be challenged, it must be assumed that it correctly charged on the point covered by defendant's request, and there is no obligation to repeat.

**Failure to Deny Grounds of Challenge** is a waiver of right to except to the challenge, p. 549.

Cited in People v. Owens, 123 Cal. 486, noted under People v. Dick, 37 Cal. 277; Henning v. State, 106 Ind. 393, 55 Am. Rep. 758, holding that, by failing to object to the court allowing the jury to separate, defendant waived his right to afterward object.

Formation of an unqualified opinion, founded upon reading newspapers, does not disqualify, when juror avers that, notwithstanding, he can act impartially and fairly, p. 549.

Cited in Territory v. Bryson, 9 Mont. 38, to same effect; Haugen v. Chicago Ry. Co., 3 S. Dak. 400, holding that the meaning of "unqualified opinion" must be decided at the discretion of court, as to any juror under challenge, and that from such decision there is no appeal unless it is arbitrary; Southern Pacific v. Rauh, 49 Fed. Rep. 701, holding that a challenge for bias must state the particular cause from which such bias is to be inferred.

**Diagram** used in a case as an aid is not evidence which the jury can take with them to deliberate on the verdict, pp. 551, 552.

Cited in Powley v. Swensen, 146 Cal. 482, refusing to reverse where pleadings taken to jury room by jury where no prejudice shown; Albion Co. v. Richmond Co., 19 Nev. 228, exemplifying the rule; State v. Webster, 21 Wash. 72, but permitting use of exhibits introduced.

#### 61 Cal. 554-555. **PEOPLE v. DARR.**

Ordinarily, the question of the sufficiency of the evidence is for the jury, and when it is not clearly insufficient to justify the verdict, a motion for new trial on that ground is properly denied, p. 555.

Cited in People v. Eagan, 116 Cal. 291, holding that, where there was a failure of proof in a particular necessary to conviction, the question was one of law for the judge.

**Deputy of District Attorney** may sign an information in the name of his principal, p. 555.

Approved in People v. Griner, 124 Cal. 20, sustaining similar signature; People v. Etting, 99 Cal. 578, holding to same effect as the principal case; Hammond v. State, 3 Wash. 173, holding to same effect as to a deputy prosecuting attorney.

**Challenge to Jurors** must be based on the grounds specified in the code, or it will be disallowed, p. 555.

Cited in *Mabry v. State*, 50 Ark. 497, holding that the causes of exception to the decision of the court upon challenges were limited by statute.

**61 Cal. 557-605. CROSBY v. DOWD.**

**Description of Property** in ejectment proceedings should be so precise as, *prima facie*, to give to the defendant, the court, and the officer who may be required to put a claimant in possession a distinct idea of the very premises. Generally, it is sufficient to describe the premises as they appear in the mortgage; otherwise, when the mortgage refers to other instruments for the description, p. 602.

Cited in *Emeric v. Alvarado*, 64 Cal. 621, as to identification of a map or other paper referred to in the judgment; *Hill v. Wall*, 66 Cal. 132, to same effect, as to an order of sale by the probate court; *Oakland Paving Co. v. Hilton*, 69 Cal. 496, holding that a proposed amendment to the constitution, which the law required to be "entered in the journals" of the legislative houses, could not be entered by an identifying reference. Distinguished in *De Sepulveda v. Baugh*, 74 Cal. 470, 471, 5 Am. St. Rep. 455, 456, where the whole tract of land was described by metes and bounds, and reference made to the records for a description of portions excepted from the operation of the mortgage. Overruled in same case (74 Cal. 471, 474, 5 Am. St. Rep. 456, 459), and laying down the true rule as to the description of land in a judgment. Distinguished in *Hill v. Wall*, 66 Cal. 136, dissenting opinion of McKee, J., holding that the description of the land in the principal case differed from that in the case at bar, and, therefore, the sale could not be collaterally attacked; *Northern Ry. Co. v. Jordan*, 87 Cal. 28, holding that the law of the principal case, even as modified by *De Sepulveda v. Baugh*, supra, still was that such a judgment might be erroneous, though it could not be held void on collateral attack so long as there was some other paper of record to which reference might be had for description, and further, that a verdict by a jury, describing land by reference to a map not in evidence or of record, was insufficient: *In re Madera Irrigation District*, 92 Cal. 329, 27 Am. St. Rep. 130, holding that the principal case had been overruled, and that the case gave a sufficient description; *Rosenthal v. Matthews*, 100 Cal. 83, contrasting and distinguishing the cases; *Hermann v. Likens*, 90 Tex. 454, holding that the description in an administrator's or a sheriff's deed ought to be sufficiently definite to enable the bidders to ascertain without unreasonable trouble the precise tract of land sold. Cited in note to 5 Am. St. Rep. 459, on the overruling of the principal case.

**Statute of Limitations** does not run against an infant heir in maintaining an action of ejectment, notwithstanding during some portion of

the time of disability there was an administrator of the estate, by whom an action could have been maintained, pp. 600, 601.

Cited in *Blythe v. Hinckley*, 84 Fed. Rep. 256, holding that an action of ejectment could be maintained against the heir who was in possession without joining the administrator; note to 42 Am. Dec. 447.

**61 Cal. 605-610. BENJAMIN v. STEWART.** Referred to in the judgment of the court in bank on same case, 61 Cal. 610, affirming the judgment rendered in department one.

**No Verdict** as to one defendant—he cannot move for a new trial, or for an application to vacate the former verdict, p. 608.

Cited in *Rankin v. Central Pacific*, 73 Cal. 94, holding in a suit for damages by joint negligence of two tort feasors, where each defendant answers separately, a verdict finding against one, but silent as to the other, will be set aside at the instance of the plaintiff.

**New Trial is as to Issue of Fact only**, p. 607.

Cited in *People v. George*, 2 Idaho, 850, holding that, on a petition for a writ of mandamus, to which a demurrer was filed, there could be no new trial, since all the facts were admitted by the demurrer.

**Inadequate Damages.**—New trial on this ground cannot be had under section 657 of the Code of Civil Procedure; the statutory ground applicable is “insufficiency of the evidence to justify the verdict,” p. 608.

Cited in *Henderson v. St. Paul Ry. Co.*, 52 Minn. 483, holding that if a new trial was proper on this ground the verdict should be treated as not supported or justified by the evidence.

**61 Cal. 615-616. VAN COURT v. WINTERSON.**

**Entry of Judgment Without Findings.**—An order to set aside a judgment so entered, and where there has been no waiver, is correct, because the presumption that findings had been filed or waived is overcome by the statement in the bill of exceptions, p. 616.

Cited in *Mace v. O'Reilley*, 70 Cal. 235, holding that, where an order for judgment was entered in the minute book of the court and findings were neither filed nor waived, and the trial judge went out of office, no judgment could be entered, and the case must be retried; *Connolly v. Ashworth*, 98 Cal. 206, holding that, when the term of office of the trial judge expires before the decision is filed, judgment entered thereon cannot be sustained; *Benton v. Benton*, 122 Cal. 399, on point that findings will be presumed waived or properly filed, on appeal from judgment.

**61 Cal. 617-619. SAN FRANCISCO v. PHELAN.**

Recital in **Assessment Book** that “the property is assessed to parties

listed and to all claimants, known or unknown," is an idle recital, and does not affect the validity of the assessment, where the property is assessed to the owner by name, p. 619.

Approved in *Bosworth v. Webster*, 64 Cal. 2, and *Salisbury v. Shirley*, 66 Cal. 228, both to the same point as the principal case.

**Taxes are Recoverable in a personal action**, p. 617.

Cited in note to 42 Am. St. Rep. 656, on recovery of personal judgment for taxes.

#### 61 Cal. 620-622. PEOPLE v. HELBING.

**Once in Jeopardy.**—Can be pleaded only when the offense charged is the same in law and in fact. When a conviction has been set aside on motion of the defendant, on the ground that the conviction was not for the offense charged, he cannot plead "once in jeopardy" on a retrial under the same information, p. 622.

Cited in *People v. Ammerman*, 118 Cal. 28, holding that where the information fails to charge any offense, the court may instruct the jury that the plea of once in jeopardy is not sustained by the evidence; *People v. Murray*, 89 Mich. 292, 28 Am. St. Rep. 306, holding that on a trial for murder, when the conviction was set aside on defendant's motion, on the ground that he had been deprived of a public trial, a plea of once in jeopardy cannot avail to prevent a second trial. Distinguished in *People v. McDaniels*, 137 Cal. 195, noted under *People v. Hunckeler*, 48 Cal. 331; *People v. Kerrick*, 144 Cal. 47, holding acquittal under grand larceny charge not a bar to proceedings under section 357, Penal Code.

#### 61 Cal. 622-625. MARSTERS v. LASH.

**Denials in Pleadings.**—If no general denial is made, and specific denials are resorted to, there must be an actual denial and not one, in form and substance, evasive, p. 624.

Cited in *Weetbay v. Gray*, 116 Cal. 663, giving example of the rule.

**Findings Must Pass on all Issues.**—If this is not so, it is error, and the judgment will be reversed for want of findings, p. 623.

Cited in *Turner v. Insurance Co.*, 10 Utah, 73, exemplifying the ruling.

**Laws of Foreign States** will, in the absence of proof, not be presumed to be the common law, but will be presumed to be the same as the laws of California, p. 624.

Cited in *Shumway v. Leakey*, 67 Cal. 460, holding the like as to the laws relating to the separate property of married women in Nevada and California; *Mortimer v. Marder*, 93 Cal. 178, holding, in the absence of evidence as to the law of another state, in which the property of

the wife was acquired, it will be presumed to be the same as the law of California; Palmer v. Atchison R. Co., 101 Cal. 190, to same effect, as to the laws of Missouri and California; Wickersham v. Johnston, 104 Cal. 411, 43 Am. St. Rep. 119, holding the same as to laws of England and California, on the subject of probate of wills; Cavallaro v. Texas Ry. Co., 110 Cal. 357, 52 Am. St. Rep. 100, holding the like as to the law of common carriers in Louisiana and California; Estate of Richards, 133 Cal. 526, as to validity of foreign marriage; Dormitzer v. German etc. Soc., 23 Wash. 206, as to property rights under foreign marriage; Meuer v. Chicago Ry. Co., 5 S. Dak. 574, 49 Am. St. Rep. 900, holding the like as to laws of contract for transportation in Missouri and South Dakota; Davison v. Gibson, 56 Fed. Rep. 444, holding that it will not be presumed that the English common law is in force in any state not settled by English colonists; American etc. Co. v. Saddle Co., 9 Utah, 93, as to laws of Michigan relative to chattel mortgages; note to 89 Am. Dec. 673 and 674, as to foreign laws and laws of sister states. Distinguished in Lux v. Haggin, 69 Cal. 381, holding that, as to the law of riparian rights, the court might and should examine and weigh the reasoning of the decisions, not only of the English courts, but also of the courts of the United States and of the several states, down to the present time.

**General Citation.**—Gunderson v. Gunderson, 25 Wash. 463.

**61 Cal. 629-634. FROMM v. SIERRA NEVADA COMPANY.**

**Rule of Damages for Conversion** of stock which the company refused to transfer on their books, held to be the highest value in the market at any time between the conversion by refusal to transfer and the verdict, pp. 630 and 634.

Cited in Ralston v. Bank of California, 112 Cal. 213, 215, holding that the refusal of a corporation to transfer shares on its books is a conversion, and the assignee may sue the company for their value; London, Paris and American Bank v. Aronstein, 117 Fed. 606, refusal of corporation without lawful excuse to transfer shares of stock on its books to one who is entitled to such transfer is conversion.

**61 Cal. 634-638. CLARK v. CLAYTON.**

**Action on Undertaking on Injunction.**—A cause of action does not accrue until the final determination of the action in which the injunction was obtained, p. 638.

Approved in Dougherty v. Dore, 63 Cal. 171, 172, sustaining the decision in the principal case; Lambert v. Haskell, 80 Cal. 624, holding that the functions of a preliminary injunction cease when the final decree is made, and as to what can be recovered thereunder; Cohn v. Lehman, 93 Mo. 584, holding that an action on an injunction bond can-

not be maintained before final decree; *Montana etc. Co. v. St. Louis etc. Co.*, 23 Mont. 317, but holding prematurity of suit not sufficiently pleaded; *Browne v. Lumber Co.*, 44 Neb. 365, holding that an order vacating a temporary injunction, but not attempting to dispose of the case, did not justify the bringing of an action on the undertaking.

**61 Cal. 638-640. BLACKMAN v. MARSICANO.**

**Claim of Lien—Sufficiency of.**—The statutory requirements of a statement of terms, time given, and conditions of the contract, are sufficiently complied with by the use of the words "Cash upon demand in gold coin of the United States," p. 640.

Cited in *Castagnetto v. Coppertown Min. etc. Co.*, 146 Cal. 333, statement in notices of laborers' lien that labor was performed by day at agreed price per day between specified dates and that amount thereof is justly due and owing, is sufficient; *Tredinnick v. Mining Co.*, 72 Cal. 80, holding as sufficient the words "that the terms of payment for said labor were cash as soon as said labor was performed"; *Kelley v. Plover*, 103 Cal. 36, holding as sufficient the words "Terms, cash on completion of contract."

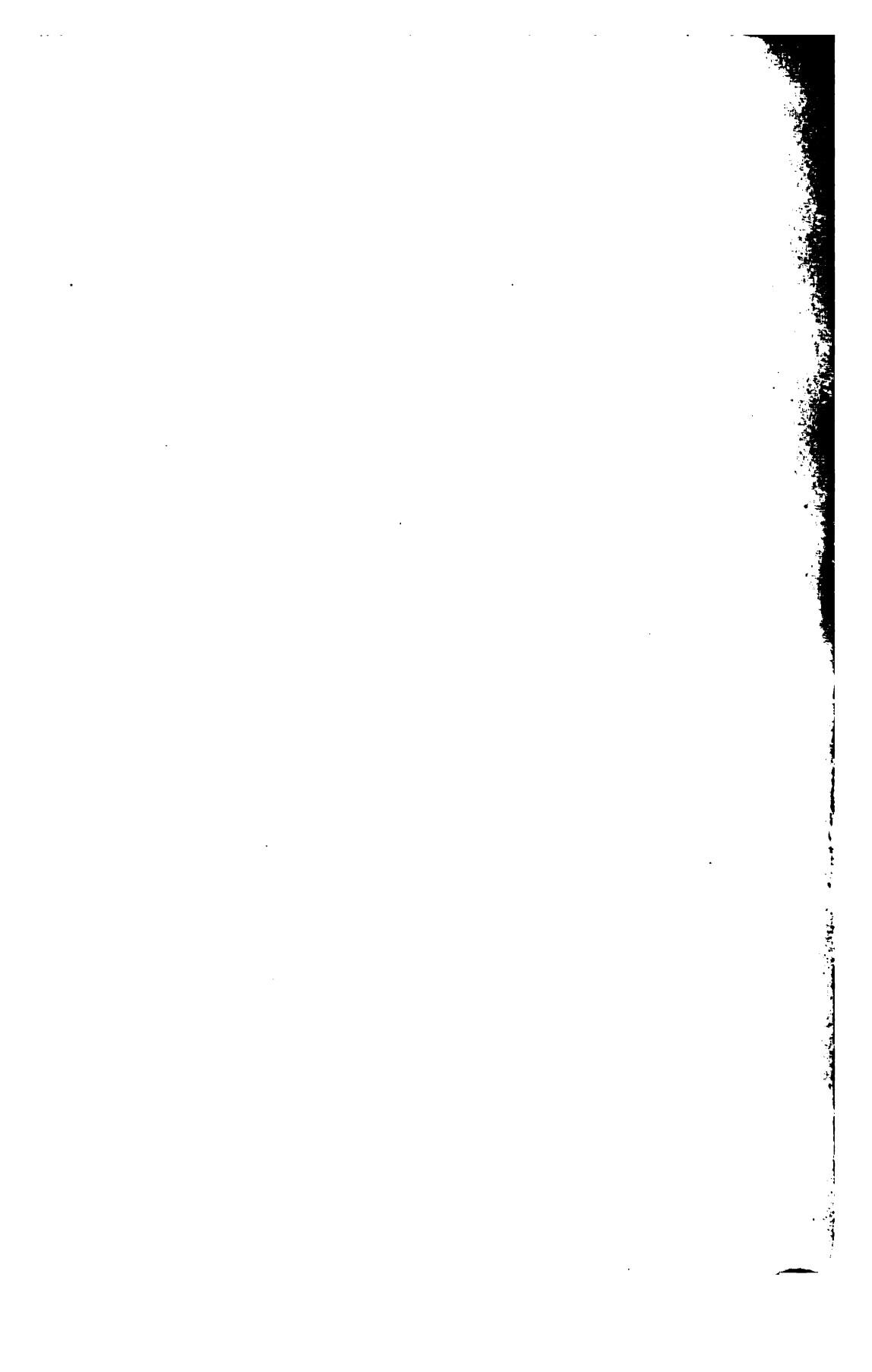
**61 Cal. 640-644. NORCROSS v. NUNAN.**

In an action for recovery of personal property, or its value, and damages for its detention, against a sheriff who justified under a writ of execution valid on its face, the title of plaintiff was inquired into, p. 642.

Cited in *Wilde v. Rawles*, 13 Colo. 585, to same effect.

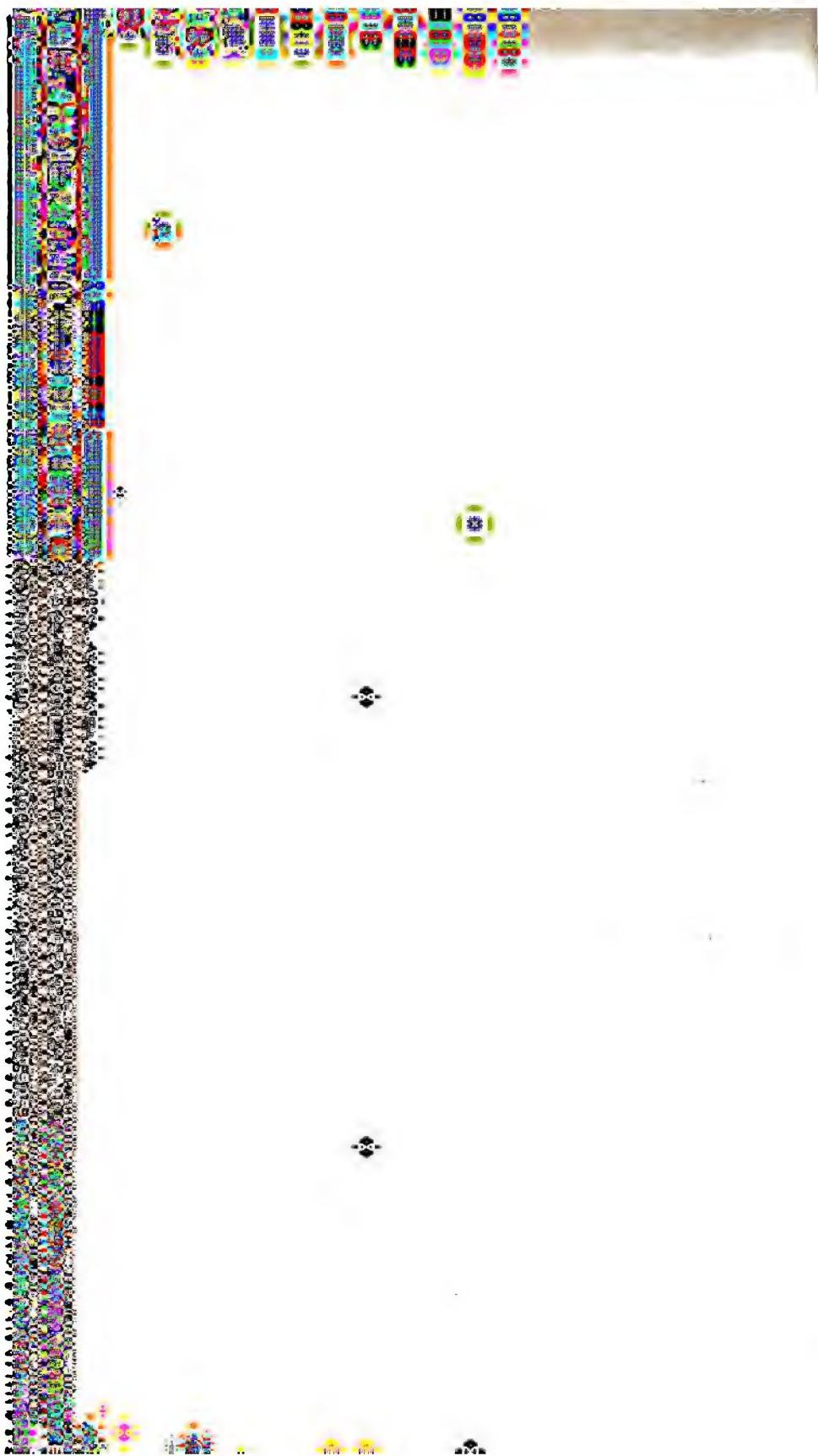
**Irregularities in Proceedings for judgment do not prevent officer from justifying under execution valid on face,** p. 642.

Approved in *Blumaur etc. Drug Co. v. Branstetter*, 4 Idaho, 561, affidavit and notice for foreclosure of chattel mortgage are process and protect sheriff in execution thereof.











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